

Articles

The Soft Power of Chinese Law

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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, and their denominations are amongst the strongest in the world with the U.S. dollar serving as global world currency. Anglo-American common law has been a core legal infrastructure for global capitalism.

China marks an exception. The People's Republic of China (PRC) is mainly an economic superpower, one that (as of yet) lacks global military predominance or financialization. More centrally, Chinese law has been mostly peripheral to China's rise, both in terms of

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choice of law issues and as a resource for overseas legal development. Nonetheless, while Chinese parties may opt for English law or Delaware law just as often as Chinese law, China is starting to promote its law overseas as a resource for the legal development of other states. Pre-existing models to understand how China is doing so, especially those based on the English or American experiences, are incomplete. As China's hard power is partial compared to previous capital exporters, it has sought to boost its soft power. Chinese law is part of this story: It sustains China's partial hard power (through the PRC's economic relations with host states, which may have coercive elements), but it has also gained particular utility as an expression of soft power—that is, a tool to align the interests of host states with China's.

This Article conceptualizes 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 the first dispute resolution institution, the PRC has co-created outside of the PRC: the China-Africa Joint Arbitration Center (CAJAC). Qualitative data collected from both China and partner states in Africa demonstrate how CAJAC exemplifies the exercise of Chinese law as soft power, reveals 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 that promote “legal cooperation,” and is aimed at securing China's economic and geostrategic interests. Rather than PRC arbitration law operating as a “legal transplant,” CAJAC shows how networks function to diffuse the technical institutional rules of arbitration commissions into African states.

Yet, there is a gap between the discourses surrounding “legal cooperation” and its actual practice, including the presence of Chinese law in the institutions that such cooperation begets. Consequently, institutions like CAJAC demonstrate some problems of Chinese domestic law, which I have called elsewhere “legal surrealism.” Chinese law as soft power is thus an ambivalent source

of transnational ordering: Whereas it may have “hard edges” that secure Chinese trade and investment, it also demonstrates some of the shortcomings of domestic Chinese law, 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	CIETAC
Chinese Communist Party	CCP
<i>Cour Commune de Justice et d'Arbitrage</i>	CCJA
Foreign-related "Rule of Law"	FROL
Forum on China-Africa Cooperation	FOCAC
Investor-State Dispute Settlement	ISDS
International Centre for Settlement of Investment Disputes	ICSID
International Commercial Arbitration	ICA
International Chamber of Commerce	ICC
London Court of International Arbitration	LCIA
Memorandum of Understanding	MOU
Nairobi Centre for International Arbitration	NCIA
Organisation pour l'Harmonisation en Afrique du Droit des Affaires	OHADA
People's Republic of China	PRC
Qinzhou 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

Conventionally, most major economies have exerted their influence in the world through a combination of coercion, currency, and contracts. For example, the United Kingdom and the United States have expanded through formal and informal empires via military campaigns, the internationalization of their denominations, and

Anglo-American common law. Common law has, in particular, been a fundamental legal infrastructure in “coding” global capital.¹ These features—coercion, currency, and contracts—produce both “hard” and “soft” power for home states.² China may be somewhat of an outlier in this sense. It is a major capital-exporter and one which seeks influence in the world, yet it lacks military prominence and currency domination at the global level, even if it is expanding regionally. Hence, its hard power is incomplete; it is primarily economic in nature through trade and investment. Perhaps because of its hard power deficit, China has sought to bolster its partial hard power through soft power to promote its interests globally.³ This Article asks whether, as an exercise of soft power, and in the context of the Party-State’s promotion of its law internationally, certain forms of Chinese law may be gradually gaining traction in jurisdictions outside of the People’s Republic of China (PRC), and what the consequences of such presence may be for host states, China, and the transnational order.⁴

At the outset, it is important to differentiate between two aspects of the extraterritorial life of law as used in this Article. The first refers to the relevant rules (e.g., legislation, administrative regulations, judicial decisions, institutional procedural rules, etc.) and legal institutions that comprise the PRC legal system, which may serve as resources for legal development in other jurisdictions. The second refers to the applicability of PRC law as a choice of law in certain provisions of international contracts.⁵ The focus of this Article is on the former, as the extent to which other states, in particular developing economies, may identify resources from China’s normative legal and governance systems for their own development is a question of broad relevance.⁶

1. KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 132, 138 (2019) (noting how English law and New York state law “code” intangibles like patents and financial assets).

2. Joseph S. Nye Jr., *Public Diplomacy and Soft Power*, 616 *ANNALS AM. ACAD. POL. & SOC. SCI.* 94, 95 (2008) (defining “hard power” as coercion and economic inducements and “soft power” as attraction).

3. See *infra* text accompanying note 36.

4. By “Party-State,” I mean the integration of the Chinese Communist Party into the government at all levels of administration. For China’s extraterritorial promotion of its law, see *infra* note 56.

5. For a comparable case of how English law benefits the United Kingdom, see LEGALUK, *ECONOMIC VALUE OF ENGLISH LAW* 13, 16–17 (2021) (calculating the extent to which internationally mobile transactions use English law, generating both income and “soft power” for the United Kingdom).

6. See Matthew S. Erie, *Chinese Law and Development*, 62 *HARV. INT’L L.J.* 51, 105 (2021) (proposing that the study of Chinese law and development should foreground the

Unless otherwise stated, the term “Chinese law” as used in this Article refers to the former usage.

From a comparative law perspective, the emergence of Chinese law on the world stage is eyebrow-raising: Only a couple of decades ago, scholars were debating whether China even had a legal system.⁷ 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.⁸ However, many of the debates regarding Chinese law are based on Anglo-American perceptions and experiences of Chinese law.⁹ In fact, there is a long history of

perspective and experience of host states); Benjamin L. Liebman, *Authoritarian Justice in China: Is There a “Chinese Model”?*, in *THE BEIJING CONSENSUS: HOW CHINA HAS CHANGED WESTERN IDEAS ABOUT LAW AND DEVELOPMENT* 225, 248 (Weitseng Chen ed., 2017) (querying whether the “Chinese model” is exportable); Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 *VAND. J. TRANSNAT’L L.* 101, 104 (2018) (assessing China’s legal development assistance); Tom Ginsburg, *Authoritarian International Law?*, 114 *AM. J. INT’L L.* 221, 250 (2020) (explaining how China uploads its priorities into international organizations that they use to support other authoritarians); Margaret K. Lewis, *Seeking Truthful Names: The External Implications of China’s Internal Ideology and Organization*, in *LAW AND PARTY IN CHINA: IDEOLOGY AND ORGANIZATION* 151, 152–53 (Rogier J.E.H. Creemers & Susan Trevaskas eds., 2020) (contemplating what China’s promotion of its “new-style” governance means for external audiences); Andrew J. Nathan, *China’s Challenge*, 26 *J. DEMOCRACY* 157, 158 (2015) (arguing that China promotes authoritarian regimes through its example); PITTMAN B. POTTER, *EXPORTING VIRTUE? CHINA’S INTERNATIONAL HUMAN RIGHTS ACTIVISM IN THE AGE OF XI JINPING* 10–11 (2021) (assessing how China’s export of “virtue” supports authoritarianism the world over).

7. STANLEY B. 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).

8. *See, e.g.*, Carl F. Minzner, *China’s Turn Against Law*, 59 *AM. J. COMPAR. L.* 935, 936–37 (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).

9. TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* 8, 10 (2013) (suggesting that U.S.-based perceptions of Chinese law illustrate orientalism); LI CHEN, *CHINESE LAW IN IMPERIAL EYES: SOVEREIGNTY, JUSTICE & TRANSCULTURAL 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) (analyzing American founding figures’ perception of Chinese law).

Western experts denigrating Chinese law.¹⁰ 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.¹¹ Grounding an analysis in these other perceptions and experiences may help shed light on whether and how Chinese law is playing a role in building the PRC's aspirational transnational order.

This Article makes the counter-intuitive claim that Chinese law, legal institutions, and legal practices may be attractive to some parties in the Global South due to Chinese law's own type of limited soft power. Caveats apply, however, and initial attraction and ultimate market success are two different stages in the arc of Chinese law's extraterritoriality.¹²

China has championed soft power, understood traditionally as the capacity of one state to shape the preferences of another to align their interests.¹³ In the case of China, soft power is often understood as its culture, political system or ideology, or developmental model.¹⁴ 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 power¹⁵ and a burgeoning field of studies examining how China is shaping international and transnational law,¹⁶ Chinese law as soft power has mostly fallen

10. See e.g., MARCEL GRANET, *LA PENSÉE CHINOISE [CHINESE THOUGHT]* 341 (1934); MAX WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* (Hans H. Gerth trans., 1951).

11. See e.g., Matthew S. Erie & Do Hai Ha, *Law and Development Minus Legal Transplants: The Example of China in Vietnam*, 8 *ASIAN J.L. & SOC'Y* 372, 384–433 (2021) (discussing the feasibility of Chinese legal transplants into Vietnam through the example of a special economic zone bill); Michelle Ratton Sanchez-Badin & Fabio Morosini, *International Economic Law by Other Means: A Three-Level Matrix of Chinese Investments in Brazil's Electricity Sector*, 62 *HARV. INT'L L.J.* 105, 106 (2021) (finding that China's approach to international economic law is similar to that of other medium-sized economies); Roza Nurgozhayeva, *Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective*, 8 *CHINESE J. COMPAR. L.* 250, 256 (concluding that in Central Asia, China is a "rule-maker").

12. See *infra* text accompanying notes 23–26.

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

14. See *infra* text accompanying notes 37–38.

15. See *infra* note 38.

16. See, e.g., GREGORY C. SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* (2021); Henry Gao, *WTO*

between the cracks. Studies of capitalism, political economy, and development usually highlight the role of law in securing commercial transactions in international business and in adjunct functions such as promoting national security and geopolitical interests overseas; however, the conceptualization of the soft power features of transnational law is still in its infancy.¹⁷

There are three inter-related stumbling blocks to understanding the soft power of Chinese law globally. First, there is an entrenched view 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 privileges Anglo-American views which often-times denigrate Chinese law. Third, there are 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 emerging economies. In doing so, it seeks to broaden the horizon of Chinese comparative law by studying Chinese law not from the privileged Global North, but from the perspectives of the Global South regarding China-inspired developments relevant to developing countries.¹⁸

The Article makes this contribution by taking a deep dive into the first legal institution, specifically the first dispute resolution mechanism, that China has co-established outside of the territorial PRC: the

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 L. REV.] 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).

17. 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, Globalisation and Global Elites*, in *TRANSNATIONAL LEGAL PROCESSES* 114 (Michael B. Likosky, ed., 2002) (studying global law as soft law); SHAHLA F. ALI, *FORMING TRANSNATIONAL DISPUTE SETTLEMENT NORMS: SOFT LAW AND THE ROLE OF UNCITRAL'S REGIONAL CENTRE FOR ASIA AND THE PACIFIC* 5 (2021) (examining the role of regional centers of global legal institutions in creating global soft law).

18. This is one of the goals of the "China, Law and Development" project. For further information, see generally CLD RESEARCH, *CHINA, LAW AND DEVELOPMENT: AN INTERDISCIPLINARY STUDY OF THE ROLE OF LAW IN CHINA'S GLOBAL DEVELOPMENT* (September 9, 2022, 11:03 AM), <https://cld.web.ox.ac.uk/> [<https://perma.cc/8X2M-TX8G>].

China-Africa Joint Arbitration Center (CAJAC). Based on fieldwork conducted over a five-year period and qualitative data gathered from China and African partner states, the Article provides empirical evidence to show how Chinese law works as soft power at the level of host states' domestic legal regimes and, through host state institutions, at the level of transnational orders. This analysis generates a number of findings and implications.¹⁹

First, Chinese law as soft power is based on “legal cooperation” through transnational networks, a feature typical of Chinese soft power. Such networks may generate legal institutions: in this case, international commercial arbitration (ICA) centers based in part on Chinese arbitration institutional rules.²⁰

Second, the specific ways through which networks beget institutions are through interest alignment and persuasion. As part of the critique of “Western” ICA, Chinese promoters have made a number of arguments, including that Chinese arbitration is more efficient than established practices.²¹ This and other arguments have gained traction among certain African arbitration circles.²² Hence, African experts' view, as informed by the efficiency argument, is a positive attitude toward Chinese law that provides a perspective that differs from many negative analyses in the English literature.

Third, in making this observation, the Article spotlights a type of “African agency” often overlooked in the literature.²³ Unlike many studies which define agency as “resistance” to Chinese power and influence (an artifact 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

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

20. This Article makes two assumptions about the nature of the material under discussion. The first is that ICA can be categorized as “law.” See, e.g., THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* at xxxv (5th ed., 2014) (“[Arbitration] restores the legitimacy of the American legal system.”). The second is that institutional rules, which are contractual in nature once parties agree to arbitrate their dispute in accordance with said rules, are also binding law. See Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, 1 J. INT’L DISP. SETTLEMENT 283, 288 (2010).

21. See *infra* text accompanying note 197.

22. See *infra* text accompanying notes 202–205.

23. See, e.g., Giles Mohan & Ben Lampert, *Negotiating China: Reinserting African Agency into China-Africa Relations*, 112 AFR. AFFS. 92 (2013); Lucy Corkin, *African Agency in the Context of China-Africa Relations*, 1 AFR. EAST-ASIAN AFFS. 162 (2015); see also Joshua Eisenman, *Part I: African State Agency*, in *AFRICA AND CHINA: HOW AFRICANS AND THEIR GOVERNMENTS ARE SHAPING RELATIONS WITH CHINA* 3, 3–21 (Aleksandra W. Gadzala ed., 2015); Folashadé Soulé, *‘Africa+1’ Summit Diplomacy and the ‘New Scramble’ Narrative: Recentering African Agency*, 119 AFR. AFFS. 633 (2020).

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.²⁴

Fourth, the gap between hyperbolic “South-South” discourses around CAJAC and similar institutions, and the actual end-results of such cooperation (including the marginal role of Chinese law) is significant. Although it is too early to judge CAJAC’s long-term viability, CAJAC has struggled to take off in the crowded field of ICA. Furthermore, rather than playing a pivotal role in establishing the institution, PRC law’s presence is subtle. While the first draft CAJAC institutional rules borrowed heavily from the rules of Chinese arbitration institutions, disharmony between State laws on arbitral procedures and the United Nations (U.N.) Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration²⁵ resulted in the marginalization of Chinese law in the final draft of CAJAC’s institutional rules. The fact that it is the technical institutional rules of Chinese arbitration commissions rather than national legislation which promoters use from China speaks to the relative difficulty of transplanting Chinese law.²⁶

CAJAC’s relevance thus may be more in its signaling function—what it communicates about “legal cooperation” between China and Africa partners—than its functional one. This discursive overreach is symptomatic of problems in domestic Chinese law, which I have called elsewhere “legal surrealism.”²⁷ Legal surrealism is a condition of some legal systems whereby the yawning gap between law’s promise and its reality is filled in by discourse or “law talk” that becomes excessive; legal discourse attempts to legitimize the status of law but overcompensates and ultimately becomes unhinged from legal practice.²⁸ Legal surrealism is not exclusive to authoritarian states such as China, but it may find its most extreme expressions in such

24. See *infra* discussion accompanying notes 220–225.

25. U.N. COMM’N ON INT’L TRADE L., UNCITRAL MODEL L. ON INT’L COM. ARB., U.N. Sales No. E. 08.V.4 (2006), https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [<https://perma.cc/S7JQ-3ATW>]. For a complete list of member states, including South Africa and Kenya, see *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [<https://perma.cc/G6QD-7KDE>].

26. See Erie & Ha, *supra* note 11, at 378 (diagnosing the reasons why Chinese law is not easily transplantable).

27. 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 CHINA INFO. 35, 38 (2012).

28. See *id.* at 39–52 (examining legal surrealism in the case of property rights in urbanizing China).

regimes. Soft power, which is conducted through communication, representation, and the production of signs can lead to legal surrealism, an excess of signs about law.

Chinese law as soft power is thus ambivalent. It may have “hard edges” which benefit Chinese trade and investment. However, it may also demonstrate shortcomings of Chinese law, shortcomings which are amplified when approaches to popularizing Chinese law are deployed overseas.

Despite the view that Chinese law is peripheral to the PRC’s global economic governance,²⁹ this Article is not the first to observe that China has soft power through recourse to its law.³⁰ But this Article goes further by taking these observations as a starting point and theorizing Chinese law as soft power, explaining its significance through a comparative lens in regards to previous capital exporters, and staking out a number of implications for the thesis.

The remainder of this Article is organized as follows: Part I 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 in the context of China’s “legal cooperation.”

Part II provides a context for understanding the significance of Chinese law as soft power and why conventional approaches may have explanatory blind spots. Specifically, this Part provides an overview of how major capital-exporting nations, namely the United Kingdom and United States, have used their law overseas to secure their empires, formal and informal. For preceding empires, commercial law was part of an ensemble of strategies including naval and military capabilities and globalized currencies which operated extraterritorially to safeguard economic and security interests. China does not (yet) have the same level of military capability or currency internationalization as the United Kingdom and United States, but it does have considerable economic power in the form of trade and investment. Without the support of a global military presence in particular, China uses legal and political means to protect its assets overseas. Chinese law as soft power provides one layer of protection by orienting external audiences toward China as a center for legal innovation.

29. See Erie, *supra* note 6, at 67–68 (citing “law negative” literature that downplays the relevance of law in China’s economic modernization).

30. See *infra* notes 42–43.

Part III 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 transnational networks of experts who promote “legal cooperation,” which emphasizes the attractiveness of Chinese law in foreign jurisdictions. This Part also describes the institutional set-up of CAJAC with a focus on its institutional rules and their relationship to those 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 IV 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 ICA. 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 reflect some of the pathologies of Chinese law in its domestic setting, namely, “legal surrealism.”³¹ 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. CHINESE LAW AS SOFT POWER

Soft power is a capacious 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 peripheral as a source of China’s soft power abroad. Joseph Nye classically defined “soft power” as “getting others to want the outcomes that you want.”³² Nye contrasted soft power to hard power, which entails both carrots (economic benefit) and sticks (force).³³ Specific conduits of soft power include culture, information, language, and communication technologies.³⁴ Hard and soft power, while representing different types and effects of power, are not simple binaries. They may be interdependent, and subsequent works, including by Nye,

31. See Erie, *supra* note 27, at 38.

32. See Nye, *supra* note 2, at 95.

33. *Id.* at 94.

34. *Id.* at 105.

have updated and expanded the taxonomy to include such combinatory ideas as “smart power” and “sharp power.”³⁵

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 so through its own understanding of that notion,³⁶ the legal literature on China’s economic rise has largely ignored the soft power potential of Chinese law.³⁷ In a sense, the idea that Chinese law has soft power has mostly fallen through the disciplinary cracks.

35. Joseph S. Nye, Jr., *Get Smart: Combining Hard and Soft Power* 88 FOREIGN AFFS. 160, 161 (2009) (defining “smart power” as the integration of hard and soft power tools through “contextual intelligence,” the alignment of tactics with objectives); Christopher Walker & Jessica Ludwig, *From ‘Soft Power’ to ‘Sharp Power’: Rising Authoritarian Influence in the Democratic World*, in SHARP POWER: RISING AUTHORITARIAN INFLUENCE 6, 6–14 (2017) (differentiating “sharp” from “soft” power in that the former “pierces, penetrates, or perforates the political and information environments in the targeted countries”); see also Peter S. Henne, *What We Talk About When We Talk About Soft Power*, 23 INT’L STUDS. PERSPS. 94, 94 (2022) (taking stock of and clarifying the concept of “soft power”).

36. See, e.g., CHINA’S SOFT POWER AND INTERNATIONAL RELATIONS (Hongyi Lai & Yiyi Lu eds., 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: COMPETITION AND COOPERATION IN THE DEVELOPING WORLD 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 Edney, Stanley Rosen & 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., 2009) (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 & William A. Callahan eds., 2011) (showing how Chinese actors use traditional Chinese culture to mold 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).

37. 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. 93 (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 GEO. J. INT’L L. 255 (2013); NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE (2009); THE BELT AND ROAD INITIATIVE: LAW, ECONOMICS, AND POLITICS (Julien Chaisse & Jędrzej Górski eds., 2018); Julien Chaisse & Mitsuo Matsushita, *China’s ‘Belt and Road’ Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 J. WORLD TRADE 163 (2018).

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).³⁸ Schools of thought on the nature of Chinese soft power vary, including a focus on Chinese culture, its political system, or its developmental model.³⁹ 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.⁴⁰ To be clear, to say that Chinese law has soft power effects is not to say that the Chinese Party-State 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.⁴¹ 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 is better placed than established powers to improve international law.⁴² In Cai's analysis, China, perhaps more than the established Western powers, resorts to soft power to promote its legal interests internationally. More on point, Gu Weixia has observed that China's inroads into international commercial dispute resolution evince its soft power.⁴³ For Gu, China's institution-building shows how China's power projection may be shifting from one that is predominantly "soft" to one that is increasingly "hard," while retaining

38. See, e.g., DAVID SHAMBAUGH, CHINA GOES GLOBAL: THE PARTIAL POWER 212–20 (2013); MARIA REPNIKOVA, CHINESE SOFT POWER 4–6 (2022).

39. See REPNIKOVA, *supra* note 38, at 4–6.

40. See Erie, *supra* note 6, at 67–68.

41. See, e.g., Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 J. INT'L ECON. L. 607, 611, 616–17, 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 (2019); 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 Korkeaho & Oana Stefan eds., 2021); Susan Finder, *Soft Law of the Supreme People's Court*, PEKING U. SCH. TRANSNAT'L L. RSCH. PAPER SERIES (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951083 [<https://perma.cc/J3L4-WPSV>].

42. 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).

43. Weixia Gu, *China's Law and Development: A Case Study of the China International Commercial Court*, 62 HARV. INT'L L.J. 67, 70 (2021) (analyzing the effects of the China International Commercial Court).

some soft elements.⁴⁴ Given the potential significance of Chinese law as soft power, this Article proposes a thorough-going analysis of the concept and its consequences.⁴⁵

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 theories, whether legal positivism,⁴⁶ legal realism,⁴⁷ or critical views such as Marxism,⁴⁸ would more readily support the view that law is coercive 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.⁴⁹ Incidentally, this prevailing view also reflects the historical experience of law under empire, that is, how law spread through imperial conquest and colonization.⁵⁰

There are nonetheless other views in legal theory that give credence to the idea that law compels behavior but can also condition behavior through non-coercive norms. These include views derived from natural law theory emphasizing the ethical and moral dimensions of law, which obtain universal applicability if not attractiveness;⁵¹ law and economics, which assumes that people make decisions based on

44. *Id.* at 102.

45. 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), *Jianghai 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*], 2022 GONGGUAN LUNTAN (公关论坛) [PUB. REL. F.] 69.

46. *See, e.g.,* 2 JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 403 (1863) ("[E]very positive law is the direct or circuitous command . . .").

47. *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).

48. KARL MARX, *THE GERMAN IDEOLOGY* (1846), *reprinted in* THE MARX-ENGELS READER 146, 187 (Robert C. Tucker ed., 2d ed. 1978) (conceptualizing law as an artifact of the state which is the form by which the ruling class protects its property).

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

50. *See infra* text accompanying notes 84–86.

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

rational considerations;⁵² and more behavioral law and economics approaches which posit that people make decisions based on not only their own preferences but also constraints on those preferences.⁵³ Post-structuralist theories of law underscore how law orients subjects toward certain dispositions of what is perceived to be “good,” “proper,” or even “real.”⁵⁴ Scholars working at the intersection of anthropology and “science and technology studies” suggest that the technical form of law can have determinative effects on the production of knowledge about law.⁵⁵

Applying 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).⁵⁶ Such promotion includes both hard and soft aspects. The hard side includes lawfare with the United States 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.⁵⁷ In addition, in regards to host states in the developing

52. See, e.g., Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBS. 73, 73 (2008) (“[E]conomics of law should be about choice of law . . .”).

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

54. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 30–32, 87 (1980) (explaining how discourses orient their subjects towards certain predispositions); JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* 1–42 (1994) (positing that capitalism has created a condition whereby the hyperreal has effaced the real).

55. See Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 979–80 (2005) (proposing the “agency of technocratic legal form” through the example of conflict of laws).

56. See generally Matthew S. Erie, *Legal Systems Inside Out: American Legal Exceptionalism and China’s Dream of Legal Cosmopolitanism*, U. PA. J. INT’L L. (forthcoming 2023) (providing one of the first assessment of China’s recent initiatives).

57. On Chinese extraterritorial legislation, see Zhengxin Huo & Man Yip, *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, 9 CHINESE J. COMPAR. L. 328, 328 (2021) (explaining current sources and trends in Chinese extraterritoriality). For a recent 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 Tech. Ltd. v. Interdigital Digit. Holdings Ltd.*], E 01 Zhi Min Chu No. 169 (Wuhan Intern. People’s Ct. Sept. 23, 2020) (ordering an anti-suit injunction not only against the court in India but against “any court worldwide” and 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 *Jin zhi 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

world, the hard aspects may include onerous debt as part of China's loan agreements.⁵⁸ Such debt relationships likely are a precondition for the exercise of soft power.

In comparison, the soft side of Chinese law promotion has not received as much media attention, despite the fact that it can assume a kind of hyper-visibility. The exercise of Chinese law as soft power is particularly salient in China's promotion of its development model abroad, under the broad mantle of "legal cooperation" (*falü hezuo* 法律合作) and associated terms such as "legal exchange" (*falü jiaoliu* 法律交流). China's development model is a debated concept,⁵⁹ yet it generally refers to an approach that is pragmatic, balances state directives with market forces, and privileges socio-economic rights over political and civil ones.⁶⁰ "Legal cooperation" has a number of forms, including overt public diplomacy conducted by China's legal and judicial organs, and also examples from commercial law involving private parties (e.g., the promotion of PRC law in cross-border deals involving one or more Chinese parties). Hence, a number of different institutions and organizations have participated in the promotion of Chinese law in economic relations with partner states, particularly in the Global South. Those entities include 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 firms, PRC law schools, Chinese think tanks and governmental non-governmental organizations, as well as arbitration commissions.⁶¹ The "Belt and Road Initiative" (BRI), a

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*], HUANQIUWANG (Mar. 3, 2021, 8:44 PM), <https://world.huanqiu.com/article/42AKf911iTm> [<https://perma.cc/3G67-CCZ9>] (proclaiming that the injunction applies to all jurisdictions in the world).

58. China's loan agreements have been extensively debated in the academic and popular literature, often through the prism of "debt traps," a lens that obfuscates more than it explains. Compare Deborah Brautigam, *A Critical Look at Chinese 'Debt-Trap Diplomacy': The Rise of a Meme*, 5 *AREA DEV. & POL'Y* 1, 2 (2020) (challenging the idea that China deliberately seeks to entrap countries in a debt relationship), with 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> [<https://perma.cc/G5FN-EWYJ>] (finding that forty-two low- and middle-income countries have levels of debt exposure to China in excess of 10% of GDP).

59. See generally Erie, *supra* note 6.

60. Jacques deLisle, *Law and the China Development Model*, in *IN SEARCH OF CHINA'S DEVELOPMENT MODEL: BEYOND THE BEIJING CONSENSUS* 147, 149, 152 (S. Philip Hsu, Yu-Shan Wu & Suisheng Zhao eds., 2011).

61. See Erie, *supra* note 6, at 94.

mega-regional economic ordering project that aims to strengthen China's economic connections with host states throughout Asia and the world, particularly features the diplomatic function of China's legal and judicial organs.⁶²

Legal diplomacy is directed to low-income and middle-income countries both through bilateral relationships (as expressed in Memoranda of Understanding (MOUs)) and through multilateral platforms for international economic governance and global development. Some of these have been established by non-Chinese parties (e.g., UNCITRAL, U.N. Conference on Trade and Development, Hague Conference, Association of Southeast Asian Nations, etc.) and others have been founded by China (e.g., International Commercial & Legal Cooperation Forum established under the China Council for the Promotion of International Trade, Asian Infrastructure Investment Bank, Shanghai Cooperation Organization, Shanghai Declaration of the World Enforcement Conference, etc.).⁶³ Over the last decade, there has also been a gradual increase in the proportion of foreign students from developing countries studying law in China, with many of them studying on scholarships from the PRC government.⁶⁴ Some of these students will return to their home countries where they will either enter private practice or work for their government. In either case, returnees' work may facilitate China-related trade and investment. These

62. See, e.g., Ning Jie (宁杰), Zhou Qiang: *Jiaqiang Sifa Hezuo wei Gongjian "Yidai-yilu" Yingzao Fazhihua 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*], CHINA INT'L COM. CT. (Sept. 25, 2019), <https://cicc.court.gov.cn/html/1/218/149/156/1339.html> [<https://perma.cc/K5DS-FRQA>] (announcing an MOU signed between the Supreme People's Court and the Federal Court of the United Arab Emirates).

63. For an example of Chinese legal diplomacy in an established forum, see *Di san jie Zhongguo-Dongmeng Da Faguan Luntan Nanning Shengming* (第三届中国东盟大法官论坛南宁声明) [*The Third China-ASEAN Chief Justices' Forum Nanning Statement*], SUP. PEOPLE'S CT. (July 21, 2022, 8:51 AM), <https://www.court.gov.cn/zixun-xiangqing-366561.html> [<https://perma.cc/78B3-ZRJW>] (observing the importance of judicial cooperation in promoting regional trade and investment). For an example of Chinese legal diplomacy in a Chinese-promoted institution, see He Xin (何心), *Chuangxin Hezuo Moshi Shenhua Sifa Youyi - di san jie Shanghai Hezuo Zuzhi Guojia Faguan Yanjiuban zai Guojia Faguan Xueyuan Chengong Juban* (创新合作模式 深化司法友谊—第三届上海合作组织国家法官研修班在国家法官学院成功举办) [*Innovating the Cooperation Model to Deepen Judicial Friendship—The Third Seminar for Judges from SCO Countries was Successfully Held at the National Judicial College*], GUOJIA FAGUAN XUEYUAN (国家法官学院) [NAT'L JUD. COLL.] (Aug. 3, 2022), <https://mp.weixin.qq.com/s/Sxvqch-xUud6-Qp7x28RLA> [<https://perma.cc/5B87-E63A>] (describing a five-day training course for Central Asian judges on Chinese law).

64. This observation is based on the author's interviews with Chinese legal school administrators and foreign law students.

trends suggest that there is, to some degree, an audience for Chinese-led “legal cooperation,” particularly in the Global South.

The role of China’s legal and judicial organs was mostly marginal in the early years of the BRI,⁶⁵ but under the “foreign-related ‘rule of law’” (*shewai fazhi* 涉外法治, hereinafter FROL) reforms, their importance is becoming more pronounced.⁶⁶ Further, while poverty alleviation, anti-corruption, public resource management, and other aspects of China’s developmental model have been the focus of its soft power in the past,⁶⁷ law is gradually coming into focus as yet another soft power prong. Examples include the SPC’s successful promotion of its “[ten] most influential cases promoting the rule of law” at the international level⁶⁸ and the Chinese Government’s “uploading” of its version of human rights into various U.N. Human Rights Council resolutions.⁶⁹

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 with foreign law and international law; the FROL 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 promoting China’s interests through such systems.⁷⁰ 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 bilateral and multilateral relationships, some of which have been formalized as

65. See Seppänen, *supra* note 6, at 119 (“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 . . .”).

66. See Erie, *supra* note 56.

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

68. See Cao Yin, *Biodiversity Ruling to Block Dam Project First of its Kind in China*, CHINA DAILY (Feb. 21, 2022) <https://www.china-daily.com.cn/a/202202/21/WS62133309a310cdd39bc87ef5.html> [https://perma.cc/M4WS-ZJ84] (relating how the U.N. Environmental Programme approved of preventive measures taken by Chinese judges to protect the green peafowl).

69. See, e.g., Human Rights Council Res. 41/19, U.N. Doc. A/HRC/RES/41/19, at 2 (July 17, 2019) (using language from Chinese political lexicon, calling on States to “realize people-centered development”).

70. See *infra* Part III for an example.

platforms while others remain more decentralized transnational networks. The organs use these relationships, platforms, and most centrally the networks that grow from 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, the construction of international commercial courts, and the establishment of joint arbitration mechanisms.⁷¹ 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.”⁷² In short, the FROL complements the BRI: China is no longer building only hard and digital infrastructures (e.g., highways, rail lines, maritime and dry ports, special economic zones, smart cities, fiber optic cables, satellite networks, 5G platforms, etc.). China is also building legal and normative 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,”⁷³ meaning that once Chinese parties are able to successfully complete development projects and penetrate markets (China’s strengths), only then can it begin 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 exclusively through hard power, as one would expect from one of Nye’s “sticks.” As further explained below,⁷⁴ China does not have the same level of military status as previous superpowers, nor can it derive benefit from world reserve currency status like the United States. Instead, it relies

71. 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)]*, ST. COUNCIL CHINA (Jan. 10, 2021, 7:44 PM), http://www.gov.cn/zhengce/2021-01/10/content_5578659.htm [<https://perma.cc/2AVL-BEM4>].

72. *Id.*

73. Jingyuan Zhou, *A New Multilateralism? A Case Study of the Belt and Road Initiative*, 8 CHINESE J. COMPAR. L. 384, 387 (2020) (noting China’s “unconventional ‘infrastructure-development-first, institution-next’ approach”).

74. *See infra* Part II.

on its economic inducements as the largest trading country in the world, one of the leading global investors, and a major donor to developing countries. Law plays an important function in creating and maintaining China's status as a trade partner, investor, lender, and donor. Clearly, there can be coercive elements to such economic relationships. For instance, the amount of debt many states owe China provides the PRC with leverage to weigh in on policy decisions faced by those states.⁷⁵ Yet debt bondage is too uni-faceted an explanation of these outcomes. Host states may flaunt their debt obligations, and China may have a more diverse toolkit than mere debt instruments to shape outcomes, particularly when Chinese lending practices are so scrutinized.⁷⁶ More broadly, the idea that China's legal arrangements with host states (i.e., trade agreements, bilateral investment treaties, MOUs, etc.) protect and promote only China's interests to the possible detriment of host states represents a lopsided picture.⁷⁷ 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 entices partners to use Chinese law, but this attraction is directly related to 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, which can complement coercion.

Moreover, the work of China's legal, judicial, and arbitration organs to persuade foreign parties to consider Chinese law as a resource for their own legal development or to adopt Chinese law in their contracts 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. Chinese law may not be an optimal source of law for international business in terms

75. See Malik et al., *supra* note 58.

76. See, e.g., *Pakistan Trapped in Vicious Cycle of Taking Loans to Pay Back Previous Loans*, TIMES INDIA (June 23, 2022, 10:47 AM), <https://timesofindia.indiatimes.com/world/pakistan/pakistan-trapped-in-vicious-cycle-of-taking-loans-to-pay-back-previous-loans/articleshow/92402654.cms> [<https://perma.cc/T698-4DHL>] (explaining Pakistan's history of loan repayments).

77. Waijiaobu (外交部) [Ministry of Foreign Affairs], *Hongyang Zhong Fei Youhao Jiaqiang Tuanjie Hezuo Dazao Zhong Fei Gongtong Fazhan de Xin Shidai* (弘扬中非友好加强团结合作 打造中非共同发展的新时代) [*Carry Forward China-Africa Friendship and Strengthen Solidarity and Cooperation to Create a New Era of China-Africa Common Development*], MINISTRY FOREIGN AFFS. CHINA (Aug. 18, 2022, 8:00 PM), https://www.fmprc.gov.cn/wjzbzd/202208/t20220819_10745611.shtml [<https://perma.cc/4HWK-8M35>] (announcing that China would forgive twenty-three interest-free loans of seventeen African states).

of inherent qualities (e.g., providing predictability to parties through contract enforcement and clear property rights),⁷⁸ but it may assume relevance in China's transnational ordering for its signaling effect: 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.⁷⁹ 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 ICA, 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.⁸⁰ Legal infrastructures assume a number of forms, but two consistent dimensions include procedural

78. Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMPAR. L. 89, 96–97 (2003) (arguing that Chinese law may provide 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'Y 551, 555 (2009) (finding that China has attained historic economic growth without formal property rights).

79. See LUBMAN, *supra* note 7; PEERENBOOM, *supra* note 7. Importantly, both Lubman and Peerenboom mention Chinese arbitration in their discussions of Chinese law, and thus arbitration is one type of evidence for their claims, respectively, that China lacks a legal system or has only a “thin” rule of law. See LUBMAN, *supra* note 7, at 3 (identifying the principal focus of his analysis to be dispute resolutions, including adjudication, mediation, and arbitration); PEERENBOOM, *supra* note 7, at 58, 163 (mentioning the reform of the PRC arbitration law as one aspect of China's legal reforms and arbitration as one form of dispute resolution which depends on the court system).

80. See PISTOR, *supra* note 1 at 17, 134 (noting how legal infrastructures are the backbone of global capitalism); GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY 3, 7, 9 (2016).

aspects like dispute resolution and substantive law for transactions.⁸¹ Generally, major economies have built on legal infrastructures laid by previous powers while also innovating their own infrastructures.⁸² China represents the most recent iteration of this process.

The reasons and justifications for economic hegemon's spread of their law overseas via their legal infrastructures have changed over time. During the age of empire (roughly, the seventeenth to the early twentieth centuries), colonial powers transplanted versions of their law abroad, sometimes forcibly, based on ideologies of cultural and racial superiority.⁸³ 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.⁸⁴ Concurrently, the growth

81. See Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 J.L. & POL'Y FOR INFO. SOC'Y 1, 11 (2012) (identifying legal infrastructures as addressing needs of dispute resolution, as well as commitment, risk-allocation, and cost sharing); Tamar Frankel, *The Legal Infrastructure of Markets: The Role of Contract and Property Law*, 73 B.U. L. REV. 389, 392 (1993) (arguing that legal infrastructures consisting of contract law and property law help order efficient markets).

82. See Erie, *supra* note 6, at 56 (explaining how China builds on previous layers of legal infrastructure).

83. See generally LAUREN A. 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 Bursset, *Why Didn't the Common Law Follow the Flag?*, 105 VA. L. REV. 483 (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); BENJAMIN L. BERGER, HAMAR FOSTER & 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).

84. 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 J. 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 . . ."); INTERNATIONAL LAW AND EMPIRE—ASPECTS AND APPROACHES (Martti Koskenniemi, Walter Rech & Manuel Jimenez Fonseca eds., 2017) (finding that international law cannot escape its Eurocentric framework); ANNE ORFORD,

of global capitalism was likewise rooted in these earlier colonial encounters.⁸⁵ In the mid-twentieth century, decolonization and the emergence of international legal institutions ushered in a new era in the international system.⁸⁶ 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.⁸⁷ Under such rationales, companies from the North prefer the law (as a choice of 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.

INTERNATIONAL LAW AND THE POLITICS OF HISTORY 257 (2021) (identifying British colonial networks as one origin of international law).

85. One of the preeminent historical accounts of how capitalism grew out of imperialism is Immanuel Wallerstein's "world-systems theory". See 1 IMMANUEL MAURICE WALLERSTEIN, *THE MODERN WORLD-SYSTEM: 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 form of capitalism in late nineteenth century India through commercial and contract laws).

86. 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 84, at 196–204 (arguing that decolonization sought to universalize international law).

87. For orthodox accounts, see, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 41 (8th ed. 2011) (arguing on prescriptive and normative grounds that common law is and should be efficient); Douglass C. North, *Institutions*, 5 J. ECON. PERSPS. 97, 98 (1991) (conceptualizing institutions as the means by which economies achieve "efficient, competitive markets"). For critical responses, see PISTOR *supra* note 1, at 208; Amy Kapczynski, David Singh Grewal & Jedediah Britton-Purdy, *How Law Made Neoliberalism*, BOS. REV. (Feb. 22, 2021), <https://bostonreview.net/articles/jedediah-purdy-david-g-victor-amy-kapczynski-lpe> [<https://perma.cc/M4U9-V5KH>]; M. SORNARAJAH, *RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 11 (2015) (claiming that the United States drove its version of neoliberalism through international investment law which affected developing countries).

Much of today's legal infrastructure was laid during the age of empires. During this period, the United Kingdom and then the United States spread their law in the course of their imperial expansion; France, Germany, the Netherlands, and Japan also did the same, to varying extents. 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 which featured elements of law from the imperial core.⁸⁸ 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 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.⁸⁹ English common law has become the lingua franca of modern international commerce, and is used as both the procedural law in dispute resolution and as the governing law of international contracts.⁹⁰ Today, a number of jurisdictions, including in the Commonwealth and former colonial possessions and territories, use versions of English law in their courts.⁹¹ Demonstrating the attractiveness of English common law, even jurisdictions that were never incorporated into the British Empire have borrowed from English court templates.⁹² Likewise, retired judges from the United Kingdom sit on benches in such jurisdictions as Singapore, Dubai, Kazakhstan, Pacific states, and

88. 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).

89. James Bryce, *Essay 2: The Extension of Roman and English Law Throughout the World*, in 1 *STUDIES IN HISTORY AND JURISPRUDENCE* 72–123 (1901).

90. Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 *NW. J. INT'L L. & BUS.* 455, 491–93 (2014) (surveying choice of law preferences from ICC data and showing that English common law reigns).

91. 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).

92. *Id.* at 276–77 (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).

the Caribbean.⁹³ The presence of English common law in these states, in turn, facilitates various forms of English power globally.⁹⁴

The American approach to constructing legal infrastructures shared some commonalities with that of their own colonist masters, but it also expanded on the role of law in empire-building. First, as a formal empire, the United States annexed Pacific and Caribbean territories over which U.S. law had dominion in the late nineteenth century.⁹⁵ By the turn of the century, the formal aspects of empire would reach a zenith through such hard-to-believe institutions as the “United States Court for China,” which was established by Congress in 1906 and based in Shanghai, providing extraterritorial jurisdiction over U.S. citizens in Shanghai.⁹⁶

Yet, the real globalization of the American empire occurred under conditions of informality, through which it both continued to export its law in legal development efforts and “rule of law” programs for much of the twentieth century. The United States also built up international legal and financial institutions into which it “uploaded” its law.⁹⁷ As the United States became the financial center of the

93. See generally Alyssa S. King & Pamela K. Bookman, *Traveling Judges*, 116 AM. J. INT’L L. 477 (2022) (studying traveling United Kingdom judges across a number of jurisdictions); ANNA DZIEDZIC, *FOREIGN JUDGES IN THE PACIFIC* (2021) (identifying three-quarters of judges in Pacific states as foreign and mainly from the Commonwealth).

94. See generally LEGALUK, *supra* note 5.

95. The term is usually associated with the historical analysis of the British empire. See John Gallagher & Ronald Robinson, *The Imperialism of Free Trade*, 6 ECON. HIST. REV. 1, 1 (1953). A number of scholars have examined the formal and informal dimensions of U.S. empire. See, e.g., SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE US CONSTITUTION, AND EMPIRE 2* (2019) (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 OF THE GREATER UNITED STATES 16* (2019) (providing a “perspectival” contribution on the study of U.S. empire based on the histories of its “territories”).

96. Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217, 217 (2008).

97. On U.S. law and development and rule-of-law programming, see generally David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974); JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 3* (1980); William P. Alford, *Exporting “The Pursuit of Happiness”*, 113 HARV. L. REV. 1677, 1678 (2000); Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3* (Thomas Carothers ed., 2006); R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011). On the role of U.S. law in building international institutions, see generally Jacques

world, New York and Delaware law were used in contracts the world over.⁹⁸ Despite extensive use of extraterritorial jurisdiction, for the most part, U.S. courts have historically been averse to transnational litigation.⁹⁹ So while U.S. courts have sought to extend U.S. law to foreign soil via extraterritorial application of law and long-arm statutes, they have been more reluctant to do the reverse—enforce foreign law on U.S. soil.¹⁰⁰ In summary, the grounds for the internationalization of U.S. law were laid by a combination of factors, including military expansionism and American centrality in global markets.

At the international level, the United States and its allies formed “governance institutions,” namely, the International Monetary Fund, World Bank, and World Trade Organization (WTO).¹⁰¹ Exemplifying the interrelationship between law and finance, these institutions assured that the U.S. dollar would become the world’s reserve currency. Other countries had to accumulate U.S. dollars and, to do

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, 179 (1999); Bryant G. Garth & Yves Dezalay, *Introduction to GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 2* (Yves Dezalay & Bryant G. Garth eds., 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* 199 (Franz von Benda-Beckmann et al. eds., 2016).

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

99. TONYA L. PUTNAM, *COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY* 43–45 (2016) (analyzing U.S. courts’ rationales for enforcing U.S. law extraterritorially). *But see* Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT’L L. 208, 208–09 (2013) (interpreting *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (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 U.S. courts’ aversion to transnational litigation based on separation of powers, international comity, and defendants’ convenience).

100. Compare Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Laws: A New Rule for the Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 111 (2010) (noting that the United States wants to unilaterally project its laws and corresponding enforcement resources to regulate what people do in other countries), with Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 945 (2017) (attributing these outcomes to parochialism at the systemic level).

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

so, bought U.S. treasury securities.¹⁰² Consequently, the U.S. dollar became the primary medium for global trade and debt issuance. As a further step, these governance institutions created mechanisms to deal with disputes that arose in the course of that business, for example, in trade.¹⁰³

In reviewing the Anglo-American experience, it is clear that one driving force for the internationalization of common law was hard power, centrally, 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.¹⁰⁴ Hence the assertion, “All violence as a means is either lawmaking or law-preserving.”¹⁰⁵ 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.¹⁰⁶ Whether in its balder colonial form or its more recent iterations, law-as-violence has been central to critical legal theories.¹⁰⁷

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

103. David Evans & Gregory C. Shaffer, *Introduction* to *DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* 1, 5 (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010) (showing that North American countries are the main users of the WTO’s Dispute Settlement Understanding).

104. *See generally* 2 DOUGLAS CLARK, *GUNBOAT JUSTICE: BRITISH AND AMERICAN LAW COURTS IN CHINA AND JAPAN (1842–1943)* (2015) (providing a history of Western treaties forced on China, Japan, and Korea).

105. WALTER BENJAMIN, *CRITIQUE OF VIOLENCE*, reprinted in 1 WALTER BENJAMIN: *SELECTED WRITINGS 1913–1926*, 236, 243 (Marcus Bullock & Michael W. Jennings eds., 2000).

106. *See, e.g.*, Melissa Crouch, *The Prerogative Writs as Constitutional Transfer*, 38 *OXFORD J. LEGAL STUDS.* 635 (2018) (showing how former British colonies borrowed administrative review remedies from English law); Benny Y.T. Tai, *Hong Kong: Maintaining a Common Law Legal System in a Non-Western Culture*, in *LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS* 62 (E. Ann Black & Gary F. Bell eds., 2011) (explaining the inheritance of Hong Kong law from English law); Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 *VA. J. INT’L L.* 1, 4 (examining the exercise of the “effects doctrine” by U.S. courts which grants them jurisdiction over conduct outside the home state’s borders where such conduct has a substantially adverse impact within that state); R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 *INT’L ORG.* 103, 113 (2004) (explaining the Americanization of securities law in the European Union).

107. One genealogy was initiated by Karl Marx and features a line of influential thinkers. *See, e.g.*, 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 like suasion; yet they may also contain the means with which to assess these alternative modes. Anglo-American common law, with its foundation of hard power, could also attain soft power. Given its longevity and geographic spread, English common law eventually gained attractiveness as a choice of law in cross-border transactions for its predictability and pro-business rules.¹⁰⁸ 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.”¹⁰⁹ On the back of American military and financial power, U.S. common law, and specifically New York and Delaware law, have carried soft power more for their “technocratic” qualities, their hyper-rationalization and specialization in such fields as corporate law, bankruptcy, and securities.¹¹⁰ Consequently, depending on the nature of the agreement, parties may opt for such law in their contracts or opt for their dispute resolution procedures to follow said sources of law.

To summarize, major capital exporting countries, namely the United Kingdom and United States, 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 United Kingdom and United States in this sense. China has one dimension of hard power in the form of its economic centrality, but it lacks the full package: global military prowess and internationalized currency. In terms of military growth, the People’s Liberation Army Navy (PLAN) is considered by some to be “the world’s largest navy” and has an increasingly powerful role in the Pacific; however, its military footprint outside the region is for the

11 CARDOZO L. REV. 921 (1990); Pierre Bourdieu, *The Force of Law: Toward a Sociology of The Juridical Field*, 38 HASTINGS L.J. 8 (1987).

108. See Cuniberti, *supra* note 90.

109. Erie & Ha, *supra* note 11, at 379.

110. Cf. YVES DEZALAY & 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).

most part insignificant compared to Western rivals.¹¹¹ In particular, the United States has had several decades to grow its global military presence, including overseas military bases. In terms of financialization there has been much discussion of the internationalization of the renminbi,¹¹² but as of yet, the Chinese currency is neither at the level of the Japanese yen nor the British pound—let alone the U.S. dollar.¹¹³ China is building both its military and financial assets, but reaching competitive capacity remains elusive. As a result, it has resorted to a number of strategies to complement its economic hard power and to protect its pecuniary and strategic interests. Among these is soft power,¹¹⁴ and law is one aspect of a multi-dimensional approach to boosting its soft power internationally. In the next Part, 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 enviable yet awkward position in the international system of trade and investment. China's status is, on the one hand, enviable as it has benefitted from this system economically over the past forty years, and hence China is incentivized to be a status quo power. China's accession to the WTO in 2001 was a watershed event which greatly facilitated China's integration into world economy and international economic law, in particular. 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; there are gaps between China's economic system and the

111. Benjamin Mainardi, *Yes, China Has the World's Largest Navy. That Matters Less Than You Might Think*, *DIPLOMAT* (Apr. 7, 2021), <https://thediplomat.com/2021/04/yes-china-has-the-worlds-largest-navy-that-matters-less-than-you-might-think> [https://perma.cc/YR94-VCJK] (arguing that the PLAN's force structure and comparably weak regional ally networks render it less strong than sheer numbers of vessels would indicate).

112. See, e.g., Shen Wei, *Rising Renminbi and the Neo-Global Financial Governance in the Context of the 'One Belt One Road' Initiative: A Changing Game or Minor Supplement?*, 32 *J. INT'L BANKING L. & REG.* 10 (2017) (discussing strategies to broaden the use of the renminbi by Beijing in global markets).

113. EDWIN L.-C. LAI, *ONE CURRENCY, TWO MARKETS: CHINA'S ATTEMPTS TO INTERNATIONALIZE THE RENMINBI* 6–7 (2021).

114. Cf. Erie, *supra* note 6, at 84 (identifying Chinese methods of effecting order transnationally).

international order.¹¹⁵ There is thus 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.¹¹⁶ Unlike preceding economic hegemony, China largely 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.¹¹⁷ Each area has been the subject of China's soft power campaigns and professional training.¹¹⁸ More recently, the Party-State has added law to these categories in the form of "legal cooperation."¹¹⁹

However, in practice, and, again, slightly diverging from Anglo-American precedents, the specific significance of law is less "the role of law in China's developmental model" (to be emulated by other states),¹²⁰ and more how China and its partners can build transnational law, meaning the law of private parties (and some public and semi-

115. Mark Wu, *The 'China, Inc.' Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 264 (2016) (finding that China's "distinct economic structure" presents challenges to the WTO system).

116. See, e.g., Xi Jinping, Keynote Speech at the Opening Ceremony of the Boao Forum for Asia Annual Conference 2022 (Apr. 21, 2022) (transcript available at https://www.fmprc.gov.cn/eng/zxxx_662805/202204/t20220421_10671083.html [<https://perma.cc/M4CG-2RBX>]) (citing the "Five Principles of Peaceful Coexistence and the Bandung Spirit" in proposing a "Global Security Initiative").

117. See BENABDALLAH, *supra* note 67.

118. See *id.*

119. See, e.g., Hong Yonghong, *Legal Cooperation of China and African States: Past, Present, and Future* (unpublished manuscript) (on file with author) (dating the genesis of such cooperation to the 1955 Bandung conference).

120. 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'Y 1, 9, 75 (2021) (arguing that host states may replicate aspects of Chinese approaches to data governance in their own laws and regulations without wholesale mimicry).

public ones) that engage in commercial transactions across borders.¹²¹ Pursuant to the “South-South” discourse, the Party-State frames such projects as “win-win,” evincing the inducive 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.

These dynamics are illustrated by CAJAC. On the one hand, CAJAC potentially 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. On the other hand, CAJAC’s market reception, to date, has been lukewarm, putting its effectiveness into doubt. Thus, China’s networked institutions 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, which is centrally concerned with creating certain images about China, its developmental approach, and its institutions. The ensuing gap between discourse and practice suggests the trans-nationalization of certain features of Chinese law, namely, “legal surrealism.”¹²² The remainder of this Part will first provide a background on the China-Africa relationship and then describe 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 Section 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.

121. 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. ON LEGIS.* 323, 325 (2018) (showing how private commercial agreements allow sophisticated parties to opt out of domestic law); Terence C. Halliday & Gregory Shaffer, *Chapter 1: 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).

122. See generally Erie, *supra* note 27.

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.¹²³ 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.¹²⁴ China's FDI stocks in Africa have grown nearly one-hundred-fold since 2003, to \$44.4 billion in 2019, and China is projected to be the top investor in Africa by 2024.¹²⁵ China is a major player in project finance in Africa, lending \$2.94 billion in 2020.¹²⁶ In addition to trade, investment, and lending, Africa is the major destination for Chinese aid to a tune of \$3.3 billion in 2019.¹²⁷ 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.¹²⁸ The COVID-19 pandemic has seen a further deepening in China's health aid to a number of African states.¹²⁹

Dovetailing with these growing economic ties, the Party-State has increasingly sought to redefine the relationships between the PRC

123. China Africa Research Initiative, *Data: China-Africa Trade*, CHINA AFRICA RESEARCH INITIATIVE, <http://www.sais-cari.org/data-china-africa-trade> [https://perma.cc/AG6E-YYBP].

124. *Statistics on China-Africa Trade in 2018*, MINISTRY OF COM. (Jan. 26, 2019, 9:52 AM), <http://english.mofcom.gov.cn/article/statistic/lanmubb/AsiaAfrica/201901/20190102831255.shtml> [https://perma.cc/B8ZN-MDJW]; YUN SUN, AFRICA IN CHINA'S FOREIGN POLICY 7 (2014) (China surpassed the United States as Africa's largest trading partner in 2009.).

125. CHINA-AFR. BUS. COUNCIL, CHINESE INVESTMENT IN AFRICA 105 (2022), <http://enimg.cabc.org.cn/uploads/2021/08/30/1630295758.pdf> [https://perma.cc/8835-8F7R].

126. China Africa Research Initiative, *supra* note 123. Alicia Garcia-Herrero & Jianwei Xu, *China's Investment in Africa: What the Data Really Says, and the Implications for Europe*, BRUEGEL (July 22, 2019), <https://www.bruegel.org/blog-post/chinas-investment-africa-what-data-really-says-and-implications-europe> [https://perma.cc/JU2M-DECG].

127. China Africa Research Initiative, *supra* note 123.

128. DAVID DOLLAR, UNDERSTANDING CHINA'S BELT AND ROAD INFRASTRUCTURE PROJECTS IN AFRICA 7 (2019), https://www.brookings.edu/wp-content/uploads/2019/09/FP_20190930_china_bri_dollar.pdf [https://perma.cc/5FFA-WNZ5].

129. See, e.g., Tian Tuda (田土达), *Feizhou Guojia 'Dianzan' Zhongguo Kangyi Yuzhu: '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] (May 12, 2020), http://intl.ce.cn/sjjj/qy/202005/12/t20200512_34884970.shtml [https://perma.cc/LF6Y-V6N8].

and African states to incorporate the latter into the CCP's vision of China's role in global affairs.¹³⁰ The relationships have become diversified as African allies become more important to China's foreign policy and global multilateral role at the U.N.¹³¹ 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.¹³²

Despite these strengthening links, legal studies regarding China and African states are in their infancy.¹³³ Won Kidane has underscored the legal aspects of Chinese-African trade and investment, including how the PRC and nearly all African states are members of the WTO, making WTO rules apply to their trade disputes.¹³⁴ Further, China has at least thirty-one bilateral investment treaties (BITs) with African countries.¹³⁵ 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.¹³⁶ While the later generations of Chinese BITs increasingly converge with international practice in including nondiscrimination, most favored nation clauses, equitable treatment, and national treatment,

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

131. See generally *id.*

132. KENTON THIBAUT, *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), https://www.atlanticcouncil.org/wp-content/uploads/2022/04/Chinas_Discourse_Power_in_the_Global_South.pdf [<https://perma.cc/982W-3YNV>].

133. See, e.g., Yonghong, *supra* note 119; Weidong Zhu, *A Brief Analysis of the Disputes Arising from China-Africa Civil and Commercial Transactions*, 7 J. CAMBRIDGE STUDS. 74 (2012); Salvatore Mancuso, *China in Africa and the Law*, 18 ANN. SURV. INT'L & COMPAR. L. 243 (2012); Timothy Webster, *China's Human Rights Footprint in Africa*, 51 COLUM. J. TRANSNAT'L L. 626 (2013); Qingxiu Bu, *China's New Approach to CSR in Congo: Is the Leverage Turning to China?*, 2010 INT'L BUS. L.J. 485; Moses N. Kiggundu, *China-Africa Legal and Judiciary Systems: Advancing Mutually Beneficial Economic Relations*, 4 BEIJING L. REV. 155 (2013); Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131 (2013) [hereinafter Ofodile, *Africa-China Bilateral Investment Treaties*]; Uche Ewelukwa Ofodile, *Trade, Empire, and Subjects – China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?* 41 VAND. J. TRANSNAT'L L. 505 (2008); WON KIDANE, *CHINA-AFRICA DISPUTE SETTLEMENT: THE LAW, CULTURE AND ECONOMICS OF ARBITRATION* (2011); Paul Nantulya, *China's Growing Police and Law Enforcement Cooperation in Africa*, in *POLITICAL FRONT LINES: CHINA'S PURSUIT OF INFLUENCE IN AFRICA* 39 (Nadège Rolland ed., 2022).

134. See KIDANE, *supra* note 133, at 217.

135. See *id.* at 222.

136. See Ofodile, *Africa-China Bilateral Investment Treaties*, *supra* note 133, at 191.

many are outdated.¹³⁷ Beyond the international investment agreements and related treaties, the FOCAC has also served as a networking platform for cooperation and knowledge exchange between lawyers, judges, and arbitrators.¹³⁸

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 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 African courts. In South Africa, for instance, cases involving Chinese parties have even been formative of the jurisprudence on ICA issues.¹³⁹

Pursuant to the terms of many contracts between Chinese and African parties, PRC courts as a forum for China-Africa disputes are often not the first choice. Rather, in the event that the contract is with a host government, that government will often 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.¹⁴⁰ 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

137. See Erie, *supra* note 6, at 91.

138. See China-Africa Joint Arbitration Centre [CAJAC], *Constitution of the China-Africa Joint Arbitration Centre 4* (unpublished) (on file with author).

139. See, e.g., *Zhongji Development Construction Engineers Co. Ltd. V. Kamoto Copper Co. SARL* 2014 (421) SA 345 (S. Afr.) (establishing common law rules on the severability of arbitration clauses and the *kompetenz-kompetenz* rule).

140. Interview with General Counsel of Private Chinese Oil Company Active in Africa and the Middle East, Video-Conference Call, in Beijing (Sept. 3, 2021).

(LCIA).¹⁴¹ The International Chamber of Commerce (ICC) is also a popular forum.¹⁴²

One exception is loan agreements that often feature PRC law in their governing law, dispute resolution, and procedural law provisions. Chinese lenders may benefit from asymmetry over African borrowers, and push for their law and Chinese courts or arbitration.¹⁴³ The loan agreements show that Chinese law, too, can have hard power effects. Yet such coercion is only one aspect of a multi-pronged interaction between the PRC legal system and those of host states in Africa. The soft power components can mystify coercion. In summary, while many Chinese and African parties have no qualms about using such Western forums, there are also strong voices rejecting conventional forums for the reason that they are established by and for Western parties; Chinese “legal cooperation” purportedly offers alternatives.

2. *The Critique of Established International Dispute Resolution Mechanisms*

Chinese and African parties have criticized some 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.¹⁴⁴ 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 institutions for cross-border

141. *Id.*; see also KIDANE, *supra* note 133, at 368.

142. Interview, *supra* note 140; KIDANE *supra* note 133, at 368. The ICC has sought to diversify international commercial dispute resolution through alternative dispute resolution and dispute avoidance, offerings which appear to have some attraction for parties. See Claudia Salomon, *Avoid Arbitration Express Train Urges ICC Court President*, ICC (Mar. 14, 2022), <https://iccwbo.org/media-wall/news-speeches/avoid-arbitration-express-train-urges-icc-court-president> [<https://perma.cc/4R9R-EW8N>]; NORTON ROSE FULBRIGHT, INTERNATIONAL ARBITRATION REPORT 4–7 (C. Mark Baker et al. eds., 2021).

143. See, e.g., Edwin Okoth, *SGR Pact with China a Risk to Kenyan Sovereignty, Assets*, DAILY NATION (Jan. 12, 2019), <https://nation.africa/kenya/news/Hidden-traps-in-SGR-deal-with-China/1056-4932764-ebw46r/index.html> [<https://perma.cc/WNT4-CEHC>] (describing the loan agreement for the Mombasa-Nairobi railway, signed between the Kenyan government and the Exim Bank of China on May 11, 2014, which specifies PRC law and CIETAC).

144. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965 [hereinafter ICSID Convention].

commerce. Specifically, BITs between capital-exporting and host states include ICSID or an ad hoc tribunal under UNCITRAL rules in their dispute resolution provisions to avoid host state courts.¹⁴⁵ Today, there are nearly three thousand BITs in total, of which approximately two thousand are in force,¹⁴⁶ and, as of mid-2020, 768 cases have been registered under the ICSID Convention and Additional Facility Rules.¹⁴⁷ As of mid-2019, Sub-Saharan and Middle Eastern & North African states accounted for fifteen percent and twelve percent of a total of 728 registered cases, respectively, under the ICSID Convention and Additional Facility Rules, cases in which African states were many respondents.¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰ The Bandung Conference marked a high-tide in solidarity in the developing world, but that moment failed to achieve lasting reform.¹⁵¹

Both China and African countries have suffered under colonialism. China is considered a “semi-colonized state,” and African

145. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L REV. L. & ECON. 107, 113 (2005).

146. *International Investment Agreements Navigator*, UNCTAD INV. POL’Y HUB, <https://investmentpolicy.unctad.org/international-investment-agreements> [<https://perma.cc/2LN7-G33S>].

147. WORLD BANK GROUP [WBG], THE ICSID CASELOAD—STATISTICS (2020), <https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282020-1%20Edition%29%20ENG.pdf> [<https://perma.cc/928W-AUMK>].

148. Uché Ewelukwa Ofodile, *African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes, and Challenges*, 34 ICSID REV. 296, 298 (2019) (“[A] growing number of countries in Africa only recently faced their first (known) ISDS claims . . .”).

149. Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT’L L. & POL’Y 953, 953 (2005); see also 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).

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

151. See generally B. S. CHIMNI ET AL., *BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017) (analyzing the legacy of the Bandung Conference).

countries have had longer exposures to colonialism that have shaped African states' engagement with international investment law and dispute resolution.¹⁵² 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 economic growth and a framework for foreign investment that offers both sides certainty, predictability, and fairness.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵ 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.¹⁵⁶

Whereas, after Germany, China has signed the most number of BITs in the world, the PRC has historically demonstrated a reluctance to use ISDS.¹⁵⁷ Historically, China has not been a major user of ICSID, being a claimant in five cases that have been concluded and a

152. TASLIM O. ELIAS, *AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW* 233 (Yenkong Ngangjoh Hodu & Makane Moïse Mbengue eds., 1988). *See generally*, 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 XIV* (2d ed. 2013); *AFRICAN PERSPECTIVES IN INTERNATIONAL INVESTMENT LAW* i-4 (Makane Moïse Mbengue & Yenkong Ngangjoh Hodu eds., 2020).

153. Makane Moïse Mbengue, 'Somethin' ELSE': *African Discourses on ICSID and on ISDS—An Introduction*, 34 ICSID REV. 259, 259-60 (2019).

154. *Id.* at 260-63.

155. Piero Foresti, *Ida Laura de Carli and others v. Republic of S. Afr.*, ICSID Case No. ARB(AF)/07/1 (Aug. 4, 2010).

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

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

respondent in four.¹⁵⁸ Rather than ICSID, traditionally, Chinese parties have relied on interstate negotiation and conciliation to solve investor-state disputes.¹⁵⁹ 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 against China.¹⁶⁰ In addition, Chinese enterprises generally refrain from having their disputes aired in public.¹⁶¹

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.¹⁶² 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.¹⁶³

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,

158. 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 *Cases*, ICSID, <https://icsid.worldbank.org/cases/case-database> [<https://perma.cc/8GBE-DYC5>].

159. See Erie, *supra* note 6, at 89.

160. See, e.g., Guiguo, *supra* note 157, 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").

161. See Erie, *supra* note 6, at 90.

162. See *supra* text accompanying note 71 ("Promote the establishment of joint arbitration mechanisms between Chinese arbitration institutions and national arbitration institutions jointly building the 'Belt and Road'").

163. 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 (2005); Piero Bernardini, *International Commercial Arbitration and Investment Treaty Arbitration: Analogies and Differences*, in PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 52 (David D. Caron et al. eds., 2015); Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012*, 28 ARB. INT'L 577 (2012).

including postcolonial states.¹⁶⁴ As a result, critics of this new form of *lex mercatoria* have labelled international arbitrators who provide services to multi-national corporations a “mercatorocracy.”¹⁶⁵ 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 of a developed state.¹⁶⁶ 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.¹⁶⁷

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”).¹⁶⁸ The problem then, from the viewpoint of state governments, is that ICA can circumvent local judiciaries. Conversely, that may be a 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.

164. See generally DEZALAY & GARTH, *supra* note 110.

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

166. Susan D. Franck et al., *The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 466 (2015).

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

168. A. Claire Cutler, *International Commercial Arbitration, Transnational Governance, and the New Constitutionalism*, in INTERNATIONAL ARBITRATION & GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 140, 155–56 (Walter Mattli & Thomas Dietz eds., 2014).

B. Description of CAJAC

1. Enter the Network

CAJAC is the product of transnational networks that promote “legal cooperation” as essential for economic relations between China and its trade partners. Specifically, according to its promoters, CAJAC purports to combine the expertise of Chinese and African arbitrators to address the needs of China-Africa transactions. Hence, it is part of an effort led, to varying 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.¹⁶⁹ It does so, in part, by creating new arbitration centers to avoid 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-private regulation of China-Africa trade and investment, a common strategy in Chinese law and development.¹⁷⁰

According to the official discourse on “legal cooperation” as a method of dispute resolution, CAJAC’s form—a transregional network of arbitral hubs—is bespoke. The discourse surrounding CAJAC’s establishment pulses with excitement about CAJAC’s originality. For example, at the sixth FOCAC-Legal Forum held in Johannesburg in 2015, during which the two original CAJAC centers were founded in Johannesburg and Shanghai, Chinese promoters proclaimed that CAJAC would “establish a grand coordinated pattern for China-Africa joint dispute resolution” (*jianli Zhong-Fei lianhe jiefen jieju da xietiao geju*).¹⁷¹ It is in this context that CAJAC exemplifies Chinese law as soft power: As part of a larger discourse around Chinese-African interlinked development,¹⁷² it aligns African stakeholders’ interests with Chinese ones.

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 economic hard power). Soft power may obfuscate some of

169. Interview with Kenyan advocate and arbitrator (Jan. 5, 2021).

170. See Erie, *supra* note 6, at 106.

171. SHIAC, *supra* note 138.

172. See Nat’l Development and Reform Comm’n et al., *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, MINISTRY FOREIGN AFFS. CHINA (March 2015), https://www.fmprc.gov.cn/eng/topics_665678/2015zt/xjpcxbayzlt2015nnh/201503/t20150328_705553.html [<https://perma.cc/S674-SUS3>].

the economic disparities by producing the misrecognition of asymmetry as “win-win.”¹⁷³ At the same time, African parties who cooperate with Chinese partners may use official discourses and institutional outgrowths in ways that benefit their own interests.

The foregoing reflects a Marxist critique of, in this case, Chinese law as soft power. Yet CAJAC’s significance may require moving beyond such standard critiques. 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 not a story of Chinese law’s transplantation per se; rather, transnational networks migrated Chinese arbitration institutional rules into CAJAC in an effort to harmonize Chinese and African arbitration regimes, an effort that was only partially successful. In the remainder of this Section, 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.¹⁷⁴ My conversation with the SHIAC officers about CAJAC was similar to discussions elsewhere. These conversations, depending on the individual and their position in regard to CAJAC, were characterized by a mixture of professional pride with reticence and sometimes meaningful pauses, suggesting versions of self-censorship. In the case of the SHIAC officers, they offered a narrative about CAJAC’s creation, and shared CAJAC marketing materials with me, but there were important gaps in their representation of the institution, for example, in terms of its main drivers. These gaps—and those meaningful pauses—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 other factors were more idiosyncratic, including anxieties about communicating with outsiders and the constitutive role of certain stakeholders in the network that formed CAJAC.

173. On law’s production of misrecognition effects that it is autonomous (and non-political), see Bourdieu, *supra* note 107, at 820.

174. Interviews with SHIAC officers, in Shanghai (Apr. 20, 2018).

The China Law Society is, according to its Chinese-language website, “led by the CCP” (*Zhongguo gongchandang lingdao de* 中国共产党领导的).¹⁷⁵ 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.¹⁷⁶ 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 in China for foreign lawyers, particularly from developing countries, and co-organize similar events outside of China.¹⁷⁷ In parallel to the SPC’s support for transnational judicial networks,¹⁷⁸ 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.¹⁷⁹ The BRILA has eighty-five founding members from thirty-six countries.¹⁸⁰ 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 with the Ministry of Justice, has also sought to promote Chinese law firms’ capacity to conduct cross-border transactional and dispute resolution work.¹⁸¹

The networking led by the China Law Society could be dismissed as epiphenomenal, mere window-dressing that is more about

175. Zhongguo Faxue Hui (中国法学会) [China Law Society], *Xuehui Jianjie* (学会简介) [Introduction to the Society], CHINALAW, <https://www.chinalaw.org.cn/portal/page/index/id/9.html> [https://perma.cc/XZ99-FBWZ].

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

177. See Seppänen, *supra* note 6, at 131.

178. Cai Congyan (蔡从燕) & Wang Yifei (王一斐), *Daguo Jueqi Zhong de Kuaguo Sifa Duihua* (大国崛起中的跨国司法对话) [Transnational Judicial Dialogue in the Rise of Great Powers], 1 GUOJIFA YANJIU (国际法研究) [INT’L L. RSCH.] (2022), <https://mp.weixin.qq.com/s/JvOnIs9iYchtvvhJqy8A0w> [https://perma.cc/2C2H-Y2R9].

179. Telephone Interview with Chinese lawyer (Sept. 20, 2019).

180. Dezan Shira & Associates, *Belt & Road International Lawyers Association Launched*, SILK ROAD BRIEFING (Dec. 10, 2019), <https://www.silkroadbriefing.com/news/2019/12/10/belt-road-international-lawyers-association-launched/> [https://perma.cc/2XMQ-5VZ3].

181. *Id.*

all-inclusive junkets than anything substantive, but doing so would miss the point of these networking events. For instance, at the China Law Society's 2017 "Conference on Legal Risks and Countermeasures of International Investment and Trade" in Beijing, some 180 people from thirty-one countries, speakers including judges, arbitrators, and academics, discussed issues in Chinese-African investment, including dispute resolution.¹⁸² Particular emphasis was made on advances China has made in recent years, such as the greater possibility for ad hoc arbitration in the free trade zones.¹⁸³ As a practical matter, 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.¹⁸⁴ As suggested by the participants, 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.¹⁸⁵ 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.¹⁸⁶ Lawyers are intrinsic promoters and beneficiaries of these global networks, which, despite deglobalization

182. This analysis is based on my personal observation of the Conference on Legal Risks and Countermeasures of International Investment and Trade, hosted by the China Law Society, in Beijing, China (Oct. 12–13, 2017).

183. *Id.*

184. *Id.*; Telephone Interview with Chinese lawyer (July 6, 2020).

185. See generally Stephen P. Borgatti & Daniel S. Halgin, *On Network Theory*, 22 ORGANIZATIONAL SCI. 1168 (2011) (reviewing key theories in the social science of networks); Virginia E. Harper-Ho, *A Network Innovation Model of Transnational Regulatory Change: Applications in Sustainable Finance*, AM. J. COMPAR. L. (forthcoming 2023) (conceptualizing comparative law through networks); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 4–5 (2002) (finding that transgovernmental networks are cooperating to solve regulatory problems).

186. See Charles Whitehead, *What's Your Sign? International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 697 (2006); Pierre-Hughes Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 115 (2009).

movements and COVID-19-related obstacles to cross-border coordination, are likely to grow.¹⁸⁷

Members of the dispute resolution industry in China promote global networks of legal professionals. The China Law Society has been trying to build cosmopolitan networks across a number of regions.¹⁸⁸ 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.¹⁸⁹ The original partners for CAJAC were the Arbitration Foundation of Southern Africa (AFSA) and SHIAC. AFSA is seen widely as the leading and most sophisticated arbitration institution in Africa, receiving the highest number of cases of any center on the continent.¹⁹⁰ 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.”¹⁹¹ 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-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

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

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

189. SHIAC, *supra* note 138.

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

191. FORUM ON CHINA-AFRICA COOPERATION, THE FIFTH MINISTERIAL CONFERENCE OF THE FORUM ON CHINA-AFRICA COOPERATION BEIJING ACTION PLAN (2013-2015)

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.¹⁹²

In 2017, the partners agreed to expand CAJAC to include, on the China side, the Beijing International Arbitration Center (BIAC) and the Shenzhen Court of International Arbitration (SCIA) and, on the African side, the Nairobi Centre for International Arbitration (NCIA) in Kenya. These centers also set up CAJAC offices. A year later, Organisation pour l'Harmonisation en Afrique du Droit des Affaires [Organization for the Harmonisation of Business Law in Africa] (OHADA), comprised of seventeen Francophone African states and featuring its main dispute resolution mechanism, the Cour Commune de Justice et d'Arbitrage [Common Court of Justice and Arbitration] (CCJA), was also approached to be the sixth CAJAC member.¹⁹³ The idea, then, was that each region of Africa and also each major metropolitan area in China would have its own arbitration center.

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."¹⁹⁴ While the Chinese arbitration establishment sought to create demand, they simultaneously created forums for co-learning through, for example, China Law Society conferences.¹⁹⁵ The Chinese law firm Dacheng, which is headquartered in Beijing but also has an office in Johannesburg, also facilitated study tours.¹⁹⁶ Arbitration counsel 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

192. See Chen, *supra* note 188.

193. See Interviews with SHIAC officers, *supra* note 174.

194. *Id.*

195. *Id.*

196. *Id.*

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.¹⁹⁷

Interviews with practitioners in Johannesburg and in Shanghai further corroborate the above accounts. Interviewees pointed to the strong role of 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.¹⁹⁸ 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.¹⁹⁹ They wanted China-seated arbitration. A Kenyan lawyer related, "China is more powerful, they are providing the money and we want the roadworks. When they hold a gun to your head, you have no choice."²⁰⁰ CAJAC, however, "looks like a collaboration."²⁰¹

Whereas it is clear that Chinese parties, and specifically the government, were the main initial drivers of CAJAC, their

197. Interview with Kenyan Lawyer and Head of Dispute Resolution Practice Group, Video-Conference Call, in Nairobi, Kenya (Dec. 4, 2020).

198. *Id.*

199. *See* Interview with Kenyan advocate and arbitrator, *supra* note 169.

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

201. *Id.*

representatives were successful in persuading African counterparts to co-establish the institution. The Kenyan lawyer above suggested the coercive aspects of the Chinese approach,²⁰² but the soft power dimension is regnant. Whereas the initial “push” may come from the Chinese, development projects and the legal institutions that support them cannot be sustained merely through such efforts; they require a “pull” from the host state side.²⁰³ This is particularly so given that China operates in many host states which are complex ecosystems of information-production, positioning, and debate featuring multiple political parties, activists and NGOs, and social media. As such, 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.²⁰⁴ Second, there is the issue of cost, particularly the costs associated with defending an ICSID claim or responding to arbitration, hiring Queens Counsels 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.²⁰⁵ 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.²⁰⁶ As one Kenyan lawyer expressed, “we wanted to tap into the Chinese market.”²⁰⁷ 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.

202. *Id.*

203. See Erie & Streinz, *supra* note 120, at 23 (“So while certain push dynamics are discernible, the force of the pull factors is not to be underestimated . . .”).

204. See generally THE TRANSFORMATION OF ARBITRATION IN AFRICA: THE ROLE OF ARBITRAL INSTITUTIONS (Emilia Onyema ed., 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).

205. See Interview with Kenyan Lawyer, *supra* note 197.

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

207. Interview with South African Lawyer and Arbitration Counsel, Video-Conference Call, in Johannesburg, S. Afr. (Dec. 14, 2020).

2. Institutional Design

Having described the transnational network that generated CAJAC, I next turn to the rules which formed its organization and operation. CAJAC is a kind of institutionalized network on a transregional scale. CAJAC's purported 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 alliance can best be understood with reference to CAJAC's institutional rules, which establish the procedure for arbitrations administered by particular centers.

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 FOCAC seemed to create an initial framework and then allowed the details to be backfilled.²⁰⁸ 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").²⁰⁹ 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.²¹⁰ This arrangement suggests that there would have been some level of coordination between Chinese and African arbitration institutions in administering cases; while the precise nature of that coordination is unknown, minimally one would expect pooling of arbitrators. Importantly, the 2015 Rules were based on SCIA's institutional rules showing direct inheritance from Chinese arbitration.²¹¹

208. Zhong Fei Lianhe Zhongcai Zhongxin Zhangcheng (中非联合仲裁中心章程) [CAJAC Constitution] (draft), art. 1.2 (specifying that CAJAC was led by the China Law Society and FOCAC); see *infra* note 217. On the concept of backfilling, see, e.g., KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES 24 (1988). See LIEBERTHAL, *supra* note 206, at 172 (observing Chinese policy operates through broad statements from above meant to guide lower officials who fill in the details).

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

210. *Id.* art. 5 (stating that "[e]ach 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").

211. 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).

Yet it became apparent that directly adopting Chinese arbitration rules in South Africa presented problems, necessitating new rules.²¹²

Furthermore, the decision was made to expand CAJAC after the first international CAJAC Conference held in Cape Town in 2017 and pursuant to the advice of business delegates, and as the additional institutions were incorporated, the decision was made to draft a common set of rules that would apply to all the CAJAC members.²¹³ CAJAC Johannesburg was tasked with drafting them.²¹⁴ Drafters included leading academics and practitioners from the field of arbitration in South Africa.²¹⁵ 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.²¹⁶

Based on a reading of principally the CAJAC Rules (hereinafter “Uniform Rules”), published in 2020, and, secondarily, the draft CAJAC Constitution, it is clear that there were trade-offs in designing CAJAC as a network of Chinese and African arbitration institutions.²¹⁷ Between the founding documents, the CAJAC Rules are more useful to understand the operation of the centers as they are more detailed and mostly follow the categories of any arbitration center’s rules; the CAJAC Constitution, is comparatively vaguer in its language. 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,”²¹⁸ 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:

212. See *infra* text accompanying notes 220–227.

213. Email from CAJAC representative (Mar. 5, 2019) (on file with author).

214. *Id.*

215. *Id.*

216. *Id.*

217. ZHONG FEI LIANHE ZHONGCAI ZHONGXIN GUIZE (中非联合仲裁中心规则) [CAJAC RULES], CHINA-AFRICA JOINT ARBITRATION CENTER (2020), https://cajacjhb.com/wp-content/uploads/2020/10/CAJAC_Rules_2020.pdf [<https://perma.cc/PY9C-UXG2>] (consisting of ten chapters that cover all aspects of arbitration, including jurisdiction, language, arbitration agreements, commencement of proceedings, arbitral tribunal, interim measures, hearing proceedings, mediation and settlement, arbitral award, expedited procedure, and miscellaneous); see CAJAC, *supra* note 138.

218. 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 PERSPS. 11, 16 (2020).

The Chinese arbitration community [is] convinced that the arbitral processes reflected in [its] 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.²¹⁹

However, the drafters faced problems in reconciling the two regimes of the Chinese and the UNCITRAL standards, the latter of which South Africa adopted in light of the 2017 International Arbitration Act. As a baseline, any South African arbitration institution would seek to comply with the International Arbitration Act in drafting its own institutional rules. Yet given the divergence between the Chinese arbitration regime and the UNCITRAL-derived standards on certain key procedural issues, abiding by the International Arbitration Act on those issues became a challenge for the drafters.

A closer examination of the Uniform Rules suggests that there may be some Chinese influence, first on the relative power of the arbitration commission and second on the issue of the seat of arbitration. As to the first, in regard 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."²²⁰ 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.

In terms of the issue of the seat, the Uniform Rules use "domicile" and not "seat," the former of which does not carry the same legal effect as the latter.²²¹ 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.

219. *Id.*

220. CAJAC Rules, *supra* note 217, art. 9.3.

221. On this issue, see Fan Kun, *Prospects of Foreign Arbitration Institutions Administering Arbitration in China*, 28 J. INT'L ARB. 343, 351 (2011).

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.²²² 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 setting aside procedures.²²³ It is not clear how PRC courts would treat awards issued by CAJAC centers in China. Based on current practices, 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,²²⁴ PRC courts would probably consider CAJAC Shanghai a domestic arbitration institution and hence their awards also as domestic.²²⁵ Yet the judicial practice is unsettled on the issue of how to treat awards issued by foreign arbitration institutions in China,²²⁶ and

222. See, e.g., Hong Kong International Arbitration Center Administered Arbitration Rules (2018), art. 14.1 (stating “[w]here there is no agreement as to the seat, the seat of arbitration shall be Hong Kong”); Nairobi Centre for International Arbitration Rules 2015 Revised Version, Rule 18(2) (“[u]nless otherwise agreed under paragraph (1), the seat of arbitration shall be Nairobi, Kenya”).

223. 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).

224. Zhonghua Renmin Gongheguo Zhongcai Fa (中华人民共和国仲裁法) [PRC Arbitration Law] (promulgated by the 9th Session of the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, September 1, 1995), 1994 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 8, 8–9 (China).

225. See CAJAC, *supra* note 138 (providing the model clause for CAJAC Shanghai: “CAJAC Shanghai shall be established and maintained by the Shanghai International Arbitration Center”).

226. Deguo Xupulin Guoji Youxian Zeren Gongsì yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsì (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 Int’l GmbH v. Wuxi Woke Gen. Eng’g Rubber Co.], Min Si Ta Zi No. 23 (Sup. People’s Ct. 2003) (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* Degaogang-tie Gongsì yu Ningbo Shi Gongyipin Jin Chukou Youxian Gongsì 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 Exp. Co.], Yong Zhong Jian Zi No. 4 (Ningbo Interm. People’s Ct. Apr. 22, 2009) (enforcing an arbitral award, considered “non-domestic,” as it was given by the ICC in

CAJAC as a hybrid institution would possibly present issues of first impression to PRC courts. The analysis is more straightforward for an award issued by a CAJAC Centre in an African state, which PRC courts would likely treat as a foreign award.²²⁷ 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.²²⁸ The Local Rules appear to trump the Uniform Rules in the event of a conflict.²²⁹ The Uniform Rules defer to the Local Rules on those specific issues that most exemplify conflict between the UNCITRAL and Chinese rules: interim measures,²³⁰ emergency arbitration,²³¹ mediation by the arbitration tribunal,²³² and settlement, mediation and negotiation facilitation.²³³ Consequently, whereas the earliest iteration conceived of an alliance that would involve greater coordination, the degree of coordination has lessened over the course of trying to harmonize the different regimes. The CAJAC Constitution does establish a CAJAC Guiding Committee which nominally provides governance over the centers. Formally, the CAJAC Guiding Committee formulates and implements

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 BP Agnati S.R.L.) [Anhui Longlide Packaging and Printing Co. v. BP Agnati S.R.L.], Min Si Ta Zi No. 13 (Sup. People's Ct. Mar. 25, 2013) (upholding the validity of an arbitration clause involving a Shanghai-seated ICC arbitration); Dacheng Chanye Qiti Zhushi Huishe yu Pulaikesi Zhongguo Touzi Youxian Gongsi (大成产业气体株式会社与普莱克斯(中国)投资有限公司) [BNB v. BNA], Hu 01 Min Te No. 83 (Shanghai No.1 Interm. People's Ct. 2020) (holding that an arbitration seated in Shanghai and administered by the Singapore International Arbitration Center was valid).

227. 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).

228. CAJAC Rules, *supra* note 217, art. 3.

229. *Id.* (stating that Local Rules apply to "matters dealt with in the Standard [i.e., CAJAC] Rules in a way contrary to mandatory rules of law applicable to arbitrations administered by that Centre or matters not dealt with in the Standard Rules").

230. *Id.* art. 32.

231. *Id.* art. 33.

232. *Id.* art. 45.

233. *Id.* art. 46.

the governing policies of CAJAC, adopts and publishes the Uniform Rules, and establishes a shared panel of arbitrators and mediators that the various centers may appoint.²³⁴ Despite this body, the two-tiered rules which allow the Local Rules to trump the Uniform Rules on contentious matters undercuts, to a large degree, a robust integration of the different centers in terms of their procedural rules. Instead, the CAJAC Constitution suggests a lukewarm compromise, requiring centers to “regard all other Centers as partner institutions extending to them assistance and cooperation as in good faith.”²³⁵

The end result is that the individual centers exist in the alliance more or less independently. Each existing arbitration center effectively acts as a “CAJAC branch” (see figure 1) and, depending on the arbitration clause in their contract, disputants could have their dispute arbitrated at that existing center through CAJAC rules, meaning the Uniform Rules and, where applicable, the Local Rules.

Figure 1. CAJAC Branches

Existing Center	CAJAC Branch
SHIAC	CAJAC Shanghai
BIAC	CAJAC Beijing
SCIA	CAJAC Shenzhen
AFSA	CAJAC Johannesburg
NCIA	CAJAC Nairobi
CCJA	CAJAC OHADA

Despite the attenuation of the original vision of networked hubs due to the two-tier rules, CAJAC nevertheless represents an approach to building legal infrastructure that differs from its 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.²³⁶ 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.²³⁷ Often, arbitration institutions partner with local counterparts, such as the ICC working with the Abu Dhabi Global Market in the United

234. CAJAC Constitution, *supra* note 217, arts. 9.1.1, 9.1.3, and 9.1.4. Compare CAJAC Constitution, with text accompanying *supra* notes 210–209.

235. CAJAC Constitution, *supra* note 217, art. 14.

236. *Id.*

237. YARIK KRYVOI, UK AND INTERNATIONAL EXPERIENCE IN THE ADMISSION, REGULATION AND OPERATION OF ARBITRAL INSTITUTIONS 19 (2021) (on file with author).

Arab Emirates.²³⁸ The second approach to overseas branch offices has been tried by arbitration institutions like the LCIA, which established branch offices overseas to administer cases in Dubai, India, and Mauritius. However, this appears to be a failed model—all three offices have been closed. The now-defunct LCIA overseas branch model featured a much tighter integration of administration between the home and branch institutions. For CAJAC, each CAJAC center has its own secretariat,²³⁹ although there is a CAJAC Guiding Committee that remains undefined in terms of its specific structure and powers.²⁴⁰

CAJAC thus differs from the previous models. While it serves marketing and training purposes like the first type, CAJAC is designed, in part, 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 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. Each of these features of CAJAC potentially advantages Chinese users. Having explained CAJAC's origins through transnational networks and its operating rules, and compared it to existing models, I next turn to some of the implications of Chinese law as soft power.

IV. CHINA'S SIMULACRAL EMPIRE

This Part appraises Chinese law as soft power, its hard edges, and its unintended effects, 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. Alternately, CAJAC can be assessed in terms of its unintended effects. Fundamentally, CAJAC shows how Chinese law as soft power may have initial traction in terms of establishing institutions that may not ultimately be competitive in the marketplace. More

238. *Id.*

239. CAJAC Rules, *supra* note 217, art. 1.4.

240. *Id.* art. 67.

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 ordering. China's own version of empire is not just "informal" as in the U.S. example, but also one with elements of legal surrealism: a simulacrum of empire.

As a preliminary matter, it warrants mention that Chinese soft power, its transnational networks, trainings, and conferences, can lead to the establishment of legal institutions. Yet the immediate question is what kind of institutions are the products of such soft power? It is too early to fully judge the success (or not) of CAJAC; as of the writing of this Article, CAJAC has not received many cases. This is not surprising given that it takes years for parties to write new forums into their contracts' dispute resolution clauses, and the COVID-19 pandemic has generally slowed business. Still, it is possible 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 promote Chinese and African state laws, Chinese and African languages, and Chinese and African arbitrators²⁴¹—CAJAC seems on the mark. Nonetheless, while it remains to be seen whether African parties will actually opt for CAJAC over alternatives such as the ICC or the LCIA, CAJAC at least gives them 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,²⁴² but rather, 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 issues pertaining to the enforcement of a CAJAC arbitral award. CAJAC then may fail to provide a neutral alternative to Chinese-African parties. The central issue is that if the awards are consistently rendered in China and Chinese courts have

241. See Interview with Kenyan advocate, *supra* note 169.

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

jurisdiction, then a host of consequences follow in terms of the arbitral proceedings.²⁴³ There are discussions to ensure that CAJAC centers include a pool of shared neutrals (that is, arbitrators who are neither from China nor from the African country that is a party to the dispute), but, 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,²⁴⁴ but rather a trans-regionalization 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. There is also the related problem, long-standing in the history of foreign investment more generally, that Chinese investors may receive “special treatment” in terms of enjoying dispute resolution mechanisms that are separate from run-of-the-mill courts. Potentially, public funding could be re-allocated from much-needed judicial budgets to “fancier” forums such as CAJAC. The consequences may ironically also hurt Chinese parties: Onshoring the disputes in China may work against their interests since African parties’ assets are most likely in their respective African state(s). In the event that 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.

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 Center’s 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

243. 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).

244. *See* Cutler, *supra* note 168.

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.²⁴⁵

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. The conference featured arbitrators from the Qinzhou Arbitration Commission (QAC) and the International Arbitration Court of the Kyrgyz Chamber of Commerce and Industry.²⁴⁶ Subsequently, Kyrgyz arbitrators were listed on both the QAC website and the BICAMC one.²⁴⁷ 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.²⁴⁸

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 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.²⁴⁹

245. *TCIAC Introduction*, TCIAC <https://www.tciac.net/about-1?lang=en> [<https://perma.cc/5XDQ-5JNX>].

246. *Shoujie “Yidaiyilu” Guoji Zhongcai Hezuo Luntan Ji “Shijie Zhongcai Jiaoliu Zhongxin” Jiepai Yishi 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*], QINZHOU SHI GUANGBO DIANSHITAI (钦州市广播电视台) [QINZHOU RADIO & TELEVISION STATION] (May 14, 2018), <http://www.gxqzxw.com/index.php?m=content&c=index&a=show&catid=37&id=7905> [<https://perma.cc/Z3KR-7D77>].

247. *See* Bishkek Int’l Ct. of Arb. for Mining and Com., *BICAMC Arbitrators*, BICAMC, <http://bicamc.kg/arbitration/bicamc-arbitrators-2/index.htm> [<https://perma.cc/A2AF-CKEJ>]; *see also*, VERITAS, *The Arbitrators of Veritas were Awarded the Certificates*, VERITAS L. AGENCY, <https://www.veritas.kg/en/news/vruchenie-sertifikatov-arbitram-veritas/> [<https://perma.cc/3HM3-5C9K>].

248. Telephone Interview with Chinese organizer of BICAMC (May 24, 2021).

249. *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).

The hallmark example is the China International Commercial Court (CICC), which has attracted no shortage of attention.²⁵⁰ Yet the court's 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.²⁵¹

In December 2020, the CICC announced that it had 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.²⁵² These additions have a strong signaling effect that China is building inclusive institutions for justice at the international level.²⁵³ In return, those included, whom Chinese refer to as "flower vases" (*huaping* 花瓶), claim international legitimacy for China's legal institutions.²⁵⁴ The CICC is China's legal surrealism in

250. See Gu, *supra* note 43; see also Matthew S. Erie, *The China International Commercial Court: Prospects for Dispute Resolution for the "Belt and Road Initiative,"* 22 ASIL INSIGHTS (Aug. 21, 2018), <https://www.asil.org/insights/volume/22/issue/11/china-international-commercial-court-prospects-dispute-resolution-belt> [https://perma.cc/926J-YHUF]; Sheng Zhang, *China's International Commercial Court: Background, Obstacles and the Road Ahead*, 11 J. INT'L DISP. 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*, 62 VA. J. INT'L L. 559 (2022).

251. Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国法官法) [PRC Judges Law] (promulgated by the NPC, 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).

252. *Name List of Proposed Expert Members of the International Commercial Expert Committee of the Supreme People's Court*, CHINA INT'L COM. CT. (Dec. 1, 2020), <http://cicc.court.gov.cn/html/1/219/208/210/1772.html> [https://perma.cc/AQ57-BDSD].

253. The external-facing function of the CICC is not its only purpose. See Susan Finder, *Brief Comments on the China International Commercial Court*, SUPREME PEOPLE'S CT. MONITOR (Aug. 1, 2021), <https://supremepeoplescourtmonitor.com/2021/08/01/brief-comments-on-the-china-international-commercial-court> [https://perma.cc/N9AV-2NRK] (observing that one focus of the CICC's work is to guide domestic PRC courts).

254. *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*

action: performance over substance, and performance that appears to have found its audience in many developing countries. Further, as CA-JAC and other examples show, the audience has, in many cases, become the performers.

All of this invites the question as to whether China's version of empire is sustainable. China's 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, and the spread of their languages and cultures,²⁵⁵ the Chinese empire does not benefit from the full assemblage of hard power (namely, military aggression) as did Anglo-American empires. Rather, the base of the Chinese empire is a subtler form of hard power: its economic governance, including its trade surplus, loans and collateral arrangements, sovereign guarantees, credit lines, and tied aid.²⁵⁶ 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,²⁵⁷ this Article draws attention to the separate deployment of transnational law that is mainly performative. In other words, it is not just that China lacks traditional indicators of hard power in the round (i.e., militarization and financialization) but, rather, China's soft power appears particularly active when compared to Anglo-American examples.

This use of transnational law, and in dispute resolution, in particular, appears distinct, and much of this has to do with the soft power cum legal surrealism effects of Chinese law. On the plus side, the Chinese approach partners with a much greater degree of equality than previous major economies. Whereas the Chinese "learned the law at

(*Promotional Video*)], CHINA INT'L COM. CT. (Dec. 9, 2020), <http://cicc.court.gov.cn/html/1/218/149/192/1885.html> [<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").

255. See Gallagher & Robinson, *supra* note 95, at 6.

256. ANNA GELPERN ET AL., HOW CHINA LENDS: A RATE LOOK INTO 100 DEBT CONTRACTS WITH FOREIGN GOVERNMENTS 2 (2021), https://docs.aid-data.org/ad4/pdfs/How_China_Lends_A_Rare_Look_into_100_Debt_Contracts_with_Foreign_Governments.pdf [<https://perma.cc/P258-JF7Q>]; see also Malik et al., *supra* note 58.

257. See Eric, *supra* note 6, at 56–57 (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).

gunpoint,”²⁵⁸ legal professionals from host states in Africa and elsewhere learn about Chinese law at conferences (virtualized in the course of the COVID-19 pandemic).²⁵⁹ 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 term, some attendees will become important intermediaries between the Chinese legal industry and that of their own country, further solidifying economic and political ties with China.

On the negative side, China’s particular approach to “legal cooperation” and building dispute resolution mechanisms for transnational law, in particular, shows inconsistencies. For one, given that China is the capital-exporter in most instances and, accordingly, may have bargaining power, the notion that such relationships are equal appears fallacious. The Party-State’s thick discourse of “win-win” tries to paper over this economic reality: Hence, the arbitration conferences and gala events as well as online analogues, websites, and social media all celebrate CAJAC.²⁶⁰ These are instances of what social critic Jean Baudrillard called “the precession of simulacra,” whereby simulation supersedes reality.²⁶¹ Even as CAJAC is a functioning institution in name only and has almost no caseload, still, it shall be acclaimed.

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

258. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 30 (1995). *But see* the quotation by the Kenyan lawyer, *supra* note 169.

259. *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) [NAT’L JUD. COLL.] (Apr. 29, 2022), https://mp.weixin.qq.com/s/mCWb1iLv2lI2Rvg_5ryl_g [<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).

260. *See, e.g.,* *Success of the First Nairobi Dispute Resolution Conference*, CHINA-AFR. JOINT ARB. CTR. SHANGHAI, http://www.shiac.org/CAJAC/index_E.aspx [<https://perma.cc/9EB9-H97Y>].

261. *See* Baudrillard, *supra* note 54, at 1.

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.²⁶² 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 the 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 surrealism. For the former, the more that “foreign experts” are used for purposes of 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. Establishment 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.²⁶³ 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. There are similar negative spillover effects in Hong Kong where two English judges resigned from the Hong Kong Court of Final Appeal, also in 2022, over concerns relating to the deterioration of the “values of political freedom, and freedom of expression.”²⁶⁴

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

262. See Erie, *supra* note 27, at 38.

263. Alison Ross, *Born Resigns from Expert Committee of Chinese Court*, GLOB. ARB. REV. (Jan. 24, 2022), <https://globalarbitrationreview.com/article/born-resigns-expert-committee-of-chinese-court> [<https://perma.cc/N487-PTUZ>] (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”).

264. *A Statement from Lord Reed, President of the Supreme Court, The Right Hon Lord Reed of Allermuir*, SUP. CT. (Mar. 30, 2022), <https://www.supremecourt.uk/news/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal-update-march-2022.html> [<https://perma.cc/X8KL-KPVJ>].

market and certainly COVID-19-related delays, the way that they have entered the market does not bode well. While CAJAC was announced with great fanfare in 2015 at FOCAC, interviewees confessed that many would-be users remain skeptical. 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, the 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 Africa, Kenya, 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 case law that interprets the relevant contracts.²⁶⁵ Also, different African jurisdictions may ultimately evolve different versions of CAJAC. For example, given the relative sophistication of the 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.²⁶⁶

CONCLUSION

Contrary to commonly held views that Chinese law and legal institutions do not play a role in China’s evolving global footprint,

265. See Interview with General Counsel of Chinese Oil Company, *supra* note 140.

266. See Repnikova, *supra* note 38, at 54.

based on the perspectives and experiences of interlocutors in the Global South and African states, this Article has provided some evidence 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. Chinese law may have its own attractive features (e.g., “efficiency”) and successfully align the interests of legal professionals in host states in Africa and elsewhere with those of the Chinese Party-State. Yet, alignment of interests and even co-establishing institutions based on those interests may be necessary but insufficient for market viability. Crucially, the purpose of “legal cooperation” may be more in messaging than the instrumental use of the institutions that cooperation begets.

On the one hand, China’s approach shows some inheritance from those of preceding capital-exporting states, namely, the US and the UK. In particular, China has sought to build out its ICA offerings for foreign parties. Yet, on the other hand, globalizing law under the Party-State, and specifically, that law’s soft power effects, also shows its own unique qualities.

The first of these is horizontal networks of transnational legal experts. While the Chinese 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 this is also a response to the limitations of China’s particular position in world history. China has not (yet) grown into a militarized and financialized global power and, it has risen economically into an international system of trade and investment that is structured through rules that China did not design. Those rules have recently been used by the architects of that system as weapons against China, while at the same time, the Party-State aspires to shape the existing rules and institutions to better suit its own geo-economic interests. Transnational networks may help.

Second and related, 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. While there are ample reports of the exploitation of African labor by Chinese-managed companies and discrimination against African migrants residing in China,²⁶⁷ for the most part, based on my

267. See, e.g., Socrates Mbamalu, *Plight of African Workers Under Chinese Employers*, AFR. LIBERTY (Sept. 27, 2018), <https://www.africanliberty.org/2018/09/27/plight-of-african-workers-under-chinese-employers> [<https://perma.cc/3FCD-YXQ2>] (citing labor violations by Chinese companies operating in Africa); Leigh Crout, *Economic Migration of African Migrants to China in COVID-19: Tensions and Transitions*, CHINA, L. & DEV. RSCH. BRIEF (Apr. 27, 2021), <https://cld.web.ox.ac.uk/files/finalrbleighacroutpdf> [<https://perma.cc/ZYZ9-UBHC>] (discussing how discrimination suffered by African migrants in Guangzhou has impacted China’s international relations).

interviews with African arbitration counsel and arbitrators, elite Chinese legal professionals have not demonstrated such biases. In this sense, Chinese-led “legal cooperation” shows progress over some analogous interactions between African and Euro-American practitioners. Attitudes of equality then have positive knock-on effects and foment more economic and legal collaboration, which may deepen over time. Likewise, students studying law in China and returning to their home states to pursue commercial or public law-related work involving China may, in the long term, produce more substantial infrastructural effects. Hence, “legal cooperation” may plant seeds that may bear fruit down the line.

At present, however, “legal cooperation”—its networks and institutions—remains handicapped by legal surrealism. China’s growing empire of law may be more an assemblage of images, placards, and discourses than a new legal infrastructure. In this, China’s outward-facing “legal cooperation” mirrors some of the problems of its domestic “popularization of law.” The Party-State’s ability to control the narrative becomes further attenuated when the message travels across borders, languages, and cultures. As a result, white elephants may be stillborn. 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, are nonetheless constantly being reworked and modified. China’s transnational legal orders are only just beginning, 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.²⁶⁸ 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,

268. These interviews are a subset 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.

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.”²⁶⁹ Conducting 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, multiple). My goal in using the qualitative data is not to generate a long-term ethnographic study of one site that produces transnational law.²⁷⁰ Instead, drawing from the anthropology of law, I adopt an “ethnographic attitude”²⁷¹ 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.²⁷²

269. Gökce Günel et al., *A Manifesto for Patchwork Ethnography*, SOC’Y FOR CULTURAL ANTHRO. (2022), <https://culanth.org/fieldsights/a-manifesto-for-patchwork-ethnography> [https://perma.cc/6RLG-TTNM].

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

271. Anya Bernstein, *Saying What the Law Is*, LAW & SOC. INQUIRY 1, 1 (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990976# [https://perma.cc/EKS8-GWA3] (defining the “ethnographic attitude” as taking objects of analysis seriously but not credulously).

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