

THE SOFT POWER OF CHINESE LAW

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Abstract

Previous major capital-exporting nations have attained hegemony through a combination of coercion, currency, and contracts. In particular, the United Kingdom and the United States developed globe-spanning navies and modern militaries, their denominations are amongst the strongest in the world with the US dollar serving as global world currency, and common law has become standard as the choice of law in international contracts. China marks an exception. The People's Republic of China (PRC) is mainly an economic superpower, one that (as of yet) lacks military predominance or financialization, although China is quickly promoting both. Likewise, Chinese law has been mostly peripheral to China's rise. Chinese parties may just as likely choose English law over PRC law for their contracts. Nonetheless, as with its navy and the internationalization of the *renminbi*, China is also advocating for the use of Chinese law for international business. Pre-existing models to understand how China is doing so, mainly, those based on the English or American experiences, mostly miss the mark. Rather than underwriting hard power, law in the Chinese case functions to boost China's soft power: its ability to align the interests of host states with its own.

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This Article is the first to conceptualize the role of law in China's world-wide soft power. It does so by taking a deep dive into the first legal institution, and specifically, dispute resolution institution, the PRC has co-created outside of the PRC: the China-Africa Joint Arbitration Center (CAJAC). Based on qualitative data collected from both China and partner states in Africa, CAJAC provides an example of the exercise of Chinese law as soft power, its aims, and also provides a basis for analyzing some of its potential effects. Specifically, as with other soft power initiatives through international training and public diplomacy, law operates through international networks and is aimed to secure China's economic and geostrategic interests. Importantly, the Article balances the Chinese view of the use of PRC law abroad with the perceptions of counterparts in African host states, views which are largely missing in the literature. The Article finds that law is one dimension of China's emerging transnational ordering, yet as an instrument of governance, its effects may be ambivalent. While it has "hard edges" that secure Chinese trade and investment, it also demonstrates some of the shortcomings of domestic Chinese law as soft power, shortcomings which are amplified when Chinese law as soft power is deployed overseas.

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ABBREVIATIONS

All-China Lawyers Association	ACLA
Arbitration Foundation of Southern Africa	AFSA
Beijing International Arbitration Center	BIAC
Belt and Road Initiative	BRI
Belt and Road International Lawyers Association	BRILA
Bilateral Investment Treaties	BITS
Bishkek International Court of Arbitration for Mining and Commerce	BICAMC
China-Africa Joint Arbitration Center	CAJAC
China International Commercial Court	CICC
China International Economic and Trade Arbitration Commission	CIETACCCP
Chinese Communist Party	CCJA
Cour Commune de Justice et d'Arbitrage	FROL
Foreign-related "Rule of Law"	FOCAC
Forum on China-Africa Cooperation	ISDS
Investor-State Dispute Settlement	ICSID
International Centre for Settlement of Investment Disputes	ICA
International Commercial Arbitration	ICC
International Chamber of Commerce	LCIA
London Court of International Arbitration	MOU
Memorandum of Understanding	NCIA
Nairobi Centre for International Arbitration	
Organisation pour l'Harmonisation en Afrique du Droit des Affaires	OHADA
People's Republic of China	PRC
Qingzhou Arbitration Commission	QAC
Shenzhen Court of International Arbitration	SCIA
Shanghai International Arbitration Center	SHIAC
Supreme People's Court	SPC
Thai-Chinese International Arbitration and Mediation Center	TCIAC
United Nations Commission on International Trade Law	UNCITRAL
World Trade Organization	WTO

INTRODUCTION

Chinese law is gradually gaining traction internationally, not just as the governing law of contracts that feature one or more Chinese parties engaged in cross-border business, but also as the procedural law for international commercial dispute resolution. From a comparative law perspective, the emergence of Chinese law on the world stage is eyebrow-raising given that only forty-years ago, scholars were debating whether China even had a legal system.¹ China law scholars today continue to query whether Chinese law can really be called “law” at all given that the Chinese Communist Party (CCP) in most instances trumps state law.² However, many of the debates regarding Chinese law are based on Anglo-American perceptions of Chinese law.³ In fact, there is a long history of “the West” denigrating Chinese law.⁴ As a point of departure, this Article notes that there are other perceptions of Chinese law and governance more generally, including those of practitioners, officials, business people, and academics based in developing countries that receive Chinese capital. Grounding an analysis in these other perceptions may help shed new light on the merits and demerits of Chinese law, whether it is attractive as a source of law, and whether it can provide the raw materials with which to build legal institutions, including transnational law.

This Article makes the counter-intuitive claim that Chinese law may be attractive to parties in the Global South, and argues that Chinese law has its own type of soft power. China has become a champion of soft power, understood traditionally as the capacity of one state to shape the preferences of another toward to align their interests.⁵ In the case of China,

¹ See *infra* text accompanying note 51.

² See, e.g., Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935, 936-7 (2011) (suggesting that Chinese authorities prioritize political levers and mediation over law); Donald Clarke, *Order and Law in China*, 2 U. ILL. L. REV. 541, 543 (2022) (arguing that China has been building a “system for the maintenance of order and the political primary of the Chinese Communist Party (CCP), not for delivering justice.”). But see Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. INT’L L. 307, 309 (2019) (positing that Chinese politics have become more law-oriented in recent years).

³ TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* 8 (2013) (suggesting that US-based perceptions of Chinese law illustrate orientalism); LI CHEN, *CHINESE LAW IN IMPERIAL EYES: SOVEREIGNTY, JUSTICE & TRANSNATIONAL POLITICS* 2 (2015) (examining the formation of Western knowledge and perception of Chinese law); JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* 1 (2016) (analysing American founding figures’ perception of Chinese law).

⁴ See, e.g., MARCEL GRANET, *LA PENSÉE CHINOISE* 341 (1934); MAX WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* (transl. Hans H. Gerth) 147 (1951).

⁵ JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 6-7 (2004).

soft power is often understood as its culture, political system or ideology, or developmental model.⁶ The role of law in China's soft power has gone mostly unexamined. Whereas there is a robust literature in international relations and comparative politics that explores China's soft power⁷ and a burgeoning field of studies examining how China is shaping international and transnational law,⁸ Chinese law as soft power has mostly fallen between the cracks. More fundamentally, studies of capitalism, political economy, and development, usually highlight the role law in securing commercial transactions in the course of international business and in adjunct functions such as promoting national security and geopolitical interests overseas, but the conceptualization of the soft power features of transnational law is still in its infancy.⁹

There are three inter-related stumbling blocks to understanding the soft power of Chinese law globally. First, entrenched views of law as coercive (i.e., as an instrument of hard power) rather than as persuasive, consensual, or inducive (in underwriting soft power); second, as seen above, the conventional epistemological position on Chinese law which privileges Anglo-American views and the traditional denigration of Chinese law; and third, the methodological impediments to the empirical study of Chinese law in host states. This Article takes these challenges head-on to offer one of the first empirical studies of how Chinese law operates as soft power in the Global South. In doing so, it seeks to broaden the horizon of Chinese comparative law by studying Chinese law not from

⁶ See *infra* text accompanying notes 23 and 24.

⁷ See *infra* note 23.

⁸ See, e.g., GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* (2021); Henry Gao, *WTO Reform and China: Defining or Defiling the Multilateral Trading System*, 62 HARV. INT'L L. J. 1 (2021); Wang Jiangyu (王江雨), *Zhongguo yujing xia de guojifa yu guoji guanxi kua xueke yanjiu* (中国语境下的国际法与国际关系跨学科研究) [*Interdisciplinary Study of International Law and International Relations in the Chinese Context*], 3 *Zhongguo falü pinglun* (中国法律评论) [CHINA LAW REVIEW] 92 (2021); CONGYAN CAI, *THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY* (2019); GUIGUO WANG, *INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE* (2015).

⁹ See generally Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 708 (2010) (showing how hard and soft law interact); CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* (2012) (observing the role of soft law in global finance); JOHN FLOOD, *CAPITAL MARKETS, GLOBALIZATION AND GLOBAL ELITES*, IN *TRANSNATIONAL LEGAL PROCESSES* 114 (2002) (studying global law as soft law); FORMING TRANSNATIONAL DISPUTE SETTLEMENT NORMS: SOFT LAW AND THE ROLE OF UNCITRAL'S REGIONAL CENTRE FOR ASIA AND THE PACIFIC (Shahla F. Ali, ed., 2021) (examining the role of regional centers of global legal institutions in creating global soft law).

the privileged Global North but rather from the perspectives of the Global South.¹⁰

The Article makes this contribution by taking a deep dive into the first legal institution, and specifically, dispute resolution mechanism, that China has co-established outside of the territorial PRC: the China-Africa Joint Arbitration Center (CAJAC). Based on fieldwork over a five-year period and qualitative data gathering from China and African partner states, the Article provides empirical evidence to show how Chinese law works as soft power and provides a basis for assessing some of its effects for transnational ordering and the domestic legal regimes of host states.¹¹ In particular, it shows how Chinese law as soft power is based on international networking, a feature typical of Chinese soft power. It further shows how Chinese law as soft power may have “hard edges” which benefit Chinese trade and investment. At the same time, it also demonstrates some of the shortcomings of Chinese law as soft power, shortcomings which are amplified when domestic approaches to popularizing Chinese law are deployed overseas.

Pursuant to the growing literature on “China in Africa,” the Article balances Chinese views with those of experts in South Africa, Kenya, and other African states and underscores their agency in engaging with Chinese.¹² Yet pursuant to this balanced perspective, it finds that, unlike many studies which define agency as “resistance” to Chinese power and influence (an artefact of conventional understandings of law as empire), many elite African lawyers, arbitrators, and businesspeople welcome Chinese capital and want to create legal institutions to facilitate its entry into African markets. African responses are soft power in action. This finding is noteworthy as the Chinese law on arbitration is, in many regards, suboptimal as a source for modeling.

Despite the view that Chinese law is peripheral to the PRC’s global economic governance,¹³ this Article is not the first to observe that

¹⁰ This is one of the goals of the “China, Law and Development” project. For further information, see <https://cld.web.ox.ac.uk/>.

¹¹ For further information about methodology and data, see Appendix *infra*.

¹² See, e.g., Giles Mohan & Ben Lampert, *Negotiating China: Reinserting African Agency into China-Africa Relations*, 112 AFRICAN AFFAIRS 92 (2013); Lucy Corkin, *African Agency in the Context of China-Africa Relations*, 1 AFR. E.-ASIAN AFFAIRS 162 (2015); AFRICA AND CHINA: HOW AFRICANS AND THEIR GOVERNMENTS ARE SHAPING RELATIONS WITH CHINA (Aleksandra W. Gadzala, ed., 2015); Folashadé Soulé-Kohndou, “Africa+1” Summit Diplomacy and the ‘New Scramble’ Narrative: *Recentering African Agency*, 119 AFRICAN AFFAIRS 633 (2020).

¹³ Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT’L L. J. 67-8 (2019) (citing “law negative” literature that downplays the relevance of law in China’s economic modernization).

China has soft power through recourse to its law.¹⁴ The Article goes further by taking these observations as a starting point and theorizing Chinese law as soft power, explaining the significance of the thesis by placing it in a comparative frame in regards to previous capital exporters, and, further, staking out a number of implications for the thesis.

The remainder of this Article is organized as follows: Part one presents the idea of Chinese law as soft power. It builds on observations made by Chinese scholars that have included the notion of soft power in their analyses. Borrowing from the broader literature on Chinese soft power, it then provides a conceptual basis for thinking about Chinese law as soft power. Part two provides a context for understanding the significance of Chinese law as soft power and why conventional approaches may have blind spots rendering them unsuited to providing explanations for the phenomenon. Specifically, this part provides an overview of how major capital-exporting nations, namely the UK and US, have used their law overseas to secure their empires (formal and informal). For both preceding empires, commercial law was part of an ensemble of technologies including naval and military capabilities and globalized currencies which operated extraterritoriality to safeguard economic and security interests. China does not yet have the same level of military capability or currency internationalization as the UK and US, but it does have considerable economic power in the form of trade and investment. Chinese law, as with the Anglo-American common law, secures China's overseas investments but without the benefit of military or denominational power. Without the support of a global military presence, in particular, China uses legal and political means to protect its assets overseas, particularly in high-risk investment destinations. Chinese law as soft power provides one layer of protection by orienting external audiences toward China as a center for legal innovation.

Part three hones in by providing an in-depth case study of how Chinese law operates as soft power through the example of CAJAC. CAJAC shows how China has built international networks of experts, in this case, legal experts and arbitration professionals in particular, to promote the attractiveness of Chinese law in foreign jurisdictions. These networks overlap with others that likewise promote interests overseas. Importantly, the networks show public-private partnerships wherein the Party-State has a central but not necessarily definitive role, as sub-state and commercial actors pursue their own interests within frameworks set

¹⁴ See *infra* notes 27 and 28.

by the Party-State.¹⁵ Even more importantly, networks feature African experts who make sense of Chinese efforts to showcase Chinese law and legal institutions like arbitration on their own terms. This part also describes the institutional set-up of CAJAC with a focus on its institutional rules, and their relationship to the institutional rules of Chinese arbitration commissions. This part shows how networks built on common interests and market access can generate legal institutions, even if those institutions are more symbolic than functional.

Part four analyzes the significance of the soft power of Chinese law. It observes that CAJAC is not an isolated phenomenon, and that China is building other dispute resolution centers around the world. An analysis of CAJAC and these other centers suggests that by co-creating such mechanisms Chinese parties seek to avoid local courts in risky host states and create alternatives through international commercial arbitration. These centers may over time produce their own versions of transnational law. Yet, these centers may also experience varying degrees of irrelevance. Chinese law as soft power may demonstrate some of the weaknesses of Chinese law in its domestic setting. Chinese domestic law in the reform era has shown what I have called elsewhere “legal surrealism,” a gap between the avowed promise of law and its actual operation.¹⁶ This legal surrealism is internationalizing along with the export of Chinese capital and law. A conclusion follows, as well as an appendix that summarizes the methodology of the paper, and data analyzed.

I. THE CHINESE LAW AS SOFT POWER

Soft power is an expansive concept and one that has gained widespread acceptance in the study of power in the international system including in explaining China’s relationship to other states within that system. However, generally speaking, Chinese law has been mostly marginalized as a source of China’s soft power abroad. Joseph Nye classically defined “soft power” as “getting others to want what you want.”¹⁷ Nye contrasted soft power to hard power which entails both

¹⁵ By Party-State, I refer to the fusion of the Chinese Communist Party and government at every level of administration and within all political and legal institutions.

¹⁶ See Matthew S. Erie, *Property Rights, Legal Consciousness, and the New Media in China: The Hard Case of the ‘Toughest Nail-House in History’*, 26 CH. INFO. 34, 38 (2012) (understanding “legal surrealism” as a gap between law’s promise and its reality and the production of discourse to fill that gap which widens such that ‘law talk’ becomes severed from law’s operation).

¹⁷ Joseph S. Nye Jr., *Public Diplomacy and Soft Power*, 616 ANNALS OF THE AMERICAN ACADEMY OF POL & SOC. SCIENCE 94, 95 (2008).

carrots (force) and sticks (economic benefit).¹⁸ Specific conduits of soft power include culture, information, language, and communication technologies.¹⁹ Subsequent work, including some done by Nye, have updated and expanded the taxonomy to include “smart power” and “sharp power.”²⁰

Despite a shared consensus in the international relations, comparative politics, and media studies literature that China has embraced the notion of soft power, and done through its own understanding,²¹ for the most part, the legal literature on China’s economic rise has not focused on Chinese law’s soft power potential.²² In

¹⁸ *Id.* at 94.

¹⁹ *Id.* at 105.

²⁰ Joseph S. Nye, Jr., *Get Smart: Combining Hard and Soft Power* 88 FOR. AFFAIRS 160, 161 (2009) (defining “smart power” as the integration of hard and soft power tools through “contextual intelligence,” the alignment of tactics with objectives); Juan Pablo Cardenal et al., *Sharp Power: Rising Authoritarian Influence*, NAT’L ENDOWMENT FOR DEMOCRACY 6 (2017) (differentiating “sharp” from “soft” power in that the former “pierces, penetrates, or perforates the political and information environments in the targeted countries”).

²¹ HONGYI LAI & YIYI LU, CHINA’S SOFT POWER AND INTERNATIONAL RELATIONS (2012) (observing that China has sought to foster a positive image around the world through political discourse, cultural diplomacy, and trade and assistance); CHINESE SOFT POWER AND ITS IMPLICATIONS FOR THE UNITED STATES 3 (Carola McGiffert, ed., 2009) (finding that Chinese soft power assumes a number of forms: investment, humanitarian aid, exchange programs, diplomacy, and participation in multilateral institutions); SOFT POWER WITH CHINESE CHARACTERISTICS: CHINA’S CAMPAIGN FOR HEARTS AND MINDS (Kingsley Edey, Stanley Rosen, and Ying Zhu, eds., 2019) (noting an uptick in soft power initiatives in the Xi Jinping era); SOFT POWER: CHINA’S EMERGING STRATEGY IN INTERNATIONAL POLITICS 3 (Mingjiang Li, ed.) (adapting Nye’s definition to argue that China shows a “soft use of power”); CHINA ORDERS THE WORLD: NORMATIVE SOFT POWER AND FOREIGN POLICY (Elena Barabantseva and William A. Callahan, eds., 2011) (showing how Chinese actors use traditional Chinese culture to mould a “Chinese-style” world order); DAVID M. LAMPTON, THE THREE FACES OF CHINESE POWER: MIGHT, MONEY AND MINDS 10 (2008) (positing that China has “ideational power” which is broader than Nye’s “soft power” in that it embraces innovation but narrower in that it excludes the attractive aspects of material inducements.)

²² Legal studies of the role of law in China’s global trade and investment understandably focus on China’s international investment agreements, including its bilateral investment treaties and free trade agreements, but for the most part, do not focus on the role of Chinese law extraterritorially, either as hard power (e.g., as a legal transplant) or as soft power. *See, e.g.*, Jie (Jeanne) Huang, *Procedural Models to Upgrade BITs: China’s Experience*, 31 LEIDEN J. INT’L L. (2018); Kate Hadley, *Do China’s BITS Matter? Assessing the Effect of China’s Investment Agreements on Foreign Direct Investment Flows, Investors’ Rights, and the Rule of Law*, 45 GEORGETOWN J. INT’L L. LAW (2013); NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE (2009); JULIEN CHAISSE & JĘDRZEJ GÓRSKI, THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS (2018); Julien Chaisse & Mitsuo Matsushita, *China’s ‘Belt and Road’ Initiative*:

a sense, the idea that Chinese law has soft power has mostly fallen through the disciplinary cracks. More specifically, on the political science side, a number of studies have shown how China has evolved its own notion of soft power (*ruan shili* 软实力 in Chinese).²³ Schools of thought vary, including a focus on Chinese culture, its political system, or its developmental model.²⁴ Reflecting one long-standing view in the literature that Chinese law was epiphenomenal in China's growth story, law is not usually highlighted as a feature of China's development that can or should be emulated elsewhere.²⁵ To be clear, the Chinese law as soft power is not the argument that China prefers soft law in its international economic arrangements, an observation that has gained popularity in the study of China's footprint in international economic ordering.²⁶ However, Chinese soft law can be one component of Chinese law as soft power.

A few Chinese legal scholars, however, have observed the soft power effects of Chinese law. For example, Cai Congyan notes that China, as a "new great power" has turned to soft power to increase its standing in the world and through its ascension, it is better placed than established powers to improve international law.²⁷ More on point, Gu Weixia has observed that China's inroads into international commercial dispute resolution evince its soft power.²⁸ Given the potential significance of

Mapping the World Trade Normative and Strategic Implications, 52 J. WORLD TRADE (2018).

²³ See, e.g., DAVID SHAMBAUGH, CHINA GOES GLOBAL: THE PARTIAL POWER 212-220 (2013); MARIA REPNIKOVA, CHINESE SOFT POWER 4-6 (2022).

²⁴ See *id.*

²⁵ See *supra* note 13.

²⁶ See, e.g., Greg Shaffer & Henry Gao, *A New Chinese Economic Order?* 23 J. INT'L ECON. L. 607, 611, 616, 617, 625 (2020); Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22 J. INT'L ECON. L. 29, 30 (2018); FRANCIS SNYDER, THREE WORLDS OF SOFT LAW IN CHINA, IN EU SOFT LAW IN THE MEMBER STATES: THEORETICAL FINDINGS AND EMPIRICAL EVIDENCE 263 (Mariolina Eliantonio, Emilia Korkea-aho, & Oana Stefan, eds., 2021); Susan Finder, *Soft Law of the Supreme People's Court*, Peking University School of Transnational Law Research Paper Forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951083 (visited May 10, 2022).

²⁷ Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EURO. J. INT'L L. 755, 764, 775 (2013) (making the case that China and other emerging powers are better positioned to improve international law because they are more in tune with the needs of the developing world).

²⁸ Gu Weixia, *China's Law and Development: A Case Study of the China International Commercial Court*, 62 HARV. J. INT'L L. 67, 70 (2021) (suggesting that the China International Commercial Court features soft power and hard power elements).

Chinese law as soft power, this Article proposes a systematic and thorough-going analysis of the concept and its consequences.²⁹

As a preliminary matter, it is worth considering how law generally could either function as or promote soft power. Recalling Nye's definition, soft power operates to attract its audience toward a sensibility or orientation that accords with that of the home state. Conventionally, legal theory, whether legal positivism,³⁰ legal realism,³¹ or critical views such as Marxist ones,³² would ascribe more closely to the view that law is coercive (i.e., productive of hard power) rather than a source of attraction. Max Weber expressed this common interpretation in his idea of "legal order" which he stated exists wherever coercive means, either physical or psychological, are available.³³ Incidentally, this prevailing view also reflects the historical experience of law under empire, that is, how law spread through imperial conquest and colonization.³⁴

There are nonetheless other views in legal theory that give credence to the idea that law not only compels behavior but can also normatively condition behavior. These include views derived from natural law theory which emphasize the ethical and moral dimensions of law which obtain universal applicability if not attractiveness,³⁵ law and economics which assumes, for example, that people make decisions about

²⁹ The concept of Chinese law as soft power has more recently permeated sanctioned views on the promotion of Chinese law in its international commercial relations. *See, e.g.*, Yang Zhaoyu (杨兆宇), *Jianghao Zhongguo fazhi guzhi, zhuli yidaiyilu jianshe – xin shidai Zhongguo dui Dongmeng fazhi chuanbo zhenglüe de zhuanxing yu chonggou* (讲好中国法治故事, 助力一带一路建设—新时代中国对东盟法治传播政略的转型与重构) [*Telling the Story of China's Rule of Law well and Helping the Construction of the Belt and Road—China's Transformation and Construction of ASEAN Rule of Law Communication Strategy in the New Era*], *Gongguan luntan* (公关论坛) [PUBLIC RELATIONS FORUM] 69 (2022).

³⁰ *See, e.g.*, JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, II 4 (1863) ("Every Law (properly so called) is an express or tacit, a direct or circuitous command").

³¹ *See generally* KARL NICKERSON LLEWELLYN & EDWARD ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) (understanding law as distinguished from other norms through its recognized authority in procedures and persons).

³² KARL MARX, *THE GERMAN IDEOLOGY*, IN *THE MARX-ENGELS READER* 187 (Robert C. Tucker, ed. 1978[1846]) (conceptualizing law as an artefact of the state which is the form by which the ruling class protects its property).

³³ MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 17 (Edward Shils & Max Rheinsten trans., 1967).

³⁴ *See infra* text accompanying notes 54-56.

³⁵ *See, e.g.*, ALASDAIRE MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (3rd ed., 2007) (arguing for a virtue ethics rooted in shared notions of the good).

choice of law based on rational considerations,³⁶ and more behavioral law and economics approaches which posit that people make choices about the law based on not only their own multiple preferences but constraints on those preferences.³⁷ Post-structuralist theories of law underscore how law, understood as immanent in social production, orients subjects toward certain dispositions of what is perceived to be “good,” “proper,” or, even, “real.”³⁸

Applying these insights of the attractiveness of law to the case of China, it is clear that promoting Chinese law on the world stage has become a priority for the Chinese government and CCP, hereinafter, the Party-State.³⁹ Such promotion includes both hard and soft aspects. The hard side includes lawfare with the US and its allies, including the extraterritorial application of Chinese law in a number of recent pieces of legislation as well as aggressive anti-suit injunctions.⁴⁰ The soft side generally has not received as much attention in the media despite the fact that, ironically, it can assume a kind of hyper-visibility. This soft side takes a number of forms, including both examples from commercial law

³⁶ See, e.g., Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBLEMS 73, 73 (2008) (“economics of law should be about choice of law.”)

³⁷ Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics* 50 STAN. L. REV. 1471, 1473 (1988) (drawing attention to individuals’ perception of legal outcomes).

³⁸ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME 1* 30-2, 87 (1980) (explaining how discourses orient their subjects towards certain predispositions); Jean Baudrillard, *Simulacra and Simulation* (1994) (positing that capitalism has created a condition whereby the hyperreal has effaced the real).

³⁹ See generally Matthew S. Erie, *China’s Dream of Legal Cosmopolitanism*, U. PA. J. INT’L L. (forthcoming) (providing one of the first assessment of China’s recent initiatives).

⁴⁰ On Chinese extraterritorial legislation, see Zhengxin Huo & Man Yip, *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, CH. J. INT’L L. 1, 3 (2021) (explaining current sources and trends in Chinese extraterritoriality). For a recent and example of Chinese anti-suit injunctions, see *Xiaomi Tongxun Jishu Youxian Gongsi yu Jiaohu Shuzi Kongduan Youxian Gongsi* (小米通讯技术有限公司与交互数字控股有限公司) [*Xiaomi Technology Limited Corporation v. Interdigital Digital Holdings Limited Corporation*], [No. 169] Wuhan Interm. People’s Ct., Sept 23, 2020 (China) (ordering an anti-suit injunction not only against the court in India but against “any court worldwide,” imposing a fine of RMB 1 million per day for any violation of the injunction.). Although the decision is not available to the public, the Wuhan Government has issued a statement on the decision. See Jinzhi yi Meiguo gongsi Wuhan guansi jieshu qian zai quanqiu qisu Xiaomi Wuhan Zhong yuan fachu quanqiu shou ge kuaguo jin su ling (禁止一美国公司武汉官司结束前在全球起诉小米: 武汉中院发出全球首个跨国禁诉令) [*Ban on US Company from Suing Xiaomi Globally until Completion of Wuhan Lawsuit: Wuhan Intermediate Court Issued the World’s First Cross-Border Anti-Suit Injunction*] (proclaiming that the injunction applies to all jurisdictions in the world) (Mar. 4, 2021), <https://perma.cc/3G67-CCZ9>.

involving private parties (e.g., the promotion of PRC law in cross-border deals involving one or more Chinese parties) and also examples from more overt public diplomacy conducted by China's legal and judicial organs.

This latter manifestation of Chinese law as soft power is particularly salient in the context of China's promotion of its development model abroad. A number of different institutions and organizations, including the Supreme People's Court (SPC), Ministry of Justice, Ministry of Foreign Affairs, Ministry of Commerce, All China Lawyers Association, China Law Society, National Judges College, PRC law schools, Chinese think tanks and "governmental non-governmental organizations," as well as arbitration commissions have participated in the promotion of Chinese law in economic relations with partner states particularly in the Global South.⁴¹ The "Belt and Road Initiative" (BRI), a mega-regional economic ordering project that aims to strengthen China's economic connections with host states throughout Asia and the world, begun in 2013, particularly features the diplomatic function of China's legal and judicial organs.⁴² Legal diplomacy is directed to low-income and middle-income countries not only through bilateral relationships (as expressed in Memoranda of Understanding (MOUs)) but also through multilateral platforms for international economic governance and global development, some of which have been established by non-Chinese parties (e.g., United Nations Commission on International Trade Law (UNCITRAL), United Nations Conference on Trade and Development, Hague Conference, etc.) and some of which China has founded (e.g., Asian Infrastructure Investment Bank, Shanghai Cooperation Organization, Shanghai Declaration of the World Enforcement Conference, etc.).

Whereas the role of China's legal and judicial organs had been mostly marginal in the early years of the BRI,⁴³ under the "foreign-related

⁴¹ See *supra* note 13 at 94.

⁴² See, e.g., Ning Jie (宁杰), Zhou Qiang: Jiaqiang sifa hezuo wei gongjian "yidaiyilu" yingzao fazhizhua yingshang huanjing (周强：加强司法合作为共建“一带一路”营造法治化营商环境) [*Zhou Qiang: Strengthen judicial cooperation in order to construct a rule of law business environment along the BRI*] (Oct. 18, 2019), <https://perma.cc/K5DS-FRQA> (announcing an MOU signed between the Supreme People's Court and the Federal Court of the United Arab Emirates).

⁴³ Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 VAND. J. TRANSNAT'L L. 101, 119 (2018) ("The marginality of law for Chinese development policies is reflected in the regulation of Chinese foreign development assistance—or rather, the lack of such regulation.")

‘rule of law’” (*shewai fazhi* 涉外法治, hereinafter FROL) reforms, their role is becoming more pronounced. Whereas poverty alleviation, anti-corruption, public resource management, and other aspects of China’s developmental model have been the focus on its soft power in the past,⁴⁴ law is becoming increasingly central to its efforts. The FROL is a discursive frame (much like the BRI or “harmonious society”) under which different actors promote various goals, most of which closely hew to the aims set out by the Party-State. Announced in 2020 by Xi Jinping, the FROL is a field of law that governs the intersection of China’s domestic law, on the one hand, with foreign law and international law, on the other hand, and does so through an understanding of “rule of law” (*fazhi* 法治) that is specific to China, namely, a legal order that is led by the CCP. Rather than simply externalizing China’s version of “rule of law,” FROL calls for building systems that integrate Chinese law and foreign and international law, and then promotes China’s interests through such systems.⁴⁵ Under the FROL, China’s legal and judicial organs are tasked with creating such systems in partnership with stakeholders outside of China, through its various relationships—bilateral and multilateral—some of which have been formalized as platforms while others remain more decentralized transnational networks. The organs use these relationships, platforms, and most centrally the networks that grow such organizations to promote a number of goals.

According to the “Plan for the Construction of China under Rule of Law (2020-2025)” (hereinafter, “The Plan”), these goals include *inter alia* promoting cooperation in international economic law, cross-border legal services, compliance management and risk prevention of Chinese enterprises, the formulation of extraterritorial laws, and the construction of international commercial courts and the establishment of joint arbitration mechanisms.⁴⁶ The Plan states clearly that the bottom line is to “promote the publicity of the rule of law abroad, and to tell the story of the rule of law in China.”⁴⁷ In short, the FROL complements the BRI: China is no longer building only traditional and digital infrastructures (e.g., highways, rail lines, maritime and dry ports, special economic zones,

⁴⁴ LINA BENABDALLAH, SHAPING THE FUTURE OF POWER: KNOWLEDGE PRODUCTION AND NETWORK-BUILDING IN CHINA-AFRICA RELATIONS 3 (2020).

⁴⁵ See Part III for an example.

⁴⁶ Zhonggong Zhongyang (中共中央) [Central Committee of the CCP], *Fazhi*

Zhongguo jianshe jihua (2020-2025) (法治中国建设计划 (2020-2025年) [*Plan for the Construction of China under the Rule of Law (2020-2025)*]).

<https://perma.cc/9MSR-VGVH>.

⁴⁷ *Id.*

smart cities, fiber optic cables, satellite networks, 5G platforms, etc.) but also their legal infrastructures through international contracts, international investment regimes, and transnational litigation and dispute resolution. Somewhat contrary to Western experiences of law and development, China's approach is "infrastructure development first, institution next,"⁴⁸ meaning that once Chinese parties are able to successfully complete development projects and penetrate markets (China's strengths), only then can it began laying the legal and normative infrastructures which will provide further protection and security to those projects and investments.

The somewhat awkward process of opening the door through traditional infrastructure and subsequently widening the door by introducing China's legal infrastructure does not happen through hard power as in Nye's "sticks." As further explained below,⁴⁹ China does not have the same level of military status as previous superpowers, nor can it control international finance through its currency, as the US in particular has done; instead, it relies on its economic inducements through being the largest trading partner in the world and one of the world's leading investors. Here then enters the role of Chinese law as soft power. Pursuant to the modification of soft power in the Chinese case, the economic benefits of partnering with China are very much central to the relevance of Chinese law.

In other words, the soft power of Chinese law attracts partners to use Chinese law but this attraction cannot be disconnected from the associated economic gains which are the core interest in such relationships. Hence, the role of law in China's soft power demonstrates both attraction and (economic) inducement. The work of China's legal and judicial organs to persuade foreign parties to adopt Chinese law either in their contracts or even, and more aggressively, as blueprints for institution-building thus has clear instrumental purposes (to benefit Chinese parties), but because of its legitimating function for economic transactions, it may also have more symbolic or communicative goals. In short, Chinese law may itself not be an optimal source of law for international business in terms of its inherent qualities (e.g., providing predictability to parties through contract enforcement and clear property rights),⁵⁰ but it may assume most relevance in China's transnational

⁴⁸ Jingyuan Zhou, *A New Multilateralism: A Case Study of the Belt and Road Initiative* 8 CH J. COMP. L. 384, 387 (2020) (noting China's "unconventional 'infrastructure-development-first, institution-next' approach").

⁴⁹ See *infra* Part II.

⁵⁰ Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 96-7 (2003) (arguing that Chinese law may provide

ordering for its signaling effect: that China is not just a supplier of global capital but also of global law, a *sine qua non* for modern superpower status.

Among some audiences, as this Article shows, China's soft power push to spread its law abroad seems to have traction. This is remarkable considering that only two decades ago, scholars were debating whether China had a legal system.⁵¹ Despite ongoing skepticism among Western observers, Chinese law has earned a positive profile in some countries outside of China. How and why did this happen? Before honing in on how Chinese law operates as soft power through the case of its promotion of its international commercial arbitration, I first take a step back to understand the significance of the soft power of Chinese law in the context of China's growing role on the world stage. To do so, I contextualize China's emerging law-as-soft-power within a comparative view of how superpowers have used law to promote their interests abroad.

II. EMPIRE, CAPITALISM, AND LAW

Historically, major capital-exporting countries dominated international trade and investment through a combination of coercion, currency, and contracts. As such, they have been incentivized to build regional or even global legal infrastructures, the rules and institutions upon which economies are built.⁵² Legal infrastructures assume a number of forms, but two consistent dimensions include procedural aspects, for example, dispute resolution, and a second is substantive law for transactions. Generally, major economies have built on legal infrastructures laid by previous powers while also innovating their own infrastructures. China represents the most recent iteration of this process.

The reasons and justifications for economic hegemony's spread of their law overseas via their legal infrastructures has changed over time.

predictability without rights); Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 555 (2009) (finding that China has attained historic economic growth without formal property rights).

⁵¹ STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 3 (1999) (asserting that while China has legal institutions, it lacks a legal system). *But see* RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 6 (2002) (countering that China is moving toward a "thin" rule of law).

⁵² GILLIAN HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 3, 7, 9 (2016). *See also* KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 17, 134 (2019) (noting how legal infrastructures are the backbone of global capitalism).

During the age of empire (roughly, the seventeenth to the early twentieth centuries), based on ideologies of cultural, racial, and legal superiority, colonial powers transplanted, sometimes forcibly, versions of their law abroad.⁵³ Much of the architecture of the modern system of international economic law can be traced to the relationships between Western colonizers and the colonized rest.⁵⁴ Concurrently, the growth of global capitalism was likewise rooted in these earlier colonial encounters.⁵⁵ In

⁵³ See generally LAUREN BENTON & LISA FORD, *RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800-1850* (2016) (identifying the origins of international law in Britain's colonial empire of the nineteenth century); Christian Burslet, *Why Didn't the Common Law Follow the Flag?*, 105 VA. L. REV. (2019) (arguing that the degree of English common law transplant during the age of the British Empire was a result of decisions about colony design); BENJAMIN ALLEN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* (2016) (arguing that ideas of "civilization" legitimized American empire); HAMAR FOSTER, BENJAMIN L. BERGER, & A.R. BUCK, *THE GRAND EXPERIMENT: LAW AND LEGAL CULTURE IN BRITISH SETTLER SOCIETIES* (2009) (showing how the ideology of "rule of law" authorized the British colonial project); NASSER HUSSAIN, *THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW* (2009) (tracing emergency power of the state to British colonial rule).

⁵⁴ See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2004) (arguing that the colonial encounter was foundational to the making of international law); Karen Alter, *The Empire of International Law?*, 113 AM. J. INT'L L. 183 (2019) (reviewing assessments of the transformation of international law in the early twentieth century); KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* (2013) (tracing the historical origins of contemporary international investment law to the expansion of European states during the seventeenth to early twentieth centuries); José E. Alvarez, *Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"*, 60 ALA. L. REV. 943, 952 (2009) ("Contemporary legal regimes, such as those governing foreign investment, share elements with some of those ancient empires."); MARTTI KOSKENNIEMI, WALTER RECH & MANUEL JIMENEZ FONSECA, *INTERNATIONAL LAW AND EMPIRE: HISTORICAL EXPLANATIONS* (2017) (finding that international law cannot escape its Eurocentric framework); ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY* 257 (2021) (identifying British colonial networks as one origin of international law);

⁵⁵ One of the preeminent historical accounts of how capitalism grew out of imperialism is Immanuel Wallerstein's "world-systems theory". See THE MODERN WORLD-SYSTEM: VOLUME I CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY 67 (1974) (tracing the emergence of world economy based on the expansion of European states starting in the sixteenth century and via the capitalist mode of production). There are a number of other accounts, theoretical and historical. See, e.g., NTINA TZOUVALA, *CAPITALISM AS CIVILIZATION: A HISTORY OF INTERNATIONAL LAW* (2020) (finding that persistent notions of "civilization" undergird efforts to require non-Western states to embrace capitalist modernity); MAÏA PAL, *JURISDICTIONAL ACCUMULATION: AN EARLY MODERN HISTORY OF LAW, EMPIRES, AND CAPITAL* (2020) (finding a causal relationship between jurisdictional and capital expansion in early modern European empires); RITU BIRLA, *STAGES OF CAPITAL: LAW, CULTURE, AND MARKET GOVERNANCE IN LATE COLONIAL INDIA* (2009) (showing how British rule stimulated a

the mid-twentieth century, decolonization and the emergence of international legal institutions, ushered in a new era in the international system.⁵⁶ Nonetheless, under ideologies of (neo)liberalism, colonialists-cum-superpowers have been given new incentives to spread their law. Various rationales concerning economic efficiency, marketization, and anti-socialist sentiment functioned to promote certain types of laws over others, particularly in what became known as the Third World and what is today referred to as the Global South.⁵⁷ Under such rationales, companies from the North prefer the law from their home state as they are most familiar with their native law, lawyers, and courts. There are transaction costs to using non-domestic law, including hiring foreign lawyers and navigating local courts.

Given that the contemporary system of international economic law and nation-states has moorings in previous international orders, much of today's legal infrastructure was laid during the age of empires. During this period, the UK and later the US, but to some extent, also France, Germany, the Netherlands, and Japan, spread their law in the course of their imperial expansion. Law was one feature of imperial administration and where law of the metropole could not be transplanted to territories and possessions, various hybrid forms evolved, many of which feature elements of law from the imperial core.⁵⁸ Different expansive states have adopted different approaches to the question of using their law as a tool for imperial governance. These approaches depended on the expanding

form of capitalism in late nineteenth century India through commercial and contract laws).

⁵⁶ See GUY FITI SINCLAIR, *TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES 1* (2017) (examining the role of international organizations in promoting, on the one hand, world peace, and, on the other hand, imperialist projects); see also ANGHIE *supra* note 54 at 196-204 (arguing that decolonization sought to universalize international law).

⁵⁷ For orthodox accounts, see, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 41 (8th ed.) (2011[1972]) (arguing on prescriptive and normative grounds that common law is and should be efficient); Douglass C. North, *Institutions*, 5 J. ECON. PERSPECTIVES 97, 98 (1991) (conceptualizing institutions as the means by which economies achieve "efficient, competitive markets"). For critical responses, see, e.g., PISTOR *supra* note 52 at 208; Amy Kapczynski, David Singh Grewal, & Jedediah Britton-Purdy, *How Law Made Neoliberalism*, BOSTON REVIEW (Feb. 22, 2021), <https://perma.cc/FN5W-WUW4> (arguing that "law and economics" analysis became naturalized in the development of law); MUTHUCUMARASWAMY SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 11 (2015) (claiming that the US drove its version of neoliberalism through international investment law which affected developing countries).

⁵⁸ See, e.g., M.B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* (1975) (studying a number of pluralist systems in the colonial world); ROBERT L. KIDDER, *TOWARD AN INTEGRATED THEORY OF IMPOSED LAW, IN THE IMPOSITION OF LAW* 283, 291 (Sandra B. Burman & Barbara E. Harrell-Bond, eds., 1979) (suggesting that colonial law interacted with local law in complex ways).

state's relative trade and military power, its relationship with the territories in question, and the evolving nature of the world system.

For example, England successfully exported English common law to its colonies and beyond through its global empire that grew over a period of four-hundred years, from the late sixteenth to early twentieth centuries.⁵⁹ English common law has become the lingua franca of modern international commerce, and is used both the procedural law in dispute resolution and as the governing law of international contracts.⁶⁰ Today, a number of jurisdictions including in the Commonwealth and former colonial possessions and territories use versions of English law in their courts.⁶¹ A recent trend has been for jurisdictions that were never even incorporated into the British Empire to borrow from English court templates.⁶² Likewise, retired judges from the UK sit on benches in such jurisdictions as Singapore, Dubai, Kazakhstan, Pacific states, and the Caribbean.⁶³ The presence of English common law in these states, in turn, facilitates various forms of English power, hard and soft.

The American approach to constructing legal infrastructures shared some commonalities with their own colonist masters, but also expanded on the role of law in empire-building. First, as a formal empire, the US annexed territories in the late nineteenth century in the Pacific and the Caribbean over which US law had dominion.⁶⁴ By the turn of the

⁵⁹ JAMES BRYCE, *ESSAY 2: THE EXTENSION OF ROMAN AND ENGLISH LAW THROUGHOUT THE WORLD* (1901).

⁶⁰ Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 *NW. J. INT'L L. & BUS.* 455 (2014) (surveying choice of law preferences from ICC data and showing that English common law reigns).

⁶¹ Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 *VA. J. INT'L L.* 225, 252 (2020) (noting both the presence of English common law in the legal systems of former territories and the connections between those jurisdictions).

⁶² *Id.* at 277 (providing the example of the Astana International Financial Center Court in Kazakhstan which incorporates English common law into its procedures despite the fact that Kazakhstan was never a British colony).

⁶³ Alyssa S. King & Pamela K. Bookman, *Importing Judges*, *HARV. INT'L L. J.* (forthcoming) (studying "traveling [UK] judges" across a number of jurisdictions). *See also* ANNA DZIEDZIC, *FOREIGN JUDGES IN THE PACIFIC* (2021) (identifying three-quarters of judges in Pacific states as foreign and mainly from the Commonwealth).

⁶⁴ The term is usually associated with the historical analysis of the British empire. *See* John Gallagher and Ronald Robinson, *The Imperialism of Free Trade*, 6 *ECON HIST. REV.* 1 (1953). A number of scholars have examined the formal and informal dimensions of US empire. *See, e.g.*, SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE US CONSTITUTION, AND EMPIRE 2* (2018) (studying the constitutional constraints on conferring citizenship to non-whites in annexed territories); PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES* 24 (2006) (arguing that New Left historians have subordinated the American informal empire to the formal one); DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY*

century, the formal aspects of empire would reach a zenith through, for instance, such hard-to-believe institutions as the “United States Court for China,” established by Congress in 1906 and based in Shanghai.⁶⁵ Yet, the real globalization of the American empire occurred under conditions of informality through which it both continued to export its law through legal development and “rule of law” programs for much of the twentieth century and also, crucially, building international legal and financial institutions into which it “uploaded” its law.⁶⁶ As the US became the financial center of the world, New York and Delaware law were used in contracts the world over.⁶⁷ Despite extensive use of extraterritorial jurisdiction, for the most part, US courts have historically been averse to transnational litigation.⁶⁸ So while US courts have sought to enforce US

OF THE GREATER UNITED STATES 16 (2019) (providing a “perspectival” contribution on the study of US empire based on the histories of its “territories”).

⁶⁵ Teemu Ruskola, *Colonialism without Colonies: On the Extraterritorial Jurisprudence of the US court for China*, 71 L. & CONTEMP. PROBLEMS 217, 217 (2008).

⁶⁶ On US law and development and rule-of-law programming, see David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WISC. L. REV. 1062 (1974); JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); William P. Alford, *Exporting ‘The Pursuit of Happiness,’* 113 HARV. L. REV. 1677 (2000); THOMAS CAROTHERS, *THE RULE-OF-LAW REVIVAL*, IN *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 2* (Thomas Carothers, ed., 2006); R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011). On the role of US law in building international institutions, see Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999); YVES DEZALAY & BRYANT GARTH, *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* (2002); RUMU SARKAR, *INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS, AND GLOBAL FINANCE* (2009); Laura Nader, *The Americanization of International Law*, in *MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD* (Franz von Benda-Beckmann, et al. eds., 2016).

⁶⁷ Matthew D. Cain & Steven M. Davidoff, *Delaware’s Competitive Reach*, 9 J. EMP. L. STUDIES 92, 94 (2012) (finding that Delaware law is a preferred choice of law for merging parties that are US-based, but New York law is common in cross-border transactions).

⁶⁸ TONYA L. PUTNAM, *COURTS WITHOUT BORDERS: LAW, POLITICS, AND US EXTRATERRITORIALITY* 43-5 (2016) (analysing US courts’ rationales for enforcing US law extraterritorially). *But see* Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality* 28 MA. J. INT’L L. 208, 208 (2013) (interpreting *Kiobel v. Royal Dutch Petrol. Co.* 133 S. Ct. 1659 (2013) as a move away from American judicial unilateralism and a gradual embrace of multilateralism); Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1100 (2015) (identifying the stated rationales for US courts’ aversion to transnational litigation based on separation of powers, international comity, and defendants’ convenience).

law on foreign soil, they have been more reluctant to do the reverse—enforce foreign law on US soil.⁶⁹

At the international level, the Washington Consensus was formative of “governance institutions,” namely, the International Monetary Fund, World Bank, and World Trade Organization (WTO).⁷⁰ Exemplifying the interrelationship between law and finance, these institutions assured that the US dollar would become the world’s reserve currency, backed by the world’s largest gold reserves. Other countries had to accumulate US dollars and, to do so, bought US treasury securities.⁷¹ Consequently, the US dollar became the primary medium for global trade and debt issuance. As an even further step, these governance institutions created mechanisms to deal with disputes that arose in the course of that business, for example, in trade.⁷²

In reviewing the Anglo-American experience, it is clear that one driving force for the internationalization of common law was hard power, that is, coercion. Colonists forcibly imposed their rule on subjected territories and possessions. The expansion of colonial law could be a violent and bloody process. “Gunboat diplomacy” opened markets and ensured the administration of the metropole’s law in territories on the other side of the globe.⁷³ Hence the assertion, “All violence as a means is either lawmaking or law-preserving.”⁷⁴ Violence could be naturalized as force, however, and in the post-colonial period, the subtler operations of Anglo-American law as transplants, long-arm statutes, extraterritorial enforcement, or blueprints for international investment treaties would gain widespread currency. Whether in its balder colonial form or its more recent iterations, law-as-violence has been central to critical legal theories.⁷⁵

⁶⁹ Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 945 (2017) (attributing these outcomes to parochialism at the systemic level).

⁷⁰ See generally RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO (2nd ed., 2009).

⁷¹ BARRY EICHENGREEN, EXORBITANT PRIVILEGE: THE RISE AND FALL OF THE DOLLAR AND THE FUTURE OF THE INTERNATIONAL MONETARY SYSTEM 4-5 (2011).

⁷² DAVID EVANS AND GREGORY C. SHAFFER, INTRODUCTION, IN DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 1, 5 (Gregory C. Shaffer and Ricardo Meléndez-Ortiz, eds., 2010) (showing that North American countries are the main users of the WTO’s Dispute Settlement Understanding).

⁷³ See generally DOUGLAS CLARK, GUNBOAT JUSTICE: VOLUME 2 (2015) (providing a history of Western treaties forced on China, Japan, and Korea).

⁷⁴ WALTER BENJAMIN, CRITIQUE OF VIOLENCE, IN WALTER BENJAMIN: SELECTED WRITINGS VOLUME 1 1913-1926 (Marcus Bullock and Michael W. Jennings, eds.) 236, 243 (2000[1921]).

⁷⁵ One genealogy was initiated by Karl Marx and features a line of influential thinkers. See, e.g., *id.*, Jacques Derrida, *Force of Law: The ‘Mystical Foundation of Authority*,

Such theories may be understood to emphasize force as the *modus operandi* of law to the detriment of other modes, for example, suasion, and yet they may also contain the means with which to assess these alternative modes. Returning to the case of Anglo-American common law, with its foundation of hard power, it could also attain soft power. Given its longevity and geographic spread, English common law eventually gained attractiveness in cross-border transactions for its predictability and pro-business rules.⁷⁶ As a result, it has gained a certain depth and breadth of prestige. Signs of this prestige include the “Royal Court of Arms, court oaths, Magic Circle firms, Inns of Court, silks, Ox-Bridge law faculties, full-bottomed wigs, and so on.”⁷⁷ US common law, and specifically New York and Delaware law, have curried soft power more for their “technocratic” qualities, its hyper-rationalization and specialization in such fields as corporate law, bankruptcy, and securities.⁷⁸ Consequently, parties opt for such law in their contracts or for their dispute resolution procedures to follow said sources of law.

To summarize, major capital exporting countries, namely the UK and US, have built legal infrastructures to support their international trade and investment. They have been able to do so fundamentally owing to their military and maritime power which forced open markets and controlled trade routes. Accordingly, legal theories track these coercive dimensions of law. Yet while versions of hard power persist to this day, hard power can also be complemented by soft power.

China differs from the UK and US in this sense. China does not yet have hard power undergirding its economic governance, and neither has it yet internationalized its currency, the *renminbi*. Where China excels is in international business. Chinese parties are involved in conducting high volumes of international business throughout the world. As a result, it has resorted to a number of strategies and resources to protect its pecuniary and strategic interests, among these is soft power.⁷⁹ Law is one

11 CARDOZO L. REV. 921 (1990); GIORGIO AGAMBEN, *THE MESSIAH AND THE SOVEREIGN: THE PROBLEM OF LAW IN WALTER BENJAMIN*, IN *POTENTIALITIES: COLLECTED ESSAYS IN PHILOSOPHY* 160 (Daniel Heller-Roazen, ed., 1999); and Pierre Bourdieu, *The Force of Law: Toward a Sociology of The Juridical Field*, 38 HASTINGS L. J. 805 (1987).

⁷⁶ See *supra* note 60.

⁷⁷ Matthew S. Erie & Do Hai Ha, *Law and Development Minus Legal Transplants: The Example of China in Vietnam*, 8 ASIAN J. LAW & SOC. 372, 379 (2021).

⁷⁸ Cf. YVES DEZALAY AND BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 34 (1996) (noting the “technocratic” nature of American lawyers serving as arbitration counsel).

⁷⁹ Cf. *supra* note 13 at 84 (identifying Chinese methods of effecting order transnationally).

aspect of a multi-dimensional approach to boosting its soft power internationally. In the next section, I move from the broad sweep to the granular by honing in on one institution which exemplifies Chinese law as soft power.

III. THE CHINA-AFRICA JOINT ARBITRATION CENTER

Chinese law as soft power operates in the context of China's envious and awkward position in the international system of trade and investment. China's status is, on the one hand, envious as it has benefitted from this system economically over the past forty years, and hence is incentivized to be a status quo power. On the other hand, China's role is awkward as it has benefitted from a system whose rules were mostly not of its own design and has positioned itself, both rhetorically and practically, as a challenger to that system. Hence, there is a strain of revisionism to China's participation in international trade and investment. China cannot unilaterally bend the existing system to itself; rather, it needs its trade partners, investment destinations, and aid recipients to help it do so.

One source of China's rhetorical revisionism is a set of concepts that derive from "Global South solidarity," "South-South cooperation," and related ideas from the 1955 Bandung conference and the New International Economic Order. The Party-State has appropriated this language in its communications with developing countries with the idea that China is the leader of the developing world.⁸⁰ Unlike preceding economic hegemony, China does not lead by force but by example. Rather than a "China model" that China imposes on other countries, more commonly, host states study and learn from China. In the past, host states have looked to China's success in such areas of its developmental model as poverty alleviation, technical skills, and public resource management.⁸¹ Each area has been the subject of China's soft power campaigns and professional training.⁸² More recently, the Party-State has added law to these categories. Yet for the most part, the significance of law is less "the role of law in China's developmental model" (to be emulated by other

⁸⁰ See, e.g., Xi Jinping, *Keynote Speech at the Opening Ceremony of the Boao Forum for Asia Annual Conference 2022*, MIN. FOREIGN AFFAIRS OF PRC (Apr. 21, 2022), <https://perma.cc/6YGK-Z78T> (citing the "Five Principles of Peaceful Coexistence and the Bandung Spirit" in proposing a "Global Security Initiative").

⁸¹ See *infra* note 44.

⁸² See *id.*

states),⁸³ and more how China and its partners can build transnational law, meaning the law of private parties (and some public and semi-public ones) that engage in commercial transactions across borders.⁸⁴ Pursuant to the “South-South” discourse, the Party-State frames such projects as “win-win,” evincing the inductive aspect of the projects, and yet just as the spread of common law has been critiqued, so too can the incipient forms of China’s legal infrastructures, for their own reasons. The remainder of this part will first provide a background on the China-Africa relationship and then describe the China-Africa Joint Arbitration Center (CAJAC), as an example of the soft power of Chinese law.

A. Background to CAJAC

CAJAC grew out of two exigencies: first, the problem of an increasing number of commercial disputes in the course of Chinese-African trade and investment and, second, dissatisfaction by both Chinese and African parties with current international forums for resolution of such disputes, forums that are perceived to be created by and for Western parties. This sub-part begins by providing the context of Chinese-African business relations and the need for dispute resolution. It then addresses the current options as well as critiques directed against those forums.

1. The law and economy of Chinese-African business

Chinese and African economies have become increasingly interdependent. After a fall in commodity prices in 2014, China-Africa trade has, in recent years, been increasing. According to the PRC Ministry of Commerce, China’s total trade volume with Africa in 2018 was \$204.19 billion, making China Africa’s largest trade partner.⁸⁵ China’s FDI stocks in Africa have grown nearly 100-fold since 2003 to \$44.4

⁸³ Possible exceptions include China’s data governance laws, namely, its Cybersecurity Law. See Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China’s Digital Silk Road as Transnational Data Governance*, 54 N.Y.U. J. INT’L L. & POL. 3, 75 (2021) (arguing that host states may replicate aspects of Chinese approaches to data governance in their own laws and regulations without wholesale mimicry).

⁸⁴ By “transnational law,” I refer to rules generated by private contracts, national legislation, and international agreements, some of which may transcend the law of (other) nation states. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956). See also William J. Moon, *Contracting Out of Public Law* 44 HARV. J. LEGISL. 323, 325 (2018) (showing how private commercial agreements allow sophisticated parties to opt out of domestic law); Terence C. Halliday & Gregory Shaffer, *Introduction: Transnational Legal Order*, in *TRANSNATIONAL LEGAL ORDERS* 3, 14 (Terence C. Halliday & Gregory Shaffer, eds., 2015) (conceiving of transnational law as that of private law-making produced by commercial contracts).

⁸⁵ Min. of Commerce of the PRC, *Statistics on China-Africa Trade in 2018* (Jan. 26, 2019), <https://perma.cc/NUS4-C3SY> (visited Jan. 10, 2020).

billion in 2019, and China is projected to be the top investor in Africa by 2024.⁸⁶ China is a major player in project finance in Africa, lending some \$36 billion in 2016.⁸⁷ In addition to trade, investment, and lending, Africa is the major destination for Chinese aid to a tune of \$3.3 billion in 2018.⁸⁸ China-Africa trade has seen an upsurge with the BRI, and while the BRI projects are heterogeneous in terms of their financing terms and deal structures, transport and power have seen an increase in Chinese lending.⁸⁹ The COVID-19 pandemic has seen a further deepening in China's health aid to a number of African states.⁹⁰ Dovetailing with these growing economic ties, the Party-State has increasingly sought to redefine the relationships between the PRC and African states to incorporate the latter into the CCP's vision of China's role in global affairs.⁹¹ The relationships have become diversified as African allies become more important to China's foreign policy and global multilateral role at the UN.⁹² Accordingly, China's soft power on the continent has grown through the Forum on China-Africa Cooperation (FOCAC), a vast media presence, and commercial activities.⁹³

Despite these strengthening links, legal studies regarding China and African states are in their infancy.⁹⁴ Won Kidane has underscored the

⁸⁶ China-Africa Business Council, *Chinese Investment in Africa* (2021) 105, <https://perma.cc/M9S8-HZG6> (visited Sept. 7, 2021).

⁸⁷ Alicia Garcia-Herrero, Jianwei Xu, and Bruegel, *China's Investment in Africa: What the Data Really Say, and the Implications for Europe*, BRUEGEL (July 22, 2019), <https://perma.cc/49JX-DT5V>.

⁸⁸ China-Africa Research Initiative, *Data: Chinese Foreign Aid*, <https://perma.cc/J8JV-HR2J> (visited Jan. 10, 2021).

⁸⁹ David Dollar, *Understanding China's Belt and Road Infrastructure Projects in Africa*, BROOKINGS INSTITUTE 7 (Sept. 2019).

⁹⁰ See, e.g., Tian Tuda (田土达), Feizhou guojia 'dianzan' Zhongguo kangyi yuanzhu: 'dayi' dangqian xian dayi (非洲国家'点赞'中国抗议援助: '大疫'当前显大义) [African countries approve of China's anti-epidemic aid: The 'Great Pandemic' is now showing great significance] Zhongguo jingji wang (中国经济网) [CHINA ECONOMIC NET], <https://perma.cc/Z3CA-5VY9> (visited July 13, 2020).

⁹¹ See generally DANIEL LARGE, CHINA AND AFRICA: THE NEW ERA (2021).

⁹² *Id.*

⁹³ Kenton Thibaut et al., *China's Discourse Powers Operations in the Global South: An Overview of Chinese Activities in Sub-Saharan Africa, Latin America, and the Middle East*, ATLANTIC COUNCIL 6 (2022).

⁹⁴ See, e.g., Yonghong Hong, *Legal Cooperation of China and African States: Past, Present and Future* (n.d., on file with author); Weidong Zhu, *A Brief Analysis of the Disputes Arising from China-Africa Civil and Commercial Transactions*, 7 J. CAMBRIDGE STUDIES 74, 74 (2009); Salvatore Mancuso, *China in Africa and the Law*, 18 ANN. SURVEY INT'L & COMP. L. 243, 243 (2012); Timothy Webster, *China's Human Rights Footprint in Africa*, 51 COLUM. J. ASIAN L. 626, 626 (2012); Qingxiu Bu, *China's New Approach to CSR in Congo: Is the Leverage Turning to China?* INT'L BUS. L. J. 485, 485 (2010); Moses N. Kiggundu, *China-Africa Legal and Judicial*

legal aspects of Chinese-African trade and investment, including how the PRC and all but five African states are members of the WTO and thus WTO rules apply to their trade disputes.⁹⁵ Further, China has bilateral investment treaties (BITs) with thirty-five African countries, and sixteen of those BITs are in force.⁹⁶ Uche Ewelukwa Ofodile has found that many of China's BITs with African states differ from those between Western states and African countries in that the former do not include provisions related to the environment, labor rights, or human rights.⁹⁷ While the later generations of Chinese BITs increasingly converge with international practice in including nondiscrimination, most favored nation clauses, and equitable treatment, and national treatment, many are outdated.⁹⁸ Additionally, China has some thirty-six judicial assistance treaties with African states.⁹⁹ Beyond the international investment agreements and related treaties, the FOCAC has served as a networking platform for judicial cooperation and knowledge exchange between lawyers, judges, and arbitrators.¹⁰⁰

Law has thus gradually become wedded to China's broader soft power overtures. Specifically, China has sought out African partners to build mechanisms to deal with their investment disputes. These disputes mirror overall patterns elsewhere. At a general level, disputes related to foreign investment fall into two general categories: those between states and which are based on treaties ("investor-state dispute settlement" or ISDS) and those between non-state parties that are grounded in contracts. Among the second category, the standard alternatives for dispute resolution mechanisms for commercial conflicts are African courts, PRC courts, and international commercial arbitration (ICA), including those conducted by African arbitration institutions, Chinese arbitration institutions, or third-party arbitration institutions. As most of the commercial contracts between Chinese and African parties are governed by local state law and local courts have jurisdiction over disputes arising from those contracts, Chinese parties frequently find themselves in

Systems: Advancing Mutually Beneficial Economic Relations 4 BEIJING L. REV. 155, 155 (2013); Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 131 (2013); Uche Ewelukwa Ofodile, *Trade, Empire, and Subjects – China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?* 41 VAND. J. TRANSN'T'L L. 505, 505 (2008); WON KIDANE, CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, CULTURE AND ECONOMICS OF ARBITRATION (2011).

⁹⁵ See Kidane, CHINA-AFRICA DISPUTE SETTLEMENT, *supra* note 140 at 79.

⁹⁶ *Id.* at 222.

⁹⁷ See Ofodile, *Africa-China*, *supra* note 94 at 191.

⁹⁸ See Erie *supra* note 13 at 91.

⁹⁹ See *supra* note 95, at 225.

¹⁰⁰ See *infra* note 147.

African courts. In South Africa, for instance, cases involving Chinese parties have even been formative of the jurisprudence on ICA issues.¹⁰¹

As for PRC courts as a forum for China-Africa disputes, they are a less likely option given that PRC law is rarely an applicable law for such contracts, a fact that demonstrates the limits of the internationalization of Chinese law, at present. In the event that the contract is with a host government, that government will insist on using local law as the governing law, although ICA is still the likely preferred means of dispute resolution, particularly among Chinese state-owned enterprises.¹⁰² Demonstrating the enduring attraction of pre-existing legal infrastructures, contracts with private parties, including mergers and acquisitions and construction, are often governed by English law (and choose arbitration at the London Court of International Arbitration (LCIA)).¹⁰³ The International Chamber of Commerce (ICC) is also a popular forum.¹⁰⁴ One exception is loan agreements that may be governed by PRC law, as Chinese lenders may benefit from asymmetry over African borrowers, and push for their law and Chinese courts or arbitration.¹⁰⁵ Yet, while many Chinese and African parties have no qualms about using such forums, there are also strong voices rejecting conventional forums for the reason that they are established by and for Western parties.

2. The critique of established international dispute resolution mechanisms

Chinese and African parties have criticized existing international dispute resolution forums based on their respective positions in the international system of trade and investment. In the field of ISDS, the main mechanism is the International Centre for Settlement of Investment Disputes (ICSID), founded in 1966 under the World Bank in Washington, D.C.¹⁰⁶ ICSID was borne of a period when chiefly Western multinational corporations were seeking to protect their investments from expropriation in developing countries and as such exemplifies Western (and, in particular, American) approaches to creating dispute resolution

¹⁰¹ See, e.g., *Zhongji Development Construction Engineers Co. Ltd. v. Kamoto Copper Co. SARL*, 2015 SA 345 (SCA), [2014] ZASCA 160 (establishing common law rules on the severability of arbitration clauses and the *kompetenz-kompetenz* rule.)

¹⁰² Interview with the general counsel of private Chinese oil company active in Africa and the Middle East, video-conference call, Beijing, Sept. 3, 2021.

¹⁰³ *Id.* See also KIDANE *supra* note 94 at 368.

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., Edwin Okoth, *SGR Pact with China a Risk to Kenyan Sovereignty, Assets*, DAILY NATION (Jan. 13, 2019), <https://perma.cc/26PX-KP5S> (describing the loan agreement for the Mombasa-Nairobi railway, signed between the Kenyan government and the Eximbank on May 11, 2014, which specifies PRC law and CIETAC).

¹⁰⁶ See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter “ICSID Convention”), Mar. 18, 1965.

institutions for cross-border commerce. Specifically, BITs between capital-exporting and host states include ICSID in their dispute resolution provisions to avoid host state courts. Today, there are nearly three thousand BITs in total, of which approximately two thousand are in force¹⁰⁷ and, as of mid-2020, 768 cases have been registered under the ICSID Convention and Additional Facility Rules.¹⁰⁸ As of mid-2019, Sub-Saharan and Middle Eastern & North African states accounted for 15 percent and 12 percent of a total of 728 registered cases, respectively, under the ICSID Convention and Additional Facility Rules, cases in which African states were mostly respondents.¹⁰⁹

The international investment regime has generated extensive protest by host states. The threshold issue for many developing countries is that the current system prohibits their own domestic regulatory capacity, an infringement of sovereignty.¹¹⁰ Scholars, nongovernmental organizations, and activists have argued that the international investment regime is a remnant of colonialism and leads to the structural disadvantage of host states in the Global South.¹¹¹ The Bandung conference marked a high-tide in solidarity in the developing world but that moment failed to achieve lasting reform.¹¹²

Both China and African countries have suffered under colonialism. China is considered a “semi-colonized state,” and African countries have had longer exposures to colonialism that have shaped African state’s engagement with international investment law and dispute resolution.¹¹³ African states, which include thirty-four of the forty-eight least developed countries in the world, are sorely in need of both foreign investment for

¹⁰⁷ UNCTAD Investment Policy Hub, *International Investment Agreements Navigator*, <https://perma.cc/W8TV-CLJN> (visited Jan. 8, 2021).

¹⁰⁸ ICISD, *The ICSID Caseload-Statistics* (2020), <https://perma.cc/7FGH-C442>.

¹⁰⁹ Uche Ewelukwa Ofodile, *African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes, and Challenges*, 34 ICSID REVIEW 296, 298 (2020).

¹¹⁰ Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 953, 953 (2005); Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime*, 50 HARV. INT’L L. J. 491, 491 (2009).

¹¹¹ See Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT’L L. 361, 365 (2018).

¹¹² See generally LUIS ESLAVA, MICHAEL FAKHRI, & VASUKI NESIAH, *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* (2017) (analysing the legacy of the Bandung conference).

¹¹³ TASLIM O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1988); VALENTINE NDE FRU, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENTS AND HOST ECONOMIES IN SUB-SAHARAN AFRICA* (2011); LISE BOSMAN, *ARBITRATION IN AFRICA: A PRACTITIONER’S GUIDE* (2013); *AFRICAN PERSPECTIVES IN INTERNATIONAL INVESTMENT LAW* (Makane Moïse Mbengue & Yenkong Ngangjoh Hodu eds., 2020).

economic growth and a framework for foreign investment that offers both sides certainty, predictability, and fairness.¹¹⁴ African states have pursued a number of their own initiatives to develop “home-grown” ISDS, including the 2015 Pan-African Investment Code, the 2016 African Society of International Law’s Principles on International Investment for Sustainable Development in Africa, and the 2019 Agreement Establishing the Continental Free Trade Agreement, which includes an investment chapter.¹¹⁵

These multilateral efforts occur alongside individual state decisions to sever their ties with the existing international investment system, mainly by terminating their BITs with European countries. Most notably, South Africa has rescinded its BITs with a number of European Union member states following a series of high-profile expropriation claims brought by Italian citizens and a Luxembourg company.¹¹⁶ South Africa has justified its actions based on its Black Economic Empowerment policies, which are designed to rectify the country’s past race-based injustices as an expression of the country’s sovereignty.¹¹⁷

Whereas, after Germany, China has signed the most number of BITs in the world, the PRC has historically demonstrated a reluctance to use ISDS.¹¹⁸ Historically, China has not been a major user of ICSID, being a claimant in five cases that have been concluded and a respondent in four.¹¹⁹ Rather than ICSID, traditionally, Chinese parties have relied on interstate negotiation and conciliation to solve investor-state disputes.¹²⁰ While Chinese parties have not criticized ICSID as unfair to the same extent they have in regards to the WTO Dispute Settlement Body, nonetheless, there are some Chinese scholars who view ICSID as biased

¹¹⁴ Makane Moïse Mbengue, ‘*Somethin’ ELSE*’: *African Discourses on ICSID and on ISDS – An Introduction*, 34 ICSID REVIEW 259, 259-60 (2019).

¹¹⁵ *Id.* at 260-63.

¹¹⁶ *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1).

¹¹⁷ Engela C. Schlemmer, *An Overview of South Africa’s Bilateral Investment Treaties and Investment Policy*, 31 ICSID REVIEW 167, 172 (2016).

¹¹⁸ Wang Guiguo, *Chinese Mechanisms for Resolving Investor-State Disputes*, 1 JINDAL J. INT’L AFFAIRS 204, 213-14 (2011).

¹¹⁹ Recently, there has been a small uptick in Chinese parties resorting to ICSID. Since 2017, there are five additional cases that are pending. Additionally, China is a respondent in one other pending case. *See ICSID, Cases*, <https://perma.cc/E2JG-WQ6V> (visited Jan. 26, 2022).

¹²⁰ *See Erie supra* note 13 at 89.

against China.¹²¹ In addition, Chinese enterprises generally refrain from having their disputes aired in public.¹²²

Although their reasons for dissatisfaction with the existing international investment regime differ, African states and China have sought alternatives, and these usually fall under the category of commercial disputes rather than ISDS, a preference reflected in the goals of the FROL.¹²³ The reason for efforts to push reform and create alternatives in ICA rather than investor-state arbitration is that the former affords more flexibility. ISDS requires forming or amending treaties, a level of state-to-state coordination that can be difficult. Whereas ISDS has received the lion's share of critique in African states and in China, it is through ICA where many reformers in both Africa and China hope to create institutions alternative to the current offerings.¹²⁴

There are two charges levelled against ICA by different parties. First, ICA has been viewed as a phenomenon of the global North. London and Paris, as sites of the LCIA and the ICC, respectively, have had a predominant presence in the practice of ICA in Africa and Asia, including postcolonial states.¹²⁵ As a result, critics of this new form of *lex mercatoria* have labelled international arbitrators who provide services to multi-national corporations a “mercatorocracy.”¹²⁶ One study based on a survey of the biennial Congress of the International Council for Commercial Arbitration found that the median international arbitrator was a fifty-three year old man who was a national of a developed state, and the median counsel was a forty-six year old man who was a national

¹²¹ See, e.g., *supra* note 118 at 230 (finding that language in the ICISD Tribunal's award in the 2007 *Tza Yap Shum v. Peru* case was “extremely biased and obviously discriminatory”).

¹²² See *Erie supra* note 13 at 90.

¹²³ See *supra* text accompanying note 46 (“Promote the establishment of joint arbitration mechanisms between Chinese arbitration institutions and national arbitration institutions jointly building the ‘Belt and Road’.”).

¹²⁴ Some scholars view an increasing convergence between ISDS and commercial disputes in the field of international investment law. See e.g., Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT'L L. 835, 835 (2005); Piero Bernardini, *International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences*, in PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 52, 52 (David D. Caron, Stephan W. Schill, Abby Cohen Smutny & Epaminontas E. Triantafilou eds., 2015); Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012*, 28 ARB. INT'L 577, 577 (2012).

¹²⁵ See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION IN THE CONSTRUCTION OF A TRANSLATIONAL LEGAL ORDER* (1996).

¹²⁶ A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* 14 (2003).

of a developed state.¹²⁷ Such homogeneity may work against Chinese and African parties, given the considerable nuance arbitrators are required to possess in terms of not only industry standards and business practices but also cultural norms.¹²⁸

Second, ICA has been criticized as facilitating a form of private transnational law that is not accountable to any public body given that arbitration is confidential and has developed its own regime for enforcement under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention”).¹²⁹ The problem then, from the viewpoint of state governments, is that ICA can circumvent local judiciaries, one reason for ICA’s attractiveness to multi-national corporations that may be investing in countries with weak or corrupt courts. African and Chinese promoters of ICA are clearly aware of the first problem and are galvanized to increase diversity, but as with their European peers, they may perceive the second issue less as a bug and more as an appealing feature of the ICA system. To summarize, Chinese and African parties have joined a chorus of criticisms against existing international commercial dispute resolution institutions, criticisms that have launched their own initiatives for ICA capacity building.

B. Description of CAJAC

1. Enter the network

CAJAC purports to combine the expertise of Chinese and African arbitrators to address the needs of China-Africa transactions. Specifically, it is part of an effort led—to various degrees—by national governments and the respective bars to ensure that Chinese-African commercial contracts use Chinese or African law and Chinese or African languages, and when disputes arise from those contracts, Chinese or African arbitrators resolve those conflicts.¹³⁰ It does so by avoiding local African state courts, which may otherwise bog the parties down in red tape. In other words, CAJAC delocalizes disputes and offers a path for quasi-

¹²⁷ Susan Dr. Franck, *The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 466-7 (2015).

¹²⁸ See generally JOSHUA D. H. KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* (2013).

¹²⁹ A. Claire Cutler, *International Commercial Arbitration, Transnational Governance, and the New Constitutionalism*, in *INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE* 140, 155-156 (Walter Mattli & Thomas Dietz eds., 2014).

¹³⁰ Interview with Kenyan advocate and arbitrator, video-conference call, Nairobi, Jan. 5, 2021.

private regulation of China-Africa trade and investment, a common strategy in Chinese law and development.¹³¹

As a method of dispute resolution, CAJAC's form—an interregional network of arbitral hubs—is bespoke. CAJAC shows how Chinese arbitrators and officials, who initiated CAJAC, have grown international networks of legal practitioners that may provide a human-resources infrastructure for building legal institutions. Yet CAJAC, which is billed as a joint effort by Chinese and African parties, also masks the underlying economic reality of some African states' dependence on Chinese trade and investment (i.e., China's hard power). It is in this context that CAJAC exemplifies Chinese law as soft power: as part of a larger discourse around Chinese-African mutual or interlinked development,¹³² it aligns African stakeholders' interests with those of Chinese ones while meanwhile producing the misrecognition of asymmetry as “win-win.”¹³³

Yet the significance of CAJAC means going beyond the Marxist critique of the mystifying effects of, in this case, Chinese law. My analysis proceeds along two lines: first, navigating the transnational network that created CAJAC and, second, analyzing CAJAC's institutional rules. The first spotlights the agency of South African, Kenyan, and other African legal experts in sponsoring CAJAC—their role was pivotal. The second shows how CAJAC is technically not a story of Chinese law's transplantation per se; rather, through an appraisal of its institutional rules, it becomes clear that CAJAC expands Chinese arbitration institutions' foothold into Africa. CAJAC does so by effectively supplanting the jurisdiction of African courts with that of Chinese arbitration institutions, a type of de facto extraterritoriality. Juxtaposing the rationalizations of those who built and may use CAJAC with the rules that determine the operation of the mechanism shows how networks may beget institutions, that is, soft power may have hard edges. Yet such networked frameworks may be less substantive (i.e., capable of resolving disputes) and more performative (i.e., signaling collaboration). This is, I argue, a defining feature of Chinese law as soft power. The ensuing gap between discourse and practice suggest the transnationalization of certain features of Chinese

¹³¹ See *supra* note 13 at 106.

¹³² See Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of the People's Republic of China (2015).

¹³³ On law's production of misrecognition effects that it is autonomous (and non-political), see Bourdieu *supra* note 75 at 820.

law, namely, “legal surrealism.”¹³⁴ In this sub-part, I explain the origins, function, and outgrowths of the network that created CAJAC.

As I learned speaking to staff members of Shanghai International Arbitration Center (SHIAC) in their office in 2018, some of whom helped create CAJAC, the genesis of CAJAC is Chinese-initiated networks, specifically, efforts by the China Law Society, the official professional organization for legal professionals in the PRC to establish platforms for engaging lawyers, judges, and arbitrators from African states.¹³⁵ My conversation with the SHIAC officers about CAJAC was similar to discussions elsewhere. These conversations, depending on the individual and their position in regards to CAJAC were characterized by a mixture of professional pride with reticence and sometimes meaningful pauses. In the case of the SHIAC officers, whereas they offered a narrative about CAJAC’s creation, and shared CAJAC marketing materials with me, there were important gaps in their representation of the institution. These gaps are attributable to a number of factors, including the early stage of CAJAC’s development (they were still drafting the institutional rules at the time) and the general atmosphere of commercial sensitivity of ICA that confronts nonparties, but also others that were more idiosyncratic, including the constitutive role of certain stakeholders in the network that formed CAJAC.

The China Law Society, for example, is, according to its Chinese-language website, “led by the CCP” (*Zhongguo gongchandang lingdao de 中国共产党领导的*).¹³⁶ The China Law Society is part of a broader effort led by the Party-State to create professional networks with African partners, facilitate knowledge exchange, promote capital formation, and transfer skills in line with China’s foreign policy objectives.¹³⁷ Importantly, these networks coordinate the interests between the CCP and private actors, and while it is incorrect to conclude that all operating within such networks are dominated by the CCP, they nonetheless participate in agendas staked out by the CCP. In this case, the China Law Society and peer organizations under the CCP hold conferences, training sessions, and workshops for foreign lawyers, particularly from developing countries, in China, and co-organize similar events outside of

¹³⁴ See *supra* note 16.

¹³⁵ Interviews with SHIAC officers, Shanghai, Apr. 20, 2018.

¹³⁶ Zhongguo faxuehui (中国法学会) [China Law Society], Xuehui jianjie (学会简介) [Introduction to the Society], <https://perma.cc/A3JG-2UQN> (visited Jan. 10, 2021).

¹³⁷ See generally LINA BENABDALLAH, SHAPING THE FUTURE OF POWER: KNOWLEDGE PRODUCTION AND NETWORK-BUILDING IN CHINA-AFRICA RELATIONS (2020).

China.¹³⁸ In parallel to the SPC's support for transnational judicial networks, in 2019, the All-China Lawyers Association (ACLA), the official professional association for PRC lawyers, launched a Belt and Road International Lawyers Association (BRILA) to promote legal cooperation between Chinese and foreign lawyers.¹³⁹ The BRILA has eighty-five founding members from thirty-six countries.¹⁴⁰ BRILA's activities include conferences, training, legal services provision, and improving regional trade rules. It illustrates some of the connectivity between the government and the bar as ACLA, along the Ministry of Justice, has also sought to promote Chinese law firms' capacity to conduct cross-border transactional and dispute resolution work.¹⁴¹

The networking led by the China Law Society could be dismissed as being epiphenomenal, mere window-dressing that is more about all-inclusive junkets than anything substantive, but doing so would miss the point of these networking events. For instance, at the "Conference on Legal Risks and Countermeasures of International Investment and Trade," hosted by the China Law Society in Beijing in 2017, and featuring some 180 people from thirty-one countries, mainly from African and the Association of Southeast Asian Nations, many speakers, including judges, arbitrators, and academics, discussed issues in Chinese-African investment, including dispute resolution. Particular emphasis was made on advances China has made in recent years, such as greater possibility for ad hoc arbitration in the free trade zones.¹⁴² As a matter of practicum, the event allowed lawyers from South Sudan, Senegal, Mali, and other African countries to meet Chinese counterparts face-to-face, and to build relationships that could assist down the line with client referrals when Chinese enterprises need local counsel in host states to deal with due diligence and local compliance concerns.¹⁴³ The sidebar conversations allow legal professionals to network, relationships which prove helpful (and profitable) for future problem solving.

This view that networks can be actionable and lead to concrete outcomes finds support in the social science literature, as well as emerging studies in comparative law and transnational law on networks.

¹³⁸ See Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?* 51 VA. J. TRANSNAT'L L. 101, 131 (2018).

¹³⁹ Interview with Chinese lawyer, via telephone, Shanghai, Sept. 20, 2019.

¹⁴⁰ Dezan Shira & Associates, *Belt & Road International Lawyers Association Launched*, SILK ROAD BRIEFING (Dec. 10, 2019), <https://perma.cc/CV5S-VBFR>.

¹⁴¹ *Id.*

¹⁴² Personal observation of "Conference on Legal Risks and Countermeasures of International Investment and Trade," hosted by the China Law Society, in Beijing (Oct. 12-13, 2017).

¹⁴³ *Id.* See also interview with Chinese lawyer, via telephone, Shanghai, July 6, 2020.

Specifically, these diverse literatures stand for the proposition that transnational networks can address common policy needs and coordinate norms and rules across borders, spurring regulatory innovation in the face of complex problems.¹⁴⁴ Lawyers are intrinsic promoters and beneficiaries of these global networks, which, despite deglobalization movements and COVID-19-related obstacles to cross-border coordination, are likely to grow.¹⁴⁵

Members of the dispute resolution industry in China promote global networks of legal professionals. The China Law Society is building cosmopolitan networks the world over.¹⁴⁶ In the Chinese-African relationship, the platform is the FOCAC-Legal Forum, an annual gathering, which was first held in 2009 in Egypt and which has been aimed at establishing collaborations between Chinese and African legal professionals. The idea for a China-Africa Joint Dispute Resolution Mechanism grew out of these meetings.¹⁴⁷ The original partners for CAJAC were the Arbitration Foundation of Southern Africa (AFSA) and SHIAC. AFSA is seen widely as the leading arbitration institution in Africa, receiving the highest number of cases of any center on the continent.¹⁴⁸ According to an official publication by the China Law Society on CAJAC, the history of the institution is as follows:

Through the FOCAC-Legal Forum, Chinese and African proponents built capacity through their respective business, legal, industrial, and commercial circles. Subsequently, the Beijing Action Plan (2013-2015) mentioned that China and Africa “agreed to...increase cooperation in... the mechanism of non-judicial settlement of disputes.” In 2011, the Project of Mutual Registration for Chinese and African Arbitrators was started and in the following year, AFSA and the Hainan Arbitration Commission registered arbitrators jointly. In November 2014, the Establishment of China-Africa Joint Dispute Resolution Mechanism was written into the Luanda Declaration, and adopted at the fifth FOCAC-Legal Forum. On June 5, 2015, the Seminar on Establishing a China-

¹⁴⁴ Virginia Harper-Ho, *A Network Innovation Model of Transnational Regulatory Change: Applications in Sustainable Finance*, Am. J. Comp. L. (forthcoming); Charles Whitehead, *What's Your Sign? International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695 (2006); Pierre-Hughes Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. (2009).

¹⁴⁵ Laurel S. Terry, *Global Networks and the Legal Profession*, 53 AKRON L. REV. 137, 175 (2019).

¹⁴⁶ Chen Jiping, “*Speech on the Opening Ceremony of the Second Course of China-Africa Legal Professionals Exchange Project*,” Beijing Foreign Studies University, Beijing China (May 25, 2015) (copy on file with author).

¹⁴⁷ SHIAC, *China-Africa Joint Arbitration Centre 3* (n.d.) (on file with author).

¹⁴⁸ See EMILIA ONYEMA, 2020 ARBITRATION IN AFRICA SURVEY REPORT: TOP AFRICAN CENTRES AND SEATS 12 (2020).

Africa Joint Dispute Resolution Mechanism was held in Beijing where participants signed the Beijing Consensus on Establishing a China-Africa Joint Dispute Resolution Mechanism and where SHIAC, AFSA, Africa ADR, and the Association of Arbitrators of Southern Africa signed the Cooperation Agreement on Establishing a China-Africa Joint Dispute Resolution Mechanism. In August 2014, a China Law Society delegation visited South Africa and signed the Johannesburg Consensus on Establishing a China-Africa Joint Dispute Resolution Mechanism. On November 26, 2015, the two centers of CAJAC were established, one in Shanghai and the other in Johannesburg, at the sixth FOCAC-Legal Forum held in Johannesburg.¹⁴⁹

In 2017, the partners agreed to expand CAJAC to include partnerships, on the China side, with the Beijing International Arbitration Center (BIAC) and the Shenzhen Court of International Arbitration (SCIA) and, on the African side, with the Nairobi Centre for International Arbitration in Kenya. These centers also set up CAJAC offices. A year later, Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), comprised of 17 Francophone African states and featuring its main dispute resolution mechanism, the Cour Commune de Justice et d'Arbitrage (CCJA), was also approached to be the sixth CAJAC member.¹⁵⁰ The idea, then, was that each region of Africa would have a partner arbitral institution in China, providing for coverage of the entire continent. The broad vision is a kind of network of multiple African and Chinese arbitration hubs that coordinate to resolve Chinese-African commercial disputes.

Stakeholders in both China and Africa agreed that CAJAC was pushed by the PRC government and Chinese arbitration commissions. Representatives of SHIAC reported that CAJAC's establishment was timed, in 2014, with the promulgation of rules regarding arbitration in the free trade zones, innovations that were incorporated into the FOCAC-Legal Forum in that year and which "attracted the notice of African countries."¹⁵¹ While the Chinese arbitration establishment sought to create demand, they simultaneously created forums for co-learning through, for example, China Law Society conferences.¹⁵² The Chinese law firm Dacheng, which is headquartered in Beijing but also has an office in Johannesburg, also facilitated study tours.¹⁵³ Arbitration counsel

¹⁴⁹ *Id.*

¹⁵⁰ *See supra* note 135.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

in Kenya echoed this account. As told by a lawyer in Nairobi the Chinese pushed for the establishment of CAJAC:

About two years ago, the Chinese delegation came to the NCIA [Nairobi Centre for International Arbitration] and a number of law firms. The delegation included a number of people from Shanghai, including representatives from SHIAC and the government. It was basically a roadshow, they were given a lot of attention. My overall take was that because there were so many Chinese companies investing [here] and because they didn't understand the common law legal system, and found the legal system opaque and [were] suspicious of non-Chinese systems, from their perspective, it was helpful to their companies to promote a system that would treat Chinese parties fairly in a dispute... There was real concern about domestic courts... They emphasized the efficiency of dispute resolution in China. They gave statistics on cases administered. It wasn't about the quality of decisions but, for business needs, certainty around timelines and mitigating legal costs. They also talked about [their] digital processes, filing online, and so on to bring the costs down. The takeaway was that it was complementary for Chinese companies to access dispute resolution mechanisms that they have faith in and are not domestic in origin. So, it was driven by the Chinese government and large Chinese companies.¹⁵⁴

Interviews with practitioners in Johannesburg and in Shanghai further corroborate the above accounts. Interviewees pointed to the strong role in the Chinese state, and to a lesser extent, African governments, in promoting the project. As related by several lawyers in Nairobi, before CAJAC, the Kenyan government put a policy in place that required any public contract (e.g., engineering, procurement, and construction) to designate the NCIA in the dispute resolution clause.¹⁵⁵ The Kenyan government likewise required Chinese parties to designate the NCIA, but the Export-Import Bank of China, which was the lender, balked at this idea.¹⁵⁶ They wanted China-seated arbitration. A Kenyan lawyer related, "China is more powerful, they are providing the money. And we want the

¹⁵⁴ Interview with Kenyan lawyer and head of dispute resolution practice group, via video-conference call, Nairobi, Dec. 4, 2020.

¹⁵⁵ See *supra* note 154.

¹⁵⁶ See *supra* note 130.

roadworks. When they hold a gun to your head, you have no choice.”¹⁵⁷ CAJAC, however, “looks like a collaboration.”¹⁵⁸

Whereas it is clear that Chinese parties, and specifically, the government, were the main drivers of CAJAC initially, their representatives were successful in persuading their African counterparts to co-establish the institution. The Kenyan lawyer above suggested the coercive aspects of the Chinese approach,¹⁵⁹ but the soft power dimension is regnant. Networks of Chinese and African legal professionals feature complex interests. On the side of the African arbitration institutions, there are incentives to collaborate. First, there is the question of fairness. Interviewees remarked that many African governments are skeptical of Western arbitration and echoed the concern that they are biased against African governments.¹⁶⁰ Second, there is the issue of cost, particularly the costs associated with defending an ICSID claim or responding to arbitration, hiring QCs in London, and international travel. On cost, the Chinese emphasized to African audiences the time-efficiency of Chinese arbitration, and the procedural efficiency of limiting oral arguments in preference for written submissions. Third, there is a deep narrative of onshoring disputes to bring them back onto the continent. One Kenyan lawyer stressed this narrative is a Kenyan one and not Chinese, but one to which the Chinese have played.¹⁶¹ So, while Chinese overseas financing may have undercurrents of ultimatum, there is also persuasion and consensus-building, behaviors that are familiar to students of Chinese policy-making.¹⁶² As one Kenyan lawyer expressed, “we wanted to tap into the Chinese market.”¹⁶³ Hence, part of the roadshow, conferencing, study tours, and exhibition of Chinese arbitral know-how is to stimulate and respond to self-interest in African counterparts.

2. Institutional design

Having described the transnational network that generated CAJAC, I next turn to the rules which formed its organization and

¹⁵⁷ *Id.* (noting that the observations were based on media accounts and not first-person knowledge given that agreements are confidential).

¹⁵⁸ *Id.*

¹⁵⁹ *See supra* note 157.

¹⁶⁰ *See also* EMILIA ONYEMA, *THE TRANSFORMATION OF ARBITRATION IN AFRICA: THE ROLE OF ARBITRAL INSTITUTIONS* (2016); Abdulqawi A Yusuf, *From Reluctance to Acquiescence: The Evolving Attitude of African States Towards Judicial and Arbitral Settlement of Disputes*, 28 *LEIDEN J. INT’L L.* 605, 605 (2015).

¹⁶¹ *See supra* note 154.

¹⁶² *See, e.g.*, KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 173 (1995).

¹⁶³ Interview with South African lawyer and arbitration counsel, via video-conference, Johannesburg, Dec. 14, 2020.

operation. At the outset, it is important to observe CAJAC is a network both in its genesis and in the institutional structure it has assumed. In short, it is a kind of institutionalized network on a transregional scale. CAJAC's form as an alliance of Chinese and African arbitration institutions renders it unique in the ICA field, yet one with both potential merits and drawbacks. The form of the network can best be understood with reference to CAJAC's institutional rules, which establish the procedure for arbitrations administered by that specific institution, and further shed light on how the different members of CAJAC (i.e., CAJAC Shanghai/SHIAC, CAJAC Beijing/BIAC, CAJAC Shenzhen/SCIA, CAJAC Johannesburg/AFSA, CAJAC Nairobi/NCIA, and CAJAC OHADA/CCJA) relate to each other, if at all, in resolving disputes.

Before assessing the rules, some further institutional history is required. CAJAC represents the logic of Chinese policy making in that the China Law Society and AFSA seemed to create an initial framework or brand, and then allowed the details to be backfilled.¹⁶⁴ Initially, when AFSA and SHIAC were the only two institutions involved with CAJAC, it was agreed that each would separately have its own institutional rules. For example, CAJAC Johannesburg drafted and then published a "Founding Statement and Rules for the Conduct of Arbitration" in 2015 (hereinafter, "2015 Rules").¹⁶⁵ The 2015 Rules establish a governance arrangement by which the two centers in Shanghai and Johannesburg would have separate rules "in conformance with the requirements of the legal jurisdictions in which they operate," but would be administered by an Arbitral Commission under a Joint Guiding Committee.¹⁶⁶ Importantly, the 2015 Rules were based on SCIA's institutional rules,¹⁶⁷ yet it soon became apparent that directly adopting Chinese arbitration rules in South Africa presented problems.

Furthermore, the decision was made to expand CAJAC, and as the additional institutions were incorporated, following the first international CAJAC Conference held in Cape Town in 2017 and the advice of business

¹⁶⁴ See, e.g., KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES 24 (1988); *supra* note 162 at 172 (observing Chinese policy operates through broad statements from above meant to guide lower officials who fill in the details).

¹⁶⁵ China-Africa Joint Arbitration Centre Johannesburg, *Founding Statement and Rules for Conduct of Arbitration* (2015) (on file with author).

¹⁶⁶ *Id.* 'Founding Statement', Art. 5 (stating "Each Arbitral Commission administers matters under its own Rules and practices which are in conformance with the requirements of the legal jurisdictions in which they operate.")

¹⁶⁷ Julia Le Roux (Zhang), Comments during Webinar, "The Often-Overlooked Value of African Seats for African-Chinese Disputes," co-hosted by Delos and Fangda (Mar. 12, 2021).

delegates, the decision was made to draft a common set of rules that would apply to all the CAJAC members.¹⁶⁸ CAJAC Johannesburg was tasked with drafting them.¹⁶⁹ Drafters included leading academics and practitioners from the field of arbitration in South Africa.¹⁷⁰ The draft rules were subsequently circulated to all the CAJAC members for comment and review. Similarly, a CAJAC Constitution has been drafted and circulated to all partners.¹⁷¹

Whereas the CAJAC Constitution is yet to be published, in 2020, the CAJAC Rules (hereinafter, “Uniform Rules”) were published, a document that shows some of the trade-offs in designing CAJAC as a network of Chinese and African arbitration institutions. Unlike the 2015 Rules, the inheritance from Chinese arbitration rules is much less pronounced in the Uniform Rules, although there is some confusion on this point. The main drafter of the Uniform Rules has written that the first draft “is closely based on the rules of one of the participating Chinese Arbitration Centres,”¹⁷² although he most likely means the 2015 Rules and not the Uniform Rules. He further gives some credence to the idea that South African arbitration has shifted from European to Chinese arbitration models, in writing:

The Chinese arbitration community are convinced that the arbitral processes reflected in their rules, while fully compliant with international standards regarding fairness and due process, are inherently more efficient and expeditious than the processes provided by the rules of arbitration institutions based in the West, particularly where rules have been too heavily influenced by common-law adversarial-style procedures. We in Africa are happy to learn from the Chinese experience and to apply it, where it is in our mutual interests to do so.¹⁷³

However, the drafters faced problems in reconciling the two regimes, those of the Chinese and the UNCITRAL standards, the latter which South Africa adopted in light of the International Arbitration Act, 2017. A closer examination of the Uniform Rules suggests that there may be some Chinese influence, particularly in regards to, first, the relative power of the arbitration commission and, second, the issue of the seat of

¹⁶⁸ Email correspondence with CAJAC representative, Johannesburg, Mar. 5, 2019.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² David W. Butler, *The Importance of the New York Convention for the Development of Trade and Investment Between China and Africa – Possible Pitfalls and the Potential Contribution of CAJAC*, 1 AFSA PERSPECTIVES 11, 15 (2020).

¹⁷³ *Id.*

arbitration. As to the first, in regards to challenges to the arbitral tribunal's jurisdiction, Article 9.3 of the Uniform Rules states, "The CAJAC Centre or the arbitral tribunal authorized by the CAJAC Centre, shall have the power to decide on the jurisdiction."¹⁷⁴ Rather than the tribunal having sole discretion, the Uniform Rules allow the arbitration commission to make such decisions, a feature common to Chinese arbitral rules. However, for the arbitration commission to have such power can create problems, in terms of when and under what conditions the institution rather than the tribunal can exercise this power.

In terms of the issue of the seat, Article 4.2 of the Uniform Rules specifies, "Where the parties have not agreed on the place of arbitration, the place of arbitration shall be the domicile of the CAJAC Centre which accepts the request. The CAJAC Centre may also determine the place of arbitration to be a location other than the domicile of the CAJAC Centre in regard to the circumstances of the case." Globally, many institutional rules of arbitration institutions identify the domicile of the institution as the default seat, and explicitly refer to the seat as such.¹⁷⁵ In the Uniform Rules, however, this language is avoided in preference for simply "domicile of the CAJAC Centre," echoing a focus on the nationality of the arbitration institution as understood in Chinese arbitration practice, prior to the recently proposed amendments to the 1994 Arbitration Law.

Making the domicile of the arbitration institution (i.e., CAJAC center) the default basis of the seat in those cases where the parties have not made such an agreement, potentially reproduces some of the pathologies of Chinese ICA, in particular, as pertains to the recognition of foreign arbitral awards and also setting aside procedures.¹⁷⁶ It is not clear how PRC courts would treat awards issued by CAJAC centers in China. Most likely, in light of their consideration of the nationality of the arbitration institution as a factor for determining whether an award is "domestic" as opposed to "non-domestic" or, "foreign-related,"¹⁷⁷ PRC

¹⁷⁴ CAJAC Uniform Rules, Art. 9.3.

¹⁷⁵ See, e.g., Hong Kong International Arbitration Center Administered Arbitration Rules (2018), Art. 14.1 (stating "Where there is no agreement as to the seat, the seat of arbitration shall be Hong Kong...") and Nairobi Centre for International Arbitration Rules 2015 Revised Version, Art. 18 (declaring, "Unless otherwise agreed under paragraph (1), the seat of arbitration shall be Nairobi, Kenya.") But see AFSA International Rules (2017), rule 26 (stating, "In the absence of agreement between the parties, the juridical seat of the arbitration shall be determined by the Secretariat.")

¹⁷⁶ Matthew S. Erie & Monika Prusinowska, *The Future of Foreign Arbitration in the People's Republic of China: Current Developments and Challenges*, 28 ASIA PAC. L. REV. 259 269-70 (2020).

¹⁷⁷ Zhonghua renmin gongheguo zhongcaifa (中华人民共和国仲裁法) [PRC Arbitration Law], adopted at the 9th Session of the Standing Comm. Nat'l People's

courts would probably consider CAJAC Shanghai, for example, a domestic arbitration institution and hence their awards also as domestic.¹⁷⁸ Yet judicial practice is unsettled on the issue of how to treat awards issued by foreign arbitration institutions in China,¹⁷⁹ and CAJAC as a hybrid institution, would possibly present issues of first impression to PRC courts. The analysis is likely more straightforward for an award issued by a CAJAC Centre in an African state which PRC courts would likely treat as a foreign award.¹⁸⁰ Nonetheless, uncertainties regarding how PRC courts would regard CAJAC awards under the existing regime draw attention to differences between the Chinese rules and UNCITRAL rules on such core issues.

The solution to the harmonization impasse in the Uniform Rules and one that allows CAJAC to sidestep potential conflicts between Chinese rules and international ones is the creation of a two-tier system. The two-tier system consists of the Uniform Rules and Local Rules, which supplement the Uniform Rules.¹⁸¹ The Local Rules appear to trump the

Cong., Aug. 31, 1994, as amended at the 29th Session of the Twelfth Nat'l People's Cong., Sept. 1, 2017), at Ch. 7.

¹⁷⁸ See *supra* note 147 (providing the model clause for CAJAC Shanghai: "...The arbitration shall be held in China-Africa Joint Arbitration Centre Shanghai)."

¹⁷⁹ Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi shenqing queren zhongcai xieyi xiaoli an (德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司) [Züblin International GmbH v Wuxi Woke General Engineering Rubber Co Ltd] ((2003) Min Si Ta Zi No. 23) (refusing to recognize and enforce an arbitral award classified as "non-domestic" for being issued by the ICC Court of Arbitration in Shanghai). *But see* Degaogangtie Gongsi yu Ningbo shi Gongyipin Jin Chukou Youxian Gongsi Maimai ((德高钢铁公司)与被申请人宁波市工艺品进出口有限公司买卖) [Duferco S.A. v Ningbo Arts & Crafts Import and Export Co Ltd] (2008) Yong Zhong Jian Zi No. 4, Apr. 22, 2009, Ningbo Intermediate People's Court (enforcing an arbitral award, considered "non-domestic," as it was given by the ICC in Beijing); Anhui sheng Longlide Baozhuang Yinshua Youxian Gongsi yu BP Agnati S.R.L. (安徽省龙利得包装印刷有限公司与被 BP Agnati S.R.L.) [Anhui Longlide Packaging and Printing Co Ltd v PB Agnati S.R.L.] (2013) Min Si Ta Zi No. 13, Mar. 25, 2013, Supr. People's Ct. (upholding the validity of an arbitration clause involving a Shanghai-seated ICC arbitration); BNB v BNA (2020), Shanghai 01 Civil Special 83 (holding that an arbitration seated in Shanghai and administered by the Singapore International Arbitration Center was valid).

¹⁸⁰ PRC courts' record for recognizing and enforcing foreign arbitral awards is, according to some, improving. See e.g., Zhao Fang, Comments, Beijing International Arbitration Center 2021 Annual Summit on Commercial Dispute Resolution in China, Nov. 26, 2021 (finding that of thirty-two cases involving the recognition and enforcement of foreign arbitral awards brought to PRC courts in 2019, only one was denied).

¹⁸¹ CAJAC Uniform Rules, Art. 3.

Uniform Rules in the event of a conflict.¹⁸² The Uniform Rules defer to the Local Rules on those issues that most exemplify conflict between the UNCITRAL and Chinese rules: interim measures,¹⁸³ emergency arbitration,¹⁸⁴ mediation by the arbitration tribunal,¹⁸⁵ and settlement, mediation and negotiation facilitation.¹⁸⁶

CAJAC, then, represents an approach to building legal infrastructure that differs from predecessors. Historically, there have been two main goals of arbitration institutions in establishing branch offices overseas. The first is to establish an office mainly for marketing and training purposes and to provide logistical support in managing cases.¹⁸⁷ For example, the ICC has established offices in Hong Kong, New York, São Paulo, Singapore, and Abu Dhabi, and the HKIAC has done so in Shanghai and Seoul.¹⁸⁸ Often, arbitration institutions partner with local counterparts, such as the ICC working with the Abu Dhabi Global Market in the United Arab Emirates.¹⁸⁹ Two, some arbitration institutions like the LCIA established branch offices overseas, in Dubai, India, and Mauritius to administer cases, although this appears to be a failed model - all three have been closed. The LCIA overseas branch model, when it existed, featured a much tighter integration of administration between the home and branch institutions. For CAJAC, each CAJAC center has its own secretariat,¹⁹⁰ although there is a CAJAC Guiding Committee that remains undefined.¹⁹¹

CAJAC differs from these two models. While it serves marketing and training purposes like the first type, CAJAC is designed to enable the administration of cases seated in China. Likewise, CAJAC differs from the LCIA approach in that the latter administered its own cases in, for example, Dubai, whereas the same is not true for CAJAC – cases may not necessarily be administered within the host state. Furthermore, CAJAC differs from China’s own previous model: the China International

¹⁸² *Id.* (stating that Local Rules apply to “matters dealt with in the Standard [i.e., Uniform] Rules in a way contrary to mandatory rules of law applicable to arbitrations administered by the Centre”).

¹⁸³ CAJAC Uniform Rules, Art. 32.

¹⁸⁴ *Id.* Art. 33.

¹⁸⁵ *Id.* Art. 45.

¹⁸⁶ *Id.* Art. 46.

¹⁸⁷ *Id.*

¹⁸⁸ Yarik Kryvoi, *UK and International Experience in the Admission, Regulation and Operation of Arbitral Institutions*. REPORT PREPARED FOR THE GREAT BRITAIN-CHINA CENTRE FOR THE CHINA PROSPERITY FUND UK-CHINA BUSINESS ENVIRONMENT PROGRAMME, 19 (Feb. 22, 2021) (on file with author).

¹⁸⁹ *Id.*

¹⁹⁰ CAJAC Uniform Rules, Art. 1.4.

¹⁹¹ *Id.* Art. 67.

Economic and Trade Arbitration Commission (CIETAC) has opened a sub-commission in Hong Kong and offshore centers in Vienna and Vancouver. CAJAC's difference is that whereas the CIETAC overseas sub-commission and offshore centers were set up to benefit from the legal systems outside of China—in other words, the cases they receive are often seated in the overseas jurisdiction—the same is not true for CAJAC-arbitrated disputes, which may preclude an African seat. Having explained CAJAC's origins through transnational networks and its operating rules, compared to existing models, in the next part, I turn to some of the implications of Chinese law as soft power.

IV. CHINA'S INFORMAL EMPIRE

This part appraises Chinese law as soft power and its hard edges in light of the example of CAJAC. Judging Chinese soft power's efficacy depends largely on which yardstick is used. CAJAC, for instance, can be judged based on its stated or unstated goals. Related, CAJAC can be assessed in terms of its unintended effects. More broadly, CAJAC and similar institutions which China is co-creating in developing states across Asia provide some grounds to reflect on China's approach to transnational governance, its own version of informal empire.

As a preliminary matter, it warrants mention that Chinese soft power, its transnational networks, trainings, and conferences can lead to legal institutions. Yet the immediate question is what kind of institutions are the products of such soft power? It is too early to judge the success (or not) of CAJAC; as of the writing of this Article, CAJAC has received only one case, and one that was administered by SHIAC. This is not surprising given that it takes years for parties to write new forums into their contracts' dispute resolution clause, and the COVID-19 pandemic has generally slowed business. Still, it is possible to suggest that, from the vantage of the architects of CAJAC, the institution may be on the path to achieving its stated goals. In terms of its overall aims, as understood by the Chinese and African arbitration communities—to provide Chinese and African alternatives to Western ICA, that would promote Chinese and African state laws, Chinese and African languages, and Chinese and African arbitrators¹⁹²—CAJAC seems on the mark. Nonetheless, it remains to be seen whether African parties will actually opt for CAJAC over alternatives such as the ICC or the LCIA, but CAJAC at least gives them

¹⁹² See *supra* note 130.

a “homegrown” option. Specific to Chinese investors, CAJAC will potentially allow Chinese parties to have their Africa-related commercial disputes seated and arbitrated in Shanghai (or Shenzhen or Beijing). Indeed, Chinese investors may be the ultimate beneficiaries of the CAJAC network.

Beyond its stated goals, there are potentially more insidious consequences for institutions like CAJAC. CAJAC demonstrates the potential to remove disputes from the jurisdiction of African courts through a “side door” to arbitration seated in China, as a form of extraterritorial control. This new form of extraterritoriality is not a familiar *de jure* type,¹⁹³ but rather, it is a way to increase Chinese arbitration institutions’ capture of cases and, more importantly, PRC courts’ jurisdiction over such arbitrations. Assuming such disputes are seated in Shanghai, Chinese law applies, and, most importantly, Shanghai courts obtain jurisdiction over the arbitration, then CAJAC may fail to provide a neutral alternative to Chinese-African parties. The central issue is if the awards are consistently rendered in China and Chinese courts have jurisdiction, then a host of consequences follow in terms of the arbitral proceedings.¹⁹⁴ There are discussions to ensure that CAJAC centers include a pool of shared neutrals, although, if the arbitration is seated in China, then Chinese courts can still intervene. The consequences are not just delocalization, which occurs in other jurisdictions where ICA has traction,¹⁹⁵ but rather a transregionalization of Chinese ICA. As such, the Chinese approach to avoiding local courts in host states with the aim of facilitating cross-border transactions to some extent borrows from methods used by previous capital-exporting countries in the West.

As with existing ICA, the long-term impact of CAJAC on host states may not stimulate their legal development, but rather, thwart it as parties opt for such forums over courts. Incidentally, the consequences may ironically also hurt Chinese parties: onshoring the disputes in China may work against their interests as the African parties’ assets are most likely in their respective African state. Assuming a Chinese party obtains an enforcement order from a PRC court, that order would then need to be recognized by the African jurisdiction’s court, adding further procedural complexity.

¹⁹³ See Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?* 99 CORNELL L. REV. 1303, 1310 (2014).

¹⁹⁴ GARY B. BORN, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS* 599-600 (2nd ed., 2015) (detailing the numerous matters relating to arbitral proceedings as determined by the seat).

¹⁹⁵ See *supra* note 129.

CAJAC is not an isolated case. Networks of Chinese arbitrators and lawyers permeate other regions as well. For example, in Southeast Asia, the Hainan International Arbitration Centre (of China) has cooperated with the Thailand Arbitration Center and the Thai-Chinese Law Alliance Association to establish, in 2020, the Thai-Chinese International Arbitration and Mediation Center (TCIAC) based in Bangkok. The website puts Beijing's language in Bangkok's mouth, showcasing law-as-soft power appeal:

President Xi Jinping pointed out that it is needed to prioritize non-litigation dispute resolution mechanisms. In order to fulfill [sic] President Xi's instructive direction, to provide good legal environment on One Belt One Road [the BRI], the Supreme Court of China encourages China's arbitral institutions to collaborate with the arbitral institutions of the countries participating in the One Belt One Road, in order to provide more safeguard for non-litigation dispute resolution mechanisms and to meet the demand of Chinese and foreign customers.¹⁹⁶

In Central Asia, the Bishkek International Court of Arbitration for Mining and Commerce (BICAMC) was established in 2018 following a conference in Qinzhou in southern China, featuring arbitrators from the Qinzhou Arbitration Commission (QAC) and the International Arbitration Court of the Kyrgyz Chamber of Commerce and Industry.¹⁹⁷ Subsequently, Kyrgyz arbitrators were listed on both the QAC website and the BICAMC one. Chinese lawyers were hired by Kyrgyz authorities to recruit additional international arbitrators for BICAMC which one recruiter identified as an institution by and for Shanghai Cooperation Organization states.¹⁹⁸

CAJAC, TCIAC, and BICAMC are just three strands of a larger story illustrating how those involved in the international commercial dispute resolution industry in the PRC view China as a torchbearer of economic law and development. Building networks, frameworks, and

¹⁹⁶ The Thai-Chinese International Arbitration and Mediation Center, *TCIAC Introduction*, <https://perma.cc/5XDQ-5JNX> (visited Jan. 27, 2022).

¹⁹⁷ Qinzhou shi guangbo dianshitai (钦州市广播电视台) [Qinzhou Radio & Television Station], Shoujie “yidaiyilu” guoji zhongcai hezuo luntan ji “shijie zhongcai jiaoliu zhongxin” jiepai zai Changzhou shi (首届“一带一路”国际仲裁合作论坛暨“世界仲裁交流中心”揭牌仪式在常州市) [*The Inauguration Ceremony of the first “Belt and Road” International Arbitration Cooperation Forum and “World Arbitration Exchange Center” was held in Changzhou*] (May 14, 2018), <https://perma.cc/Z3KR-7D77>.

¹⁹⁸ Telephone interview, May 24, 2021.

institutions—while not necessarily building better law—is one aspect of this imaginary. Specifically, China’s homegrown dispute resolution mechanisms for international investment and trade demonstrate China’s emergence as a norm-supplier for dispute resolution to the world.¹⁹⁹

The hallmark example is the China International Commercial Court (CICC) that has attracted no shortage of attention,²⁰⁰ and yet the actual caseload is, to date, thin. Rather, it is the idea that China has a bilingual, internationally-trained bench complemented by a multi-national corps of ultra-elite legal practitioners in the form of an “International Expert Committee,” all housed under the roof of the SPC that allegedly evinces China’s claims to shaping global governance. The International Expert Committee is itself a sub-optimal result of Chinese judicial protectionism. Non-Chinese citizens cannot serve as judges, and hence, China was unable to replicate the approach of other jurisdictions to incorporate foreign judicial expertise.²⁰¹

In December 2020, the CICC announced that it enlarged its International Expert Committee to include a retired judge from Uganda, an attorney general from Nigeria, and arbitrators from Nigeria and Egypt, among others.²⁰² These additions have a strong signaling effect that China is building inclusive institutions for justice at the international level. In return, those included, whom Chinese refer to as “flower vases” (*heaping*

¹⁹⁹ See also Qingjiang Kong, *Beyond the Love–Hate Approach?: International Law and International Institutions and the Rising China*, 15 CHINA: AN INT’L J. 41, 41 (2017).

²⁰⁰ See *supra* note 28. See also Matthew S. Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the “Belt and Road Initiative,”* 22 AJIL INSIGHTS (Aug. 21, 2018), <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt>; Sheng Zhang, *China’s International Commercial Court: Background, Obstacles and the Road Ahead*, 11 J. INT’L DISPUTE SETTLEMENT 150, 150 (2020); Kun Fan, *Supreme Courts and Arbitration: China*, B-ARBITRA | BELGIAN REV. ARB. 587, 587 (2019); Jianpeng He & Jianzhao Zhao, *A China-Led Comprehensive Dispute Settlement Mechanism for the Belt and Road Initiative: Is it Too Early?* 29 ASIA PAC. L. REV. 86 (2022); Mark Jia, *Special Courts, Global China*, VA. J. INT’L L. (forthcoming).

²⁰¹ Zhonghua renmin gongheguo faguanfa (中华人民共和国法官法) [PRC Judges Law], promulgated by the NPC and effective Oct. 1, 2019, art. 12(1). On non-democratic states building legal hubs that feature foreign judges, see Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA. J. INT’L L. 225, 240 (2020).

²⁰² CICC, *Name List of Proposed Expert Members of the International Commercial Expert Committee of the Supreme People’s Court* (Dec. 1, 2020), <https://perma.cc/AQ57-BDSD>.

花瓶), claim international legitimacy for China's legal institutions.²⁰³ The CICC is China's legal surrealism in action: performance over substance, and a performance that appears to have found its audience in many developing countries. Further, as CAJAC and other examples show, the audience has, in many cases, become the performers.

All of this begs the question as to whether China's informal empire is sustainable. China's version of informal empire differs from earlier ones. While both China and its historical antecedents rely on patterns of trade and investment that catalyze a number of overseas effects, including industrialization, outbound migration of their citizens, the spread of their languages and cultures,²⁰⁴ Chinese informal empire does not benefit from the full assemblage of hard power (namely, military aggression) as did Anglo-American empires. Rather, the base of Chinese informal empire is its economic governance, including its trade surplus, loans and collateral arrangements, sovereign guarantees, credit lines, tied aid, and so on.²⁰⁵ Law is, of course, integral to such economic governance, whether WTO law, BITs, or debt agreements. Yet above and beyond this layer of "baked-in" law which may only differ from Anglo-American versions as a matter of degree rather than kind,²⁰⁶ this Article draws attention to the deployment of transnational law that is mainly performative.

This use of transnational law, and in dispute resolution, in particular, appears distinct. On the plus side, the Chinese approach partners with a much greater degree of equality than previous major

²⁰³ CICC, Zhongguo guoji shangshi fating huhang 'yidaiyilu' (zhanshi pian) (中国国际商事法庭护航一带一路 (展示篇)) [China International Commercial Court BRI Conveys (promotional video)] (2020), <https://perma.cc/KB9A-RJYX> (showing William Blair, the retired U.K. judge and brother of Tony Blair, who sits on the International Expert Committee, stating that the International Expert Committee "shows the confidence the international community has in this new court.")

²⁰⁴ See Gallagher & Robinson *supra* note 64 at 6.

²⁰⁵ Anna Gelpern et al., *How China Lends: A Rate Look into 100 Debt Contracts with Foreign Governments*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, KEIL INSTITUTE FOR WORLD ECONOMY, CENTER FOR GLOBAL DEVELOPMENT, AND AIDDATA AT WILLIAM & MARY (Mar. 31, 2021), <https://www.aiddata.org/publications/how-china-lends>, Ammar A. Malik et al., *Banking on the Belt and Road: Insights from a New Global Dataset of 13,427 Chinese Development Projects*, AidData (Sept. 29, 2021), <https://www.aiddata.org/publications/banking-on-the-belt-and-road>.

²⁰⁶ See Erie *supra* note 13 at 56-7 (balancing the view that while some aspects of China's economic ordering borrow from Western ones, Chinese approaches also demonstrate a number of unique innovations).

economies. Whereas the Chinese “learned the law at gunpoint,”²⁰⁷ host states learn about Chinese law at conferences (virtualized in the course of the COVID-19 pandemic).²⁰⁸ The cooperative strategy which emphasizes equal relations and common goals may make all the difference in the long-run. In other words, South-South cooperation has considerable appeal and Chinese workshops, conferences, seminars, and trainings find a ready and willing audience. In the long run, some attendees will become important intermediaries between the Chinese legal industry and market and that of their own country, further solidifying economic and political ties with China.

On the negative side, China’s particular approach to building dispute resolution mechanisms for transnational law shows weaknesses. This is because this approach reflects certain logics of China’s own experience in building domestic “rule of law.” While China’s public law institutions certainly demonstrate strong coercive features, they have also depended on suasion. For instance, starting in the mid-1980s, the Party-State introduced campaigns to “popularize the law” (*pufa* 普法) to its citizens, including those engaged in property disputes, exhorting them to resort to the relevant administrative processes for dispute settlement.²⁰⁹ Such popularization included mass education, propaganda, and “spectacles” of justice through official and social media. Nonetheless, the actual experience of disputants could veer dangerously from official counts of procedural justice, with the ensuing gap between the official representation of law and the lived experience generating discontent.

A version of this legal surrealism is playing out across borders as the Party-State uses law as a source of soft power. The domestic mechanisms for “foreign-related” disputes and the ones that China is co-establishing outside of the PRC each reveal different symptoms of legal

²⁰⁷ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 30 (1995).

²⁰⁸ See, e.g., Li Wenjie (李文捷), *Chixu jiaqiang shewai fazhi gongzuo wei ‘yidaiyilu’ jianshe zhuru sifa dongneng 2022 nian pu yu guojia faguan yanxiu ban yuanman jieshu* (持续加强涉外法治工作为“一带一路”建设注入司法动能 2022年葡语国家法官研修班圆满结束) [*Continue to strengthen the rule of law work related to foreign affairs, inject judicial momentum into the construction of the “Belt and Road”, and successfully conclude the 2022 Portuguese-speaking Countries Judge Training Course*], Guojia Faguan Xueyuan (国家法官学院) [NATIONAL JUDICIAL COLLEGE] (Apr. 29, 2022), <https://perma.cc/GD8Q-P47L> (reporting on a seminar hosted by the National Judges College and supported by the Party Group of the Supreme People’s Court for judges from Portuguese-speaking countries in Africa and Latin America).

²⁰⁹ *Supra* note 16 at 38.

surrealism. For the former, the more that “foreign experts” are used for purposes of surface-level legitimation without functional substance, the more likely that such institutions strain credulity. Both participants (the foreign experts themselves) and would-be users may become disenchanted. The leading arbitrator Gary Born quit the CICC International Expert Committee in 2022 following China’s continued deprivation of basic rights to its citizens, including Muslim minorities.²¹⁰ The CICC’s small caseload could be interpreted as evidence of parties’ reluctance to use the mechanisms. The SPC is currently revising its approach to the International Expert Committee, and time will tell whether such modifications are successful.

These problems of legal surrealism, specifically, controlling the message that the legal institution is meant to communicate, are amplified in the case of the institutions China is co-establishing in Africa, Central Asia, and Southeast Asia. While they are relatively new, and face challenges in the form of the competitive dispute resolution market and certainly COVID-19-related delays, the way that they have entered the market does not bode particularly well. While CAJAC was announced with great fanfare in 2015 at FOCAC, through conferencing and online analogues (websites, social media, etc.)—all common features of legal surrealism—interviewees confessed that most African parties have not heard about CAJAC. The onus is now on its proponents to convert the message into practice. Moreover, to the extent that mechanisms (once used) disproportionately benefit Chinese parties, Chinese will encounter new and potentially intractable problems. Would-be law-users once confronted with the realities of legal surrealism—that legal outcomes do not necessarily follow from official discourses about law’s vaunted benefits in terms of usability and access, protection of individual or corporate rights, impartiality, et cetera—may refuse to comply with the Party-State’s interpretation of that law.

In the case of CAJAC, South African, Kenyan, and Francophone African states may develop their own uses for the mechanism. This may be particularly so given that their local courts which recognize and enforce CAJAC arbitral awards would likely generate its secondary and derivative norms through caselaw that interprets the relevant contracts.²¹¹ Also, different African jurisdictions may ultimately evolve different version of CAJAC. For example, given the relative sophistication of the

²¹⁰ Alison Ross, *Born resigns from expert committee of Chinese court*, GLOBAL ARBITRATION REV. (Jan. 24, 2022) (quoting Gary Born saying “I believe the rule of law and protections of fundamental human rights and civil liberties are better served through my resignation than through continued association with the court’s work.”)

²¹¹ See *supra* note 101.

South African arbitration industry and its courts, it is likely that South African partners may have more bargaining power vis-à-vis their Chinese interlocutors in growing the CAJAC Johannesburg center. It is conceivable that Chinese promoters may have more leverage in jurisdictions with more nascent arbitration regimes, such as some of the Francophone states in central or western Africa.

Alternately, in a situation of legal surrealism, intended law-users may reject that law or legal institution, and, in its place, use alternative sources of law. China's over-extensions in this area could lead to forum shopping that actually reinforces the reputation of established centers for dispute resolution. Hence, consistent with the literature on Chinese soft power, the Party-State's influence may not always operate as intended, local actors' interpretations, uses, and appropriation of soft power's discourses and institutions matter certainly at the granular level and also potentially, in the aggregate, at the macro level.²¹²

CONCLUSION

Contrary to commonly-held views that Chinese law and legal institutions do not play a role in China's evolving global footprint, this Article has shown that law is one part of a multi-pronged strategy to align the interests of host states in the developing world with those of China. China's approach shows some inheritance from those of preceding capital-exporting states, namely, the US and UK. In particular, China has sought to build out its ICA offerings for foreign parties. Yet China's growing legal infrastructure also shows its own unique qualities. While the Chinese certainly did not invent networking, they have raised it to a particularly exalted place in their foreign relations. Part of the reason for doing so is cultural, but also a response to the limitations of China's particular position in world history. Namely, first, China has not (yet) grown into a militarized and financialized global power and, second, it has risen economically into an international system of trade and investment that is structured through rules that China did not design, and which are most recently used as weapons against China. At the same time, the Party-State aspires to shape the existing rules and institutions to better suit its own geo-economic interests.

Chinese law as soft power shows potential particularly in how Chinese proponents have engaged with partners in host states on equal terms, largely devoid of culturalist and racist overtones. However, it

²¹² See Repnikova *supra* note 23 at 54.

remains handicapped by some of the same limitations seen in the Party-State's popularization of law from decades earlier. The Party-State's ability to control the narrative becomes attenuated when the message travels across borders, languages, and cultures. As a result, white elephants may be stillborn. Yet such projects, jointly motivated on the Chinese and African sides by market considerations as well as dissatisfaction with the existing international system of trade and investment, including its dispute resolution mechanisms, are constantly being reworked and modified. China's transnational legal infrastructures are only at a very early stage, and the learning curve is formidable.

APPENDIX: METHODOLOGY AND DATA

My qualitative data includes interviews with experts in China and in a number of African states as well as fieldwork in China. In total, I conducted two dozen interviews.²¹³ Most interviews with Chinese experts were conducted in Mandarin. These interviews were supplemented with intensive fieldwork that was conducted prior to the COVID-19 pandemic in late 2019. As part of this fieldwork, I participated in closed-door workshops with legal reformers from the PRC, especially those working on the reform of the 1994 PRC Arbitration Law. Moreover, my fieldwork included repeated site visits to arbitration centers, law firms, governmental offices, and think tanks that are involved in the business of FROL. Due to the COVID-19 pandemic, fieldwork in African countries was not possible; in lieu, I conducted extensive video and telephonic interviews with CAJAC stakeholders in Johannesburg, Nairobi, and within the OHADA framework. My approach can be summarized as “patchwork.”²¹⁴ Interviews with experts in different cities in both African states and China shows how arbitration has developed unevenly within the different states and also avoids the pitfalls of treating China and Africa as two monolithic jurisdictions, or “China-Africa” as one relationship, when it is, in fact, multiples. My goal in using the qualitative data is not to generate a long-term ethnographic study of one site that produces transnational law.²¹⁵ Instead, drawing from the anthropology of law, I

²¹³ These interviews are a sub-set of a larger and unique dataset of nearly 300 semi-structured interviews conducted with legal and regulatory experts for the “China, Law and Development” project. In compliance with ethical requirements, all interviewees are anonymized.

²¹⁴ Gökce Günel, Saiba Varma, & Chika Watanabe, *A Manifesto for Patchwork Ethnography*, SOC. FOR CULTURAL ANTHRO. (2022), <https://culanth.org/fieldsights/a-manifesto-for-patchwork-ethnography>.

²¹⁵ See, e.g., Jens Meierhenrich & Richard Ashby Wilson, ‘*The Life of the Law Has Not Been Logic; It Has Been Experience*’: *International Legal Ethnography and the New*

adopt an “ethnographic attitude”²¹⁶ in studying the formation of CAJAC through a network of lawyers and arbitrators from China and African states, a network I approached through multi-sited visits with those experts.²¹⁷

Legal Realism, in RESEARCH HANDBOOK ON MODERN LEGAL REALISM 277 (Shahin Talesh, Elizabeth Mertz & Heinz Klug eds., 2021).

²¹⁶ Anya Bernstein, *Saying What the Law Is* (copy on file with author) (defining the “ethnographic attitude” as taking objects of analysis seriously but not credulously).

²¹⁷ See generally George E. Marcus, *Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography*, 24 ANN. REV. ANTHRO. 95 (1995).