

**CHINA'S LAW AND DEVELOPMENT:  
A CASE STUDY OF THE CHINA  
INTERNATIONAL COMMERCIAL COURT**

*Weixia Gu\**

**Abstract:** *Established in 2018, the China International Commercial Court (CICC) represents a major step of China's top-down effort in its capacity building in terms of its national dispute resolution infrastructure, judicial personnel, as well as the ambition to create a Belt and Road lex mercatoria and legal harmonization.*

*Through a close examination of the legal framework of the CICC, the paper argues that the establishment of the CICC has showcased a shift in the paradigm in the Beijing Consensus in the context of law and development via a more active top-down, institutional and hard-law approach. The article argues that the shift in paradigm does not mean that China is necessarily moving away from or abandoning the norm-based soft-law approach. Instead, it is likely that both Yin (soft power) and Yang (hard power) of China's law and development will be a complementary attempt in its overriding "Rule of Law China" (fazhi zhongguo) vision. It is further argued that the establishment of the CICC will represent a reshaping and readjustment of the Beijing Consensus amidst the tension between Beijing's Belt and Road Initiative and Washington's Indo-Pacific Strategy, signifying a more determined and proactive mindset in the ideological tug of war in the realm of legal architecture and the international rule of law discourse.*

**Keywords:** *China International Commercial Court; legal infrastructure; capacity building; paradigm shift; Beijing Consensus; Law and Development; China.*

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\* Associate Professor, University of Hong Kong Faculty of Law and Co-Chair, American Society of International Law Asia-Pacific Interest Group (2018-2021). I thank Matthew Eric, William Alford, Linda Mulcahy, Tom Ginsburg, Ji Li, Sida Liu, and other participants at the Oxford-HILJ-YJIL Virtual Symposium on "China and the International Legal Order" for comments on earlier drafts, and the Harvard International Law Journal editorial staff for their support. Research leading to this paper is funded by the Hong Kong Government Research Grants Council General Research Fund (17602218; 17609419). I thank Jacky Tam for helpful research assistance. The usual disclaimer applies.

## INTRODUCTION

Different from the Washington Consensus, an economic legal order which emphasizes privatization, marketization, liberal democracies, and rule of law,<sup>1</sup> the Beijing Consensus led by China focuses on state capitalism, capacity building, infrastructure development, and authoritarian legality.<sup>2</sup> Scholars have argued about a rising new Chinese economic legal order that is characterized by China's decentralized mode of trade governance through a pragmatic, incremental development policy grounded in soft law and norm-based networks.<sup>3</sup> This is shown in China's approach toward the Belt and Road Initiative (“BRI,” *yidaiyilu* 一帶一路)<sup>4</sup> as China largely relies on memorandums of understanding and soft law agreements.<sup>5</sup> There is no stringent cross-border legal framework or rigid regulatory structure in China's approach toward the BRI.

However, the Beijing Consensus is not a static concept. Indeed, traces of metamorphosis could be seen in the recent development of China's law and development, particularly in its hard-law route. China has recently established its top legal infrastructure, the China International Commercial Courts (“CICCs”) in Shenzhen and Xi'an respectively, as branches of the Supreme People's Court (“SPC”), for handling

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<sup>1</sup> For a succinct summary of the Washington Consensus, see Weitseng Chen, *Debating the Consensuses*, in *THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT* (Weitseng Chen ed., 2017). For a comparison between the Washington Consensus and the Beijing Consensus, see Gregory Shaffer & Henry Gao, *A New Chinese Economic Law Order?* 23 *J. INT'L ECON. L.* 607, 609–11 (2020).

<sup>2</sup> For a succinct summary of the Beijing Consensus, see Wenwei Guan, *Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective*, 12 *ASIAN J. COMP. L.* 115 (2017). See also Chen, *supra* note 1.

<sup>3</sup> See Shaffer & Gao, *supra* note 1; see also Heng Wang, *China's Approach to the Belt and Road Initiative*, 22 *J. INT'L ECON. L.* 29 (2019).

<sup>4</sup> See *Zhongguo Yi Dai Yi Lu Wang* (中国一带一路网) [The Belt and Road Portal], <https://www.yidaiyilu.gov.cn/> (last visited Mar. 6, 2021); see also *Belt and Road Basics*, H.K. TRADE DEV. COUNCIL, <https://beltandroad.hktdc.com/en/belt-and-road-basics> (last visited Mar. 6, 2021).

<sup>5</sup> Shaffer & Gao, *supra* note 1, at 614–16.

international commercial cases in the context of BRI dispute resolution.<sup>6</sup>

This paper aims to explore China's law and development in the international legal ordering through the prism of the CICC. It argues that the CICC establishment represents a major step in China's concerted top-down efforts in its legal infrastructure capacity building and represents a shift in the paradigm of the Beijing Consensus of law and development. The CICC, established in the SPC, is seen as a manifestation of the increasingly top-down and hard-law approach by China on legal institutional capacity building, and of the BRI governance. Following this introduction, in Section II, this paper examines the regulatory and structural framework of the CICC, followed by a close analysis of the salient features and takeaways from the CICC as a Chinese state-led international dispute resolution infrastructure. The CICC's major contributions to the hard-law track of the Beijing Consensus is supported by the following three pieces of evidence. First, the CICC shows China's top-down effort of national dispute resolution infrastructure capacity building through a one-stop, multi-tiered dispute resolution mechanism—a platform of litigation, arbitration, and mediation law-positive agglomeration trinity connecting the CICC and those accredited Chinese domestic top-tier arbitration and mediation institutions.<sup>7</sup> Second, the CICC's

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<sup>6</sup> Zhonggong zhongyang bangong ting, guowu yuan bangong ting yinfa guanyu jianli “yidai yilu” guoji shangshi zhengduan jie jue jizhi he jigou de yijian (中共中央办公厅、国务院办公厅印发《关于建立“一带一路”国际商事争端解决机制和机构的意见》[Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions], CHINALAWINFO DATABASE, <http://www.lawinfochina.com/display.aspx?id=28393&lib=law> (last visited Jan. 8, 2021). See also *infra* Part I.

<sup>7</sup> There are parallels between China's pursuit of a convergence between state-based litigation and the private actor-based ADR process and Singapore's system. This is very much like Singapore's state-led dispute resolution capacity building of Singapore International Commercial Court, SICC-SIAC-SIMC trio. The terminology of “Law-Positive Agglomeration Trinity” was inspired by Man Yip's observation in the Singapore context, where the author commented that the SICC, SIAC and SIMC (in tandem with the SIMI) are “the hallmarks of the nation's three-pronged strategy to become a premium dispute resolution hub through a comprehensive offering of dispute resolution services.” It also suggested that the Singapore's game plan was to

judicial personnel is comprised of both the Chinese domestic judges and the International Commercial Expert Committee (“ICEC”), which draw from both common law and civil law dispute resolution expertise. This represents a clear step toward legal innovation and experimentation. The ICEC is tasked with the mediation function and proof of foreign law, which is a fusion of hard- and soft-law approaches, under which foreign legal expertise can be indirectly absorbed through the mediation settlement procedures.<sup>8</sup> Third, the CICC reflects China’s ambition to create a BRI *lex mercatoria* and legal harmonization via the hard-law pathway, such as the CICC’s open court and open judgments.<sup>9</sup> In Section III, this Article reviews the existing literature on law and development, including the debate on whether a causal link exists between formal rational law and economic development. With the above literature in mind, the paper then proceeds to examine China’s recent path of law and development in light of the CICC establishment. Using the CICC as a case study, the author submits that the new CICC infrastructure may represent a shift in the paradigm of the Beijing Consensus. The paper argues that, with the new CICC in place, the Beijing Consensus that traditionally emphasizes strong Party leadership, state capitalism, and a norm-based soft-law regime may potentially move away from the reliance on soft-law norms for business certainty. Instead, the path for the Beijing Consensus is foreseeably moving toward a parallel fusion between a legal infrastructure with innovative and experimental institutional rules (“law-positive approach”),<sup>10</sup> and a norm-based network and non-legally binding soft-law

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“augment the menu of dispute resolution options for potential users.” Man Yip, *The Singapore International Commercial Court: The Future of Litigation*, 12 ERASMUS L. REV. 82, 83 (2019). See generally, Michael Hwang, *Commercial Courts and International Arbitration—Competitors or Partners?* 31 ARB. INT’L 193 (2015).

<sup>8</sup> See *infra* Part I.

<sup>9</sup> The CICC has been maintaining a comprehensive Sino-English bilingual website where all the CICC judgments and rulings are uploaded online. See *Judgments*, CHINA INT’L COM. CT., <http://cicc.court.gov.cn/html/1/219/211/223/index.html> (last visited 6 Mar. 2021); *Rulings*, CHINA INT’L COM. CT., <http://cicc.court.gov.cn/html/1/219/211/376/index.html> (last visited Mar. 6, 2021).

<sup>10</sup> Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT’L L.J. (forthcoming 2021), 16.

instruments and policies (“norm-based approach”).<sup>11</sup> As such, the CICC as a top-down, law-positive infrastructure, signifies a major step toward a dual-track model which places equal emphasis on soft-law instruments and hard-law capacity building of legal infrastructure. This exemplifies a change in the Beijing Consensus, which is especially relevant in light of the tensions between China and the United States.

As will be seen, such reshaping and readjustment of the Chinese developmental model may be analyzed in light of the overall framework of the global geopolitical power dynamics. Amidst the increasing ideological tug of war between China's Beijing Consensus and the United States' Washington Consensus,<sup>12</sup> the top-down capacity building effort as shown in the establishment of the CICC may serve as a turning point in the Chinese model of legal and economic development.<sup>13</sup> In the tug of war between the BRI development led by China and the Indo-Pacific Strategy<sup>14</sup> led by the United States, it is argued that the CICC is also a complementary attempt in the “Rule of Law China” (*fazhi zhongguo* 法治中国) vision.<sup>15</sup> Such capacity building further signifies a more proactive approach adopted by China in the international legal order discourse.

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<sup>11</sup> *Id.*

<sup>12</sup> See Chen, *supra* note 1; Shaffer & Gao, *supra* note 1; Guan, *supra* note 2. See also John Ohnesorge, *East Asia and the Study of Law and Development*, in ROUTLEDGE HANDBOOK OF ASIAN LAW 41 (Christoph Anton ed., 2017); Randal Peerenboom & Bojan Bugarcic, *The Emerging Post Washington, Post Beijing Consensus: Prospects and Pitfalls*, 19 UCLA J. INT'L L. & FOREIGN AFF. 89 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2277427](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2277427).

<sup>13</sup> Guan, *supra* note 2, at 115–39.

<sup>14</sup> See U.S. DEP'T OF STATE, A FREE AND OPEN INDO-PACIFIC: ADVANCING A SHARED VISION (Nov. 4, 2019), <https://www.state.gov/wp-content/uploads/2019/11/Free-and-Open-Indo-Pacific-4Nov2019.pdf>; see also U.S. NAT'L SECURITY COUNCIL, UNITED STATES STRATEGIC APPROACH TO THE PEOPLE'S REPUBLIC OF CHINA (May 26, 2020).

<sup>15</sup> See Larry A. DiMatteo, 'Rule of Law' in China: *The Confrontation of Formal Law with Cultural Norms*, 51 CORNELL INT'L L.J. 391 (2018). 393; see also King Fung Tsang, *China's Rule of Law from a Private International Law Perspective*, 47 GA. J. INT'L & COMP. L. 93 (2018); Henrik Anderson, *Rule of Law Gaps and the Chinese Belt and Road Initiative: Legal Certainty for International Businesses?*, in A LEGAL ANALYSIS OF THE BELT AND ROAD INITIATIVE 103 (Giuseppe Martinico & Xueyan Wu eds., 2020).

## I. THE CHINA INTERNATIONAL COMMERCIAL COURT ("CICC")

### A. Overview

China's Central Government, the State Council, released in June 2018 the *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions* (the "Mechanism and Institutions Opinion").<sup>16</sup> China's top leadership stressed the need to build institutions that can provide the "Chinese solution" (*zhongguo fang'an* 中国方案) to the dispute resolution needs arising out of the BRI development context and to account for the multiplicity of laws and legal cultures across the BRI jurisdictions.<sup>17</sup> The solution suggested is to build a Chinese International Commercial Court and to implement a "diversified" dispute resolution system to satisfy the range of disputes that the BRI will produce. "Diversification" here is taken to mean the use of litigation, arbitration, and mediation altogether to resolve international commercial disputes.<sup>18</sup>

Established in June 2018, days after the Mechanism and Institutions Opinion was published, the CICC was established as a pair of specialized international commercial courts based in Shenzhen, Guangdong Province (the "first CICC") and Xi'an, Shaanxi Province (the "second CICC"). The two localities are of strategic significance—Shenzhen, being the maritime, financial, and tech hub of Southern China, is premised on attracting cases from the Maritime-based Silk Road in the BRI system (the "21st Century Maritime Silk Road" 二十一世纪海上丝绸之路), whereas Xi'an is the

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<sup>16</sup> Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions, *supra* note 6.

<sup>17</sup> *Id.*

<sup>18</sup> Wenxin Qiao (乔文心), *Chuangxin jizhi jigou gongzheng gaoxiao bianli jieju guoji shangshi jiufen—renmin fayuan fuwu baozhang "yidai yilu" jianshe gongzuo zongshu* (创新机制机构 公正高效便利解决国际商事纠纷——人民法院服务保障 "一带一路" 建设工作综述) [Innovative Mechanism Institutions Are Fair, Efficient and Convenient to Resolve International Commercial Disputes—A Summary of the Construction of the "Belt and Road"], CHINA CT. NETWORK (Mar. 5, 2019), <https://www.chinacourt.org/article/detail/2019/03/id/3746817.shtml>.

“starting point” of the Ancient Silk Road (the “Silk Road Economic Belt” 丝绸之路经济带) and is expected to take on disputes arising from the land-based BRI Economic Belt.<sup>19</sup>

The CICC is governed by the *Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court* (the “CICC Provisions”).<sup>20</sup> Meanwhile, the Fourth Civil Division of China's SPC in Beijing, which specializes in trials of international commercial disputes in China, is responsible for guidance and coordination of the two CICCs.<sup>21</sup>

The CICC brands itself as a “one-stop shop” platform for diversified dispute resolution.<sup>22</sup> It includes experimental and innovative procedural rules which seek to incorporate alternative dispute resolution (“ADR”) mechanisms into the conventional litigation process conducted before the CICC. Under this vision, litigation, arbitration, and mediation are blended and integrated to facilitate the resolution of international commercial disputes brought before the CICC.<sup>23</sup> To illustrate, the SPC issued the *Notice of the SPC on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the “One-stop” Diversified International Commercial Dispute Resolution Mechanism* (the “One-stop Shop Notice”).<sup>24</sup> Under this

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<sup>19</sup> Janet Walker, *Specialised International Courts: Keeping Arbitration on Top of its Game*, 85 ARB. 2, 8 (2019).

<sup>20</sup> Zuigao renmin fayuan guanyu sheli guoji shangshi fating ruogan wenti de guiding (fa shi [2018] 11 hao) (最高人民法院关于设立国际商事法庭若干问题的规定) (法释 [2018] 11号) [Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court] (promulgated by the Sup. People's Ct., June 25, 2018, effective July 1, 2018), [hereinafter CICC Provisions], art. 1, <http://cicc.court.gov.cn/html/1/219/208/210/817.html>.

<sup>21</sup> Julien Chaisse & Xu Qian, *Conservative Innovation: The Ambiguities of the China International Commercial Court*, 115 AJIL UNBOUND 17, 21 (2021); see also Wei Cai & Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 68 INT'L & COMP. L. Q. 869 (2019).

<sup>22</sup> *Id.*; see also Sheng Zhang, *China's International Commercial Court: Background, Obstacles and the Road Ahead*, 11 J. INT'L DISP. SETTLEMENT 150 (2020).

<sup>23</sup> *Id.* at 161.

<sup>24</sup> Zuigao renmin fayuan bangong ting guanyu queding shoupi naru “yi zhan shi” guoji shangshi jiufen duoyuan hua jie jue jizhi de guoji shangshi zhongcai ji tiaojie jigou de tongzhi (最高人民法院办公厅关于确定首批纳入“一站式”国际商事纠纷多元化解决机制的国际商事仲裁及调解机构的通知) [Notice of the Supreme

Notice, parties are entitled to opt for mediation before or during the CICC trial processes.

To incubate the one-stop dispute resolution platform, the CICC has established strong linkages with China's top mediation and arbitration institutions that allow parties to choose various ADR options before or during the litigation process. The CICC One-Stop Shop Notice endorsed two of the most experienced international commercial mediation institutional providers in China to work with its one-stop dispute resolution platform. They are the Mediation Center of the China Council for the Promotion of International Trade ("CCPIT") and the Shanghai Commercial Mediation Center ("SCMC"). If disputing parties have reached a mediation settlement agreement under CCPIT or SCMC, the CICC may either (i) issue a "conciliation statement" or (ii) make a "judgment based on the mediation agreement" if it is requested by the parties.<sup>25</sup> This conversion of the institutional mediation settlement agreement into the CICC judgment is unprecedented and is one of the most innovative features in the CICC. It evidences the law-positive approach in the Beijing Consensus of adopting experimental and innovative rules in formal legal institutions.<sup>26</sup>

Moreover, the One-Stop Shop Notice endorsed and accredited several leading Chinese arbitration institutions, which specialize in international commercial dispute resolution so that parties who choose to arbitrate under the auspices of an endorsed arbitration institution may directly apply to the CICC for judicial assistance in arbitration. This includes the issuance of interim measures of protection (preservation of evidence, assets, or acts).<sup>27</sup> An application may also be made to the CICC for setting aside or enforcing

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People's Court on Inclusion of the First Group of International Commercial Arbitration and Mediation Institutions in the "One-stop" Diversified International Commercial Dispute Resolution Mechanism], CHINA INT'L COM. CT. (Dec. 5, 2018) [hereinafter One-stop Shop Notice], <http://cicc.court.gov.cn/html/1/219/208/210/1144.html>.

<sup>25</sup> *Id.* para. 3.

<sup>26</sup> The innovative features of the CICC are to be further explored in subsequent sections; *see also* Erie, *supra* note 10.

<sup>27</sup> One-stop Shop Notice, *supra* note 24, para. 4.

the arbitral awards after the rendering of the same by the accredited arbitration institutions. These institutions include the top-tier arbitration institutions in the Chinese institutional arbitration market<sup>28</sup> such as the China International Economic and Trade Arbitration Commission (“CIETAC”), Shenzhen Court of International Arbitration (“SCIA”), Beijing Arbitration Commission (“BAC”), Shanghai International Arbitration Center (“SHIAC”), and China Maritime Arbitration Center (“CMAC”).

### B. *Regulatory and Structural Framework*

The legal basis for the establishment of the CICC is the CICC Provisions, officially a judicial interpretation issued by the SPC on June 27, 2018. The CICC Provisions are the primary regulatory instrument setting out the framework for the specialized court, including its jurisdiction, the threshold of “international and commercial” cases, the constitution of judges, the establishment of the International Commercial Expert Committee, the governing law, and the language of proceedings.<sup>29</sup>

In addition to the CICC Provisions, which are the empowering instrument of the CICC, the SPC issued a number of other instruments at the end of 2018, such as the *Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)* (“CICC Procedural Rules”)<sup>30</sup> and the *Working Rules of the*

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<sup>28</sup> For a discussion on top-tiered Chinese arbitration institutions and the institutional arbitration market, see Weixia Gu, *Piercing the Veil of Arbitration Reform in China: Promises, Pitfalls, Patterns, Prognoses and Prospects*, 65 AM. J. COMP. L. 799, 820–29 (2017).

<sup>29</sup> CICC Provisions, *supra* note 20.

<sup>30</sup> Zuigao renmin fayuan bangong ting guanyu yinfa zuigao renmin fayuan guoji shangshi fating chengxu guize (shixing) de tongzhi (最高人民法院办公厅关于印发《最高人民法院国际商事法庭程序规则（试行）》的通知) [Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)], CHINA INT'L COM. CT (Dec. 5, 2018) [hereinafter CICC Procedural Rules], <http://cicc.court.gov.cn/html/1/219/208/210/1183.html>.

*International Commercial Expert Committee of the SPC (For Trial Implementation)* (“ICEC Working Rules”).<sup>31</sup>

The CICC Procedural Rules, effective as of December 5, 2018, lay down the general civil procedural rules applicable to this niche court. They elaborate on the procedural technicalities for the filing of cases, service of documents, pre-trial mediation, trial, and enforcement concerned with the CICC.<sup>32</sup> Special rules are designed to support the incorporation of the ADR elements into the CICC litigation framework, such as the linkage between endorsed domestic arbitration institutions and the CICC for the application of interim measures of protection and setting aside or enforcement of arbitral awards.<sup>33</sup>

Judges to be appointed to the CICC are required to be experienced in trial work, familiar with international treaties, international usages, international trade and investment practices, and capable of using both Chinese and English proficiently as working languages.<sup>34</sup> As of January 2021, there are altogether sixteen judges appointed to the CICC bench, all of whom are Mainland Chinese, selected from senior judge (*gaojifaguan* 高级法官) rank, working in the SPC for a considerable number of years and familiar with international commercial law.<sup>35</sup> Nine out of the sixteen CICC judges have either visited or studied at a university outside Mainland China.<sup>36</sup> However, the introduction of foreign judges has been prohibited by Chinese law. China’s Judges Law requires a

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<sup>31</sup> *Zuigao renmin fayuan bangong ting guanyu yinfa zuigao renmin fayuan guoji shangshi zhuanjia weiyuan hui gongzuo guize (shixing) de tongzhi* (最高人民法院办公厅关于印发《最高人民法院国际商事专家委员会工作规则（试行）》的通知) [Working Rules of the International Commercial Expert Committee of the Supreme People’s Court (For Trial Implementation)], CHINA INT’L COM. CT (Dec. 5, 2018) [hereinafter ICEC Working Rules], <http://cicc.court.gov.cn/html/1/219/208/210/1146.html>.

<sup>32</sup> CICC Procedural Rules, *supra* note 30, chs. 2–6.

<sup>33</sup> *Id.*, at arts. 34–35.

<sup>34</sup> CICC Provisions, *supra* note 20, art. 4.

<sup>35</sup> *See Judges*, CHINA INT’L COM. CT.,

<http://cicc.court.gov.cn/html/1/219/193/196/index.html> (Dec. 25, 2020).

<sup>36</sup> *Id.*

judge in China to be of Chinese nationality.<sup>37</sup> Faced with this obstacle, the CICC has innovatively introduced international expertise through its niche product, the International Commercial Expert Committee (“ICEC”).

There are two major provisions on the establishment of the ICEC: first, the CICC Provisions,<sup>38</sup> and second, the Working Rules of the ICEC.<sup>39</sup> The CICC Provisions provide that an ICEC is established to create a “one-stop” international commercial dispute resolution mechanism at the CICC.<sup>40</sup>

The ICEC Working Rules, effective on the same date as the CICC Procedural Rules (December 5, 2018), set out the composition as well as the major powers and duties enjoyed by the members of the ICEC. Notably, the ICEC is composed of international law experts of both Chinese and foreign nationalities.<sup>41</sup> As of January 2021, of all the fifty-five members appointed to the ICEC by the SPC, twenty are Chinese domestic experts and thirty-five are experts from outside Mainland China (including Hong Kong, Macau, and Taiwan).<sup>42</sup> With respect to professional background, the experts are mainly drawn based on their academic, judicial, litigator, and arbitrator experiences in international commercial law, whereas pure mediation experts (whether domestic or foreign) are still rare.<sup>43</sup> Regarding geographical coverage, in the latest round of appointments taking place in December 2020, the SPC for the first time appointed three Singaporean<sup>44</sup> and four African<sup>45</sup> jurists to its ICEC. Notably,

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<sup>37</sup> See Judges Law of the People's Republic of China, art. 12(1) (promulgated by Standing Comm. Nat'l People's Cong., Feb. 28, 1995, most recently amended by Standing Comm. Nat'l People's Cong., Apr. 23, 2019, effective Oct. 1, 2019); see also Cai & Godwin, *supra* note 21, at 900.

<sup>38</sup> CICC Provisions, *supra* note 20.

<sup>39</sup> ICEC Working Rules, *supra* note 31.

<sup>40</sup> CICC Provisions, *supra* note 20, art. 11.

<sup>41</sup> ICEC Working Rules, *supra* note 31, art. 2.

<sup>42</sup> See *Experts Directory*, CHINA INT'L COM. CT., <http://cicc.court.gov.cn/html/1/219/235/237/index.html> (Jan. 5, 2020).

<sup>43</sup> *Id.*

<sup>44</sup> K.C. Vijayan, *Singapore judge among experts appointed to serve China's commercial court*, THE STRAITS TIMES (Dec. 11, 2020), <https://str.sg/JaTS>.

<sup>45</sup> Jevans Nyabiage, *China's top court appoints four Africans to legal team for handling belt and road disputes*, SOUTH CHINA MORNING POST (Dec. 14, 2020), <https://www.scmp.com/news/china/diplomacy/article/3113694/chinas-top-court->

these international law experts are expected to help deal with legal issues related to China's global infrastructure development program arising out of China's high-profile BRI development.

Apart from providing advisory opinions on specialized legal issues concerning international treaties, international commercial rules, and the finding and application of foreign laws involved in the CICC cases,<sup>46</sup> the ICEC members are empowered to preside over mediations of the international commercial cases of the CICC and, hence, to issue mediation settlement agreements.<sup>47</sup> The mediation power of the ICEC is an integral part of the CICC's ambition to set up a "One-stop Multi-tier Dispute Resolution Platform" envisaged by the SPC and CICC Provisions, and with the promotion of arbitration-mediation as one of its top priorities.<sup>48</sup> Moreover, this mediation power is a ground-breaking feature of the ICEC in the sense that if a mediation settlement agreement presided over by an ICEC member is reached between the disputing parties, the CICC may issue a judgment based on such ICEC mediation settlement agreement.<sup>49</sup>

As such, the "fossilization" into a CICC judgment via mediation settlement agreements can come from two different mediation routes: (i) mediations provided by CICC's endorsed Chinese mediation institutions,<sup>50</sup> and (ii) mediations presided by the ICEC members entrusted by the CICC. Between the two routes, the actual impact of the latter is more far-reaching, as the foreign members and international legal expertise of the ICEC are indirectly allowed to get involved in "CICC judgment writing" through the mediation mechanism, which is equivalent to "semi-adjudication."<sup>51</sup> Given that most of the ICEC members come from an adjudicative and advocate

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<sup>46</sup> ICEC Working Rules, *supra* note 31, art. 3(2).

<sup>47</sup> *Id.* arts. 3(1), 9–13.

<sup>48</sup> Gu, *supra* note 28, at 120.

<sup>49</sup> ICEC Working Rules, *supra* note 31, art. 13.

<sup>50</sup> One-stop Shop Notice, *supra* note 24, para. 3; *see discussion supra* Part I.A.

<sup>51</sup> Cai & Godwin, *supra* note 21, at 880. *See generally* Zhang, *supra* note 22, at 155.

background, the ICEC can be regarded as a major breakthrough in the internationalization of the Chinese legal framework and judicial expertise. This is by far the most liberal feature of the CICC in terms of internationalization and may to some extent offset the concerns and skepticism as to its lack of international elements (particularly relating to foreign judges). We shall further explore the function and salient features of the ICEC in the section below.

Structurally, the CICC is within the hierarchy of the Chinese domestic judiciary. It forms part of the SPC of China where both the first CICC in Shenzhen and the second CICC in Xi'an are permanent branches of the SPC.<sup>52</sup> Flowing from this structure, it is ensured that the caseload of the CICC can be guaranteed via direct referrals from the SPC in Beijing. In fact, the case flow under the CICC Provisions includes "other international commercial cases that the Supreme People's Court considers appropriate to be tried by the CICC."<sup>53</sup> Comparative studies show that the feature of "rooting" the international commercial courts ("ICCs") within the domestic judiciary is similarly found in other jurisdictions, such as in the Singapore International Commercial Court ("SICC") and some European continental international commercial courts.<sup>54</sup> In other jurisdictions, the international commercial court forms a standalone court isolated from the domestic legal framework, such as the Dubai International Financial Centre Court ("DIFC Court") and the Brussels International Business Court ("BIBC") in Belgium.<sup>55</sup>

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<sup>52</sup> Cai & Godwin, *supra* note 21, at 872, 875.

<sup>53</sup> CICC Provisions, *supra* note 20, art. 2(5).

<sup>54</sup> See generally Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 60 VA J. INT'L L. 225 (2020); Pamela K. Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020). Examples of European continental ICCs which are structured within the domestic judiciary include the Chamber for International Commercial Disputes of the Frankfurt Regional Court in Germany and the International and European Commercial Chamber of the Paris Court in France.

<sup>55</sup> Stephan Wilske, *International Commercial Courts and Arbitration—Alternatives, Substitutes or Trojan*

*Horse?* 11 CONTEMP. ASIA ARB. J. 153, 171–72 (2018); Bookman, *supra* note 54, at 243.

The CICC is a first-instance court but its judgments are final.<sup>56</sup> The principle of “First Instance Being Final” (*yishenzhongshen* 一审终审) is consistent with the practice of adjudicating civil and commercial cases in the SPC when exercising its first-instance jurisdiction.<sup>57</sup>

On jurisdiction, Article 2 of the CICC Provisions prescribes the following five types of cases:<sup>58</sup>

- (1) First instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People’s Court according to Article 34 of China’s Civil Procedure Law, with an amount in dispute of at least ¥300 million (referred to as “Parties’ Choice of Court”);
- (2) First instance international commercial cases that are subject to the jurisdiction of the provincial-level higher people’s courts, which nonetheless consider that the cases should be tried by the Supreme People’s Court for which permission has been obtained (referred to as “Referral from Provincial-level Higher People’s Courts”);
- (3) First instance international commercial cases that have a nationwide significant impact (referred to as “Nationwide Significant Impact Cases”);
- (4) Cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards according to Article 14 of

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<sup>56</sup> Cai & Godwin, *supra* note 21, at 897.

<sup>57</sup> See Civil Procedure Law of the People’s Republic of China, art. 20 (promulgated by Nat’l People’s Cong., Apr. 9, 1991, most recently amended for the 3rd time by Standing Comm. Nat’l People’s Cong., June 27, 2017).

<sup>58</sup> CICC Provisions, *supra* note 20, art. 2.

these Provisions (referred to as “Review of Arbitral Awards”); and

- (5) Other international commercial cases that the Supreme People’s Court considers appropriate to be tried by the International Commercial Court (referred to as “Direct Case Referral from the SPC”).

As seen from the above, two referral routes of the case flow can be found in the CICC framework. One is referrals from China’s Provincial-level Higher People’s Courts<sup>59</sup> and the other is the direct case referrals from the SPC.<sup>60</sup> This referral arrangement echoes the Singapore approach, where the Singapore High Court also has the power of direct referrals from itself to the Singapore International Commercial Court with or without the parties’ consent provided that it is considered to be more appropriate for the case to be heard in the SICC.<sup>61</sup> This could ensure a steady caseload for the CICC.

Additionally, parties can submit to the jurisdiction of the CICC by inserting a choice of court agreement clause under a contract if the disputed sum is at least ¥300 million.<sup>62</sup> Caution must be exercised for this jurisdictional route since Article 2(1) of the CICC Provisions cites to Article 34 of China’s Civil Procedure Law (“CPL,” most recently amended in 2017),<sup>63</sup> which further imposes a “connection with China” requirement. Under Article 34 of the CPL, it is stated that:

“The parties to a contractual dispute or any other property dispute may agree in writing to be subject to

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<sup>59</sup> *Id.* art 2(2).

<sup>60</sup> *Id.* art 2(5).

<sup>61</sup> See Singapore Supreme Court of Judicature Act, ch. 322 § 80 Ord. 110 r.12; see also Man Yip, *The Resolution of Disputes Before the Singapore International Commercial Court*, 65 INT’L & COMP. L.Q. 439, 461 (2016).

<sup>62</sup> CICC Provisions, *supra* note 20, art. 2(1).

<sup>63</sup> See Civil Procedure Law of the People’s Republic of China (promulgated by Nat’l People’s Cong., Apr. 9, 1991, most recently amended for the 3rd time by Standing Comm. Nat’l People’s Cong., June 27, 2017) [hereinafter China’s CPL], [http://www.moj.gov.cn/Department/content/2018-12/25/357\\_182594.html](http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html).

the jurisdiction of the people's court at the place having connection with the dispute, such as where the defendant is domiciled, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located, etc., provided that such agreement does not violate the provisions of the Law regarding court-level jurisdictions and exclusive jurisdictions.”<sup>64</sup>

Since China’s CPL requires a “connection to China with the dispute” before the dispute can be tried by a Chinese people’s court, the parties’ choice of court agreement would only be valid and enforceable if it has actual connections with China such that (i) the domicile of the plaintiff or the defendant is in China, (ii) the contract is signed or performed in China, or (iii) the subject matter of the dispute is located in China.

As for judges, the CICC hears cases with a collegial panel consisting of three or more judges. A split judgment and minority opinion should be clearly stated in the judgment.<sup>65</sup> This can be considered as a major breakthrough given that minority opinions are not common and are generally not recorded in China.<sup>66</sup> However, it remains to be seen to what extent the Chinese judges have adapted to the delivery of minority judgments. As of January 2021, the CICC has delivered only one judgment<sup>67</sup> and three rulings,<sup>68</sup> all of which are unanimous decisions. As mentioned, the judges in Chinese courts must be of Chinese nationality.<sup>69</sup> It follows that no foreign or international judges can be appointed to sit on the CICC bench. The ICEC is thus regarded as a most courageous mitigating endeavor to bring in international expertise within China’s permissible legislative and judicial framework.

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<sup>64</sup> *Id.* art. 34.

<sup>65</sup> CICC Provisions, *supra* note 20, art. 4.

<sup>66</sup> Cai & Godwin, *supra* note 21, at 880.

<sup>67</sup> Supreme People’s Court of the People’s Republic of China Civil Judgment, <http://cicc.court.gov.cn/html/1/219/211/223/1558.html> (last visited Mar. 6, 2021).

<sup>68</sup> For the three rulings, see Supreme People’s Court of the People’s Republic of China Civil Rulings, <http://cicc.court.gov.cn/html/1/219/211/376/index.html> (last visited Jan. 6, 2021).

<sup>69</sup> Judges Law of the People’s Republic of China, *supra* note 37.

For language, generally speaking, a Chinese court trying cases involving foreign entities is required to use the written and spoken language commonly used in China, i.e., Mandarin Chinese.<sup>70</sup> In the context of the CICC and in order to accommodate international dispute resolution needs, a new arrangement allows written evidentiary submissions to be made in English, for which a Chinese translation would not be required provided that the opposing party consents.<sup>71</sup>

The default law to be applied to the CICC proceedings is Chinese law. However, parties may choose a foreign law as their governing law by agreement.<sup>72</sup> In this respect, a connection can be drawn to the ICEC, under which the expert members are empowered to provide an advisory opinion on the legal position (proof and finding) of foreign laws in the adjudication of the CICC cases.<sup>73</sup> As such, the CICC can largely benefit from the legal expertise of the ICEC even when the governing law is not Chinese law.

### C. *Salient Features*

One cannot deny that there is room for improving the element of internationalization of the CICC. Scholars have argued that “internationalization, professionalism and transparency” should be the priority of the CICC in order to truly compete in the global commercial dispute resolution market.<sup>74</sup> At the same time, the experimental and innovative nature of the CICC reflects a more determined and proactive mentality adopted by the Chinese government in the capacity building of its legal infrastructure and legal hubs. This is particularly true in light of the “Rule of Law China” campaign,<sup>75</sup> the launch

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<sup>70</sup> China's CPL, *supra* note 63, art. 262.

<sup>71</sup> CICC Provisions, *supra* note 20, art. 9(2).

<sup>72</sup> *Id.* art. 7; *see also* Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (promulgated by Standing Comm. Nat'l People's Cong., effective Apr. 1, 2011), art. 3.

<sup>73</sup> ICEC Working Rules, *supra* note 31, art. 3(2).

<sup>74</sup> *See, e.g.*, Cai & Godwin, *supra* note 21, at 901.

<sup>75</sup> Young Nam Cho, *Governing the Country according to the Law: China's Rule of Law Policy as Political Reform*, 21 J. INT'L & AREA STUD. 21 (2014); Young Nam Cho, *Law Dissemination Campaign in China: The Origin of Chinese 'Rule of Law' Policy*, 21 J. INT'L & AREA STUD. 27 (2014).

of the ambitious BRI,<sup>76</sup> as well as the overall global ideological tug of war between the Washington Consensus and the Beijing Consensus.

After examining the regulatory and structural framework of the CICC, it is appropriate to now highlight three key features of the CICC development:

First, the ICEC can be regarded as emblematic of the “paradigm shift” of the Beijing Consensus as well as a major breakthrough in the Chinese legal system in light of the existing statutory impediments found in, for example, China’s Judges Law, which allows only Mainland Chinese nationals to sit on the Chinese judicial benches. This reflects a more proactive, experimental, and innovative mentality adopted by the Chinese government and judiciary in seeking to incorporate overseas judicial expertise so as to compete in the global dispute resolution market. As mentioned, members of the ICEC, according to the CICC Provisions, will provide foreign legal expertise to engage in the CICC mediation work, and the outcome of which could be turned into a CICC judgment equivalent to “semi adjudication.” One may argue that there has been a lack of diversity in nationality, professional background, and geography in the composition of the existing CICC bench. However, the ICEC expert members draw from both the common law and civil law legal system, as well as from both the Eastern, Western and African legal cultures. They represent a good source of legal expertise, which may assist the Chinese judges on the CICC bench in deciding complex disputes involving multiple jurisdictions, especially those arising out of the BRI context.

The CICC’s innovation has attracted leading jurists and practitioners throughout the world.<sup>77</sup> In the latest round of the

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<sup>76</sup> Weixia Gu, *China’s Belt and Road Development and A New International Commercial Arbitration Initiative in Asia*, 51 VAND. J. TRANSNAT’L L. 1305 (2018).

<sup>77</sup> See *Experts Directory*, *supra* note 42. Appointees of the ICEC include Sir William Blair (formerly the Head Judge in charge of the Commercial Court in England and Wales), Justice Anselmo Reyes (currently International Judge at the Singapore International Commercial Court and former Justice of the Hong Kong High Court in charge of the Commercial and Admiralty List as well as Construction and Arbitration List), Justice Steven Chong (Justice of the Singapore Court of Appeal,

ICEC member appointment, international law specialists from Uganda, Nigeria, Algeria, and Egypt were selected to join the ICEC to expand the CICC's expertise of international dispute resolution in BRI-related African regions.<sup>78</sup> Moreover, it is welcome to see that mediation settlements reached between parties at the pre-trial stage of the CICC litigation can be subsequently converted into a CICC judgment. This is comparable to the DIFC Court's mechanism in converting monetary DIFC court judgments into arbitral awards via its collaboration with the London Court of International Arbitration.<sup>79</sup>

Second, it is also notable that the CICC embraced the concept of a "one-stop shop" for international commercial dispute resolution, which incorporates a tripartite relationship consisting of litigation, arbitration, and mediation. The notion of a one-stop shop echoes the concept of a "multi-door courthouse" coined by the late Harvard professor Frank Sander, who envisaged future courts providing a "menu of options" for dispute resolution back in the 1970s.<sup>80</sup> The incorporation of ADR procedures generally represents a "convergence" between state-based litigation and the private actor-based ADR process. In Singapore, the trio of the SICC, the SIAC (Singapore International Arbitration Centre), and the SIMC (Singapore International Mediation Centre) could unleash the power of legal agglomeration by taking advantage of the synergy and coordination between various state-based legal institutions with differentiated functions.<sup>81</sup> Similar top-down attempts have been seen in the structuring of the CICC,

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the highest court in Singapore), Gabrielle Kaufmann-Kohler (President of International Council for Commercial Arbitration and Professor of University of Geneva), George Bermann (Professor and Director of Columbia Law School Center for International Commercial and Investment Arbitration), and Gary Born (Chair of the International Arbitration Group of Wilmer Hale and President of the Singapore International Arbitration Centre Court of Arbitration).

<sup>78</sup> Nyabiage, *supra* note 45.

<sup>79</sup> Walker, *supra* note 19, at 4.

<sup>80</sup> The concept of a "multi-door courthouse" was coined by the late Harvard Professor Frank Sander back in the 1970s. See Erie, *supra* note 54, at 229 (citing Frank E.A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 84 (Leo A. Levin & Russell R. Wheeler eds., 1979)).

<sup>81</sup> Hwang, *supra* note 7, at 197.

where an endorsed list of Chinese leading arbitration and mediation institutions has been adopted. This consists of top-notch Chinese domestic international commercial dispute resolution institutions. It remains to be seen how this synergy generated from the “Trinity of Agglomeration” would potentially provide additional support for China’s reputation as a dispute resolution hub.

Third, the guaranteed caseload of the CICC is also a notable feature. The CICC’s case flow is ensured by the internal case referral path either from China’s SPC or any other provincial-level High Court.<sup>82</sup> Such arrangement ensures a stable volume of cases especially at its initial stage of launching. This set-up is presumably inspired by the SICC, which, as a branch of the Singapore High Court, also takes on cases referred from its mother court.<sup>83</sup>

## II. SIGNIFICANCE OF THE CICC IN LAW AND DEVELOPMENT STUDY

### A. *Overview of Law and Development Scholarship*

A close examination of the structure and framework of the CICC serves as a good window to understand the overall law and development (“L&D”) trend in China. This paper aims to explore the latest trend and path of China’s L&D by using the CICC legal infrastructure as a case study. Before delving into the discussion of L&D in China, we shall first briefly set out a summary of the existing conventional L&D scholarship—predominantly based on the works of Max Weber;<sup>84</sup> Douglass

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<sup>82</sup> CICC Provisions, *supra* note 20, at arts. 2(2), 2(5).

<sup>83</sup> Wilske, *supra* note 55, at 166; *see also* Man Yip, *The Resolution of Disputes Before the Singapore International Commercial Court* 65 INT’L & COMP. L.Q. 439, 461.

<sup>84</sup> David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 729 (1972).

North;<sup>85</sup> and La Porta, Lopez-De-Silanes, Shleifer and Vishny (“LLSV”) in the West.<sup>86</sup>

1. *Traditional Neoclassical Approach in Western L&D: Law as the Cause for Economic Development*

The pioneering work for L&D scholarship can arguably be traced to the legal-sociologist Max Weber, who argued that a causal link exists between a “formal rational law” and economic development.<sup>87</sup> Weber’s thesis that a system of formal rational law is the cause contributing to economic development has been characterized as the first wave of L&D movement.<sup>88</sup> The Weberian notion of L&D argues that a system of law with “formality” (i.e., the “criteria of decision are intrinsic to the legal system” as opposed to being determined by an outcome-oriented reasoning) and “rationality” (i.e., a formulation of a system of rules which are universally applicable) is the necessary and sufficient condition for economic prosperity.<sup>89</sup> Weber’s thesis arose from his research question at the outset—why did the modern system of industrial capitalism emerge on the European Continent? Observing the unique features of the European legal system, Weber proposed a positive correlation between law and economic development in his landmark treatise, *Economy and Society (Wirtschaft und Gesellschaft)*.<sup>90</sup>

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<sup>85</sup> Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 361 (1994).

<sup>86</sup> Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 285–86 (2008).

<sup>87</sup> Ohnesorge, *supra* note 12, at 43; Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829 (2000).

<sup>88</sup> John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L ECON. L. 219, 222 (2007); Max Joite, *The England Problem and the China Problem: Past and Present Counter-Examples to Law and Development Theory*, 11 H.K. J. LEGAL STUD. 143 (2017).

<sup>89</sup> David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 729 (1972).

<sup>90</sup> *Id.* at 722.

In particular, Weber pointed to the special features that were present in the European civil law system to establish the importance of having a “formal rational law” for economic development. He especially relied on the late nineteenth-century German legal system where five key propositions could be distilled from the civil law regime. First, every concrete legal decision is arrived at by applying abstract legal propositions to a factual situation. Second, it must be possible to arrive at a decision in concrete cases through abstract propositions and strict adherence to legal logic. Third, the law should be a gapless system. Fourth, objects that cannot be legally “construed” are legally irrelevant. Finally, all human courses of action are ordered by law.<sup>91</sup> To Weber, the “abstract” legal logic is neatly summed up and enshrined in the form of German Codes (e.g., the German Civil Code or *Bürgerliches Gesetzbuch*) in the German legal system.<sup>92</sup> Judges apply deductive reasoning by applying the law starting from the premises found in the systematic and well-organized codes and laws. In this way, law is applied in a “gapless” manner, and judges’ discretion (and hence any potential of irrationality) will be minimized. For example, Weber believed the strong protection of private property rights, such as a stable and organized land title system, and effective enforcement of contract rights would be fundamental to providing legal and business certainty for individuals and corporations to organize their affairs.<sup>93</sup> This notion of “formal rational law” as the necessary condition or cause for economic development, as will be explored in the subsequent discussion below, is challenged by the empirical cases of the “England Problem” and the “China Problem.”

Max Weber’s analysis was subsequently revived and popularized in the institutional economics led by scholars including Nobel Laureate Douglass North.<sup>94</sup> In North’s theory, legal infrastructure and law are fundamental institutions that

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<sup>91</sup> *Id.* at 731.

<sup>92</sup> *Id.*

<sup>93</sup> Ohnesorge, *supra* note 12, at 43.

<sup>94</sup> *Id.* at 44.

underlie the operation and success of market economies.<sup>95</sup> “Institutions,” as defined by North, are “humanly devised constraints that structure human interaction.”<sup>96</sup> While North acknowledged there are soft and informal constraints such as customs, traditions, norms, and codes of conduct, North placed special emphasis on the hard-law formal constraints which include “constitutions, laws and property rights.”<sup>97</sup>

In his theory of institutional economics, North sought to draw the connection between (i) effective property rights and presence of formal institutions (for example, constitutions, laws, and courts), and (ii) long-term economic development.<sup>98</sup> To establish a positive correlation between (i) being the cause and (ii) being the end result, North focused on microeconomics from the perspective of individual entrepreneurs.<sup>99</sup> The positive causal link between (i) and (ii) is explained in terms of the uncertainty and additional transaction costs involved if the law is unclear and the enforcement of private property rights and contract rights is ineffective.<sup>100</sup> Based on the neoclassical economic premises that transactions are generally costly and efficient markets can be obtained only upon zero transaction costs, North argued that the role of institutions, such as an effective enforcement mechanism for private contract rights, is crucial in reducing uncertainty and the transaction costs that arise from it.<sup>101</sup> In a systematically organized legal system, markets are impersonal. Individuals are able to rely on the contracting party's title of ownership, failing which the courts will provide remedies to rectify the situation.<sup>102</sup> Under such a regime,

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<sup>95</sup> *Id.*

<sup>96</sup> Joite, *supra* note 88, at 149.

<sup>97</sup> *Id.*; see also Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 552, 572–76 (2009).

<sup>98</sup> Joite, *supra* note 88, at 150.

<sup>99</sup> Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 361 (1994).

<sup>100</sup> Joite, *supra* note 88, at 150 (citing Douglass C. North, *Institutions*, 5 J. ECON. PERSPS. 97, 109 (1991)).

<sup>101</sup> Douglass C. North, *Institutions and Economic Theory*, 61 AM. ECONOMIST 72, 73 (2016).

<sup>102</sup> See Joite, *supra* note 88, at 150.

individual entrepreneurs can have low transaction costs with minimal legal and business uncertainty.<sup>103</sup> Interestingly, the notion of having an ideal impersonal economic allocation of resources stands in stark contrast to the East Asian economic experience where a personal network is commonly relied upon.<sup>104</sup>

The third wave of L&D scholarship can be attributed to the LLSV school of legal origins theory that originated from the World Bank “Doing Business” initiative.<sup>105</sup> The LLSV school fundamentally submitted that the economic outcomes of various jurisdictions under study are not so much about the *substantive* content of law (for example, company law, commercial law), but rather the historical origins of the respective jurisdictions.<sup>106</sup> Comparing the four different “legal origins” or “mother systems”—English common law, French civil law, German civil law and Scandinavian civil law—the LLSV school argued that the English common law is generally a “superior” legal origin as it places emphasis on minimal state intervention and individual liberty.<sup>107</sup> From their studies, the LLSV thinkers have observed that (i) English common law has shown a more protective attitude towards outside investors than civil law jurisdictions; (ii) civil law jurisdictions are generally associated with a “heavier hand” of government intervention and regulation than their common law counterparts; and (iii) common law is related to less formalistic judicial procedures and greater judicial independence than civil law, resulting in more effective enforcement and security of private property and contract rights.<sup>108</sup> Despite criticisms that the LLSV school’s definition on legal origins was too broad, resulting in culturalist arguments as to the superiority of certain civilizations over

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<sup>103</sup> *Id.*

<sup>104</sup> See Ohnesorge, *supra* note 12, at 41–53.

<sup>105</sup> Ohnesorge, *supra* note 85, at 253.

<sup>106</sup> Gerhard Schnyder, *The Law and Finance School: What Concept of Law?* 4 (Oct. 27, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2859950](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2859950).

<sup>107</sup> *Id.*; see also Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 285–86 (2008).

<sup>108</sup> La Porta et al., *supra* note 107, at 285–86.

others, one may argue that the LLSV school is consistent with the Washington Consensus, a developmental model and ideology based on a liberal democratic regime, the rule of law, and minimal state intervention.<sup>109</sup> One may also say the school still echoes similar lines of research such as Reyes and Gu's observations on the developing world of arbitration in Asia Pacific where Singapore and Hong Kong, as common law jurisdictions in the East, stand out as the most successful arbitration jurisdictions.<sup>110</sup>

The above three waves of L&D scholarship all point towards one prevalent developmental model—the Washington Consensus—a term which summarizes the neoliberalist approach adopted by the U.S. government, which focuses on liberalization, privatization, and marketization.<sup>111</sup> The Washington Consensus was formed and a series of policies were formulated by the International Monetary Fund (“IMF”), the World Bank, and the U.S. Treasury in part to respond to the economic crisis in Latin America.<sup>112</sup> At the heart of the Washington Consensus is the claim that “good governance” is a necessary prerequisite for economic prosperity, and that “good governance” includes a range of institutional core values, such as democracy, rule of law, economic freedom, and strong protection of private property rights.<sup>113</sup> However, one of the main criticisms levied against the Washington Consensus is that it confuses description with prescription.<sup>114</sup> The fact that the developed countries adopted policies such as free trade, protection of intellectual property rights, and financial liberation does not mean that a transplant of those

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<sup>109</sup> See Schnyder, *supra* note 106, at 4; Guan, *supra* note 2, at 117.

<sup>110</sup> See Anselmo Reyes & Weixia Gu, *Conclusion: An Asia Pacific Model of Arbitration Reform*, in *THE DEVELOPING WORLD OF ARBITRATION: A COMPARATIVE STUDY OF ARBITRATION REFORM IN THE ASIA PACIFIC* 279 (Anselmo Reyes & Weixia Gu eds., 2018) (taking into account a basket of performance indicators for various jurisdictions in Asia Pacific, including the adoption of Model Law, judicial support, Rule of Law Index, FDI, etc., and concluded that the more successful jurisdictions like Hong Kong and Singapore tend to be common law based).

<sup>111</sup> Guan, *supra* note 2, at 117.

<sup>112</sup> Peerenboom & Bugarcic, *supra* note 12, at 2.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

institutions in developing countries would necessarily lead to economic development.<sup>115</sup> The attempt to export a “universally-applicable” set of values to Latin America and East Asia by the United States and international organizations such as the IMF and the World Bank has met with difficulties. Further, the attempt has come under serious criticism, especially from Latin American political leaders.<sup>116</sup> It has even been remarked that the Washington Consensus has unfortunately “left a trail of destroyed economies and bad economies around the globe.”<sup>117</sup>

## 2. *A Mismatch between Theory and Empirical Evidence in China and East Asia*

The Washington Consensus with its formal law, rule of law, and liberal democracy regime may not find empirical support in its claim of positive correlation with economic development. This is especially so in the experiences of high-growth East Asian economies.<sup>118</sup>

For example, the Four Asian Tigers (Hong Kong, Singapore, South Korea, and Taiwan) had no liberal democratic regime in place nor substantial constitutional constraints during their high-growth phases in the 1960s.<sup>119</sup> In particular, while Hong Kong citizens largely enjoyed a high degree of personal liberty and rights, Hong Kong was generally considered a liberal but non-democratic regime before the handover in 1997.<sup>120</sup> Governors of Hong Kong were

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<sup>115</sup> *Id.* at 3.

<sup>116</sup> Guan, *supra* note 2, at 127.

<sup>117</sup> JOSHUA COOPER RAMO, *THE BEIJING CONSENSUS* 4 (2004).

<sup>118</sup> See Ngoc Son Bui, *Law and Development Theory: A Dialogical Engagement*, 51 *GEO. WASH. INT'L L. REV.* 65 (2019).

<sup>119</sup> *Id.* at 95.

<sup>120</sup> Kemal Bokhary, *The Rule of Law in Hong Kong Fifteen Years After the Handover*, 51 *COLUM. J. TRANSNAT'L L.* 287, 295 (2013) (quoting Chris Patten's words that Hong Kong is “the only place [he has] ever been able to identify that is liberal but not (alas) democratic”).

appointed directly by the British government.<sup>121</sup> The colonial government of Hong Kong favored consultation rather than elections.<sup>122</sup> Yet, between 1960 and 2000, the Four Asian Tigers had an incredible seven-fold economic growth.<sup>123</sup> In the context of Hong Kong, the high-growth phase can be attributed to the influx of capital and labor from China, rapid industrialization, as well as the unique strategic role of Hong Kong as a window into the Chinese market, especially during the Cold War era.<sup>124</sup> The same high growth was also observed in a few emerging economies in Southeast Asia, including Thailand, Malaysia, Indonesia, and the Philippines, which had experienced a four-fold increase in real incomes over the same period.<sup>125</sup>

Similar to Max Weber's "England Problem," the theory of the Washington Consensus also faced the serious empirical counter-evidence of the "East Asian Problem" and the "China Problem."<sup>126</sup> The hypothesis that the Washington Consensus is a set of universally applicable doctrines was severely tested by the empirical evidence presented from East Asia.<sup>127</sup> In contrast to having a formal legal system with the rule of law and judicial independence, China's rapid economic growth since the 1980s took place following a top-down policy stimulus of the "reform and opening up" policy and "four modernizations" plan initiated by Chinese leader Deng Xiaoping.<sup>128</sup> China's legal reform only came hand in hand with

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<sup>121</sup> TIM SUMMERS, CHINA'S HONG KONG: THE POLITICS OF A GLOBAL CITY 12 (2019).

<sup>122</sup> *Id.* at 16.

<sup>123</sup> Steven Radelet, *Supporting Sustained Economic Development*, 26 MICH. J. INT'L L. 1203, 1204–05 (2005).

<sup>124</sup> SUMMERS, *supra* note 121, at 14.

<sup>125</sup> *Id.*

<sup>126</sup> Ohnesorge, *supra* note 12, at 42; *see also* Jamie Mackie, *Development and Democratisation in East and Southeast Asia*, 5 AGENDA 335, 337 (1998).

<sup>127</sup> *Id.*

<sup>128</sup> John Gillespie & Albert H.Y. Chen, *Comparing Legal Development in China and Vietnam: An Introduction*, in LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES 1, 17 (John Gillespie & Albert Chen eds., 2010) (portraying China's legal and economic development as distinctive from that of the Washington Consensus, as well as the northeast Asian development models).

economic reform, and its experience arguably proves that a strong state with political commitment to support private economic development can provide the necessary legal certainty for individual entrepreneurs.<sup>129</sup> Furthermore, China's legal reforms never focus on wholesale reform in its domestic legal system, but rather on the attraction and facilitation of foreign investment. For instance, before the reform and opening up, China had acceded to only 20 international organizations and was a signatory to merely 30 international treaties.<sup>130</sup> Now, China is a member of over 130 international organizations and a contracting state to over 300 international treaties and conventions. However, internally, although China has increasingly stressed the importance of legality and "comprehensively rul[ing] the country according to law (*quanmian yifazhiguo* 全面依法治国)," the Chinese legal model is infused with Marxist-Leninist ideology and traditional Confucianism, which share a sense of distrust or unwillingness to confer law a supreme status.<sup>131</sup> Despite its lack of internationalization in its domestic legal system, China has undergone a massive economic transformation and expansion and has become the second largest economy in the world, reaching a nominal GDP of \$5.87 trillion a decade ago.<sup>132</sup>

Similarly, Vietnam's economic takeoff was largely stimulated by the policy of *doi moi* (policy of renovation)—a series of reforms aimed at enhancing international investment. While gradually picking up experiences from the West on areas of economic liberalization, Vietnam maintained a single-party political structure like China and a socialist legal system that placed emphasis on the authority of the state and

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<sup>129</sup> See Ohnesorge, *supra* note 12, at 44.

<sup>130</sup> See Zonglai Wang & Bin Hu, *China's Reform and Opening-up and International Law*, 9 CHINESE J. INT'L L. 193, 194 (2010).

<sup>131</sup> Anthony H. F. Li, *Centralisation of Power in the Pursuit of Law-based Governance: Legal Reform in China under the Xi Administration*, 2 CHINA PERSPS. 63 (2016); see also ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 1–4 (4th ed. 2019).

<sup>132</sup> Guangdong Xu, *Law and China's Economic Growth: A Macroeconomic Perspective*, 2012 DOVENSCHMIDT Q., 3, 4 (2012).

Confucian values.<sup>133</sup> In particular, Vietnam generally does not embrace internationalization in areas of human rights law and is reluctant to adopt direct legal-political reform.<sup>134</sup> Similar to China, there is a tendency in Vietnam to favor morality and norms over formal legality.<sup>135</sup> The Ministry of Justice of Vietnam was even defunct from 1961 to 1981.<sup>136</sup> Nevertheless, Vietnam's GDP per capita increased by 2.7 times between 2002 and 2018, reaching over \$2,700 in 2019, with over forty-five million people being lifted out of poverty.<sup>137</sup> There is as such an obvious mismatch between the theories of the Washington Consensus and the empirical evidence of law and development in China and East Asia.

### *B. CICC's Significance and Insights to L&D*

#### *1. Shift in Beijing Consensus Paradigm—Moving Toward a Dual Track Approach?*

The confusion between description and prescription and the mismatch between theory and reality presented in the Washington Consensus proved that it would be wishful thinking to achieve economic prosperity by a wholesale transplant of the Western institutions to developing countries. In fact, the failure to implement the Washington Consensus has caused scholars to rethink the approaches in the L&D movement. In the same vein, Gillespie and Chen considered that the “global culture” including the Northeast Asian influences does not “invariably produce local variations of Western or Northeast Asian legal development in socialist Asia.”<sup>138</sup> They point out that Western legal and economic

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<sup>133</sup> Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 *LAW & SOC'Y REV.* 93 (1998).

<sup>134</sup> *Id.* at 95.

<sup>135</sup> *Id.* at 96.

<sup>136</sup> *Id.* at 99.

<sup>137</sup> See *The World Bank in Vietnam*, <https://www.worldbank.org/en/country/vietnam/overview#1> (last visited Apr. 13, 2021).

<sup>138</sup> Gillespie & Chen, *supra* note 128.

development are important but they are only *reference* points for Asian legal models.<sup>139</sup>

Given the success of China's reform and opening up in achieving economic prosperity since the 1980s, China's developmental model, which has been premised on (i) incremental reform, (ii) innovation and experimentation, (iii) export-led and infrastructure-based growth, (iv) state capitalism, and (v) authoritarianism, has been considered as an alternative developmental mode to the Washington Consensus.<sup>140</sup> Instead of having formal law, which is court-oriented, China's Beijing Consensus has alternatives such as (i) informal alternatives to law (for example, norms, traditions, and interpersonal connections and network known as *guanxi* 关系) and (ii) the strong role of the state.<sup>141</sup> While advocates of institutional economics such as Douglass North placed emphasis on the role of formal law to reduce transaction costs by providing legal certainty, legal and business certainty are achieved in China largely through informal means of relational capitalism.<sup>142</sup> For example, Albert Chen has suggested that the role of *guanxi* practices may have served as a "functional substitute for rational law for the purpose of reducing transaction costs."<sup>143</sup>

The "Rule of Relationship" business practices that focus on networks are different from the "Rule of Law" business practices that focus on rational laws. In particular, the former encompasses a "particularistic, personal and informal" approach to business networks.<sup>144</sup> It places emphasis on the "cultivation of family and personal ties," providing the basis of trust which in turn serve as a "source of stability, certainty, predictability and risk-reduction."<sup>145</sup> For instance, loyalty and trust between members within a family-oriented business in

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<sup>139</sup> *Id.* at 2.

<sup>140</sup> Guan, *supra* note 2, at 128.

<sup>141</sup> Ginsburg, *supra* note 87, at 854.

<sup>142</sup> *Id.*

<sup>143</sup> Albert H. Y. Chen, *Rational Law, Economic Development and the Case of China*, 8 SOC. & LEGAL STUD. 97 (1999).

<sup>144</sup> *Id.* at 105–06.

<sup>145</sup> *Id.*

East Asia are especially strong, with the company as a de facto extension of the family.<sup>146</sup> Moreover, studies show that Chinese businesses and entrepreneurs tend to rely on *renqing* 人情 in the give and take among members of a social network.<sup>147</sup> The concept of *renqing* refers to the kind of assistance network among individuals that says, “if you do me a favour, I’ll owe you one.”<sup>148</sup> There is a greater opportunity for such network building in the East because of the network-oriented practices compared to that in the West. And such practices seem to provide the requisite stability and certainty in business transactions, more often in China than in other Eastern jurisdictions.

That being said, the formal norms and conventions that underlie the Western business traditions should not be ignored. It may be too simplistic to deny the importance of “soft” elements of Western businesses. While it is true that the Western model is primarily based on universal principles where transactions are largely formal and impersonal, contractual and transactional relationships can also be individualistic and idiosyncratic.<sup>149</sup> Western European markets and enterprises, though they may rely on similar informal trust networks as their Eastern market counterparts do, rely more on a different sense of “trust,” which is organization and profession based. For example, instead of having informal assessments of one’s creditworthiness based on the bilateral dealings between two companies, European enterprises likely rely on formalized institutions such as credit reports or letters of credit issued by the banks.<sup>150</sup>

In addition, the role of a strong authoritarian state also plays a key role in the L&D of China. While hard law requires a legally binding change and binding commitments in

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<sup>146</sup> Lung-Tan Lu, *Guanxi and Renqing: The Roles of Two Cultural Norms in Chinese Business*, 29 INT’L J. MGMT. 466, 467 (2012).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 471.

<sup>149</sup> Hans Jansson, Martin Johanson & Joachim Ramstrom, *Institutions and Business Networks: A comparative Analysis of the Chinese, Russian and West European Markets*, 36 INDUS. L. MKTG. MGMT. 955, 962 (2007).

<sup>150</sup> *Id.*

governance, soft law refers to non-binding, normative change such as various policy initiatives, arrangements and agreements in governance.<sup>151</sup> As a developing country, China, with its strong one-party state, pursued hands-on policies to use various soft-law policy initiatives as stimuli for economic growth, for instance, the establishment of Special Economic Zones (“SEZs”) in Southern China, as well as Free Trade Zones (“FTZs”) throughout the coastal areas of China.<sup>152</sup> These state-led, top-down policies reflect the second feature of China’s developmental model discussed above, innovation and experimentation, and the fourth feature, state capitalism, led by the Chinese Communist Party in the Beijing Consensus.<sup>153</sup>

On the other hand, China has largely emphasized promulgating soft-law, norm-based rules instead of establishing a formal rational legal system with Western features such as judicial independence and constitutional constraints on domestic governance. In the context of the BRI and for international governance, China has largely relied on the signing of memoranda of understanding (“MOUs”), such as the MOU between China’s National Development and Reform Commission (“NDRC”), the United Nations Economic Commission for Europe (“UNECE”), and the Memorandum of Arrangement (“MOA”) between China and New Zealand.<sup>154</sup> As Shaffer and Gao have identified, the BRI developed outside China and the FTZs developed within China largely rely on legal infrastructure in terms of MOU arrangements and agreements, which are non-legally binding

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<sup>151</sup> Gregory Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712–15.

<sup>152</sup> Yang Feng, *Examining Legislation in China’s Special Economic Zones: Framework, Practice and Prospects*, 47 H.K. L.J. 585, 587 (2017).

<sup>153</sup> See *supra* Part II; see also Guan, *supra* note 2, at 128.

<sup>154</sup> See Memorandum of Understanding Between the United Nations Economic Commission for Europe and the National Development and Reform Commission of China, [https://unece.org/DAM/MoU\\_between\\_UNECE\\_the\\_NDRC\\_in\\_China\\_2017-05-14.pdf](https://unece.org/DAM/MoU_between_UNECE_the_NDRC_in_China_2017-05-14.pdf) (last visited Mar. 6, 2021); see generally, NEW ZEALAND AND CHINA COUNCIL, BELT AND ROAD INITIATIVE—A STRATEGIC PATHWAY, <https://nzchinacouncil.org.nz/wp-content/uploads/2018/07/NZCC-BRI-report.pdf>.

soft-law instruments.<sup>155</sup> It has also been pointed out that there is no stringent cross-border legal framework or rigid regulatory structure in China's approach toward the BRI.<sup>156</sup>

However, viewed in light of the L&D scholarship and the BRI, the establishment of the CICC can be regarded as a turning point in the paradigm of the Beijing Consensus, shifting from a norm-based, soft-law approach towards a dual-track model (both soft-law and hard-law). As to the soft-law track, China has adopted a large number of norm-based instruments, including MOUs, MOAs, Guiding Principles (e.g., the Guiding Principles on Financing the Development of Belt and Road), Joint Statements (e.g., Joint Statement on the Belt and Road Food Safety Cooperation), Declarations (e.g., China-Arab States Cooperation Action Declaration on the Belt and Road), Letters of Intent (e.g., Letter of Intent between the United Nations Economic and Social Commission for Asia and the Pacific and the PRC Ministry of Foreign Affairs on Promoting Regional Connectivity and the BRI).<sup>157</sup> The wide range and forms of soft-law instruments reflect that the BRI has been largely based on norm-based commitments instead of legally binding international obligations.

On the other hand, the CICC can be seen as a manifestation of a major step taken by the Chinese government towards a new dual-track model in the Beijing Consensus, one which also emphasizes hard-law institutional infrastructure capacity building.<sup>158</sup> As seen in Part II, the CICC was established as a permanent branch embedded within the hierarchy of China's top court, the SPC. The embedded court structure of the CICC mirrors the design of the SICC, which is also a branch of the Singapore High Court. This institutional approach echoes the observation made by Wang, in which he remarked that the CICC together with the institutional infrastructure of the China International Development Cooperation Agency ("CIDCA"), a sub-ministry-level

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<sup>155</sup> Wang, *supra* note 3, at 41; *see also* Shaffer & Gao, *supra* note 1, at 616.

<sup>156</sup> Wang, *supra* note 3, at 35.

<sup>157</sup> *Id.*

<sup>158</sup> Erie, *supra* note 10, at 16–20.

executive agency under the State Council founded in 2018, constitutes a new model of development via a more hard-law infrastructure-focused approach.<sup>159</sup>

As previously argued, the CICC has three major contributions to the new hard-law track of the Beijing Consensus. First, it represents a top-down effort of national dispute resolution capacity building as the CICC framework draws links with the Chinese domestic top-tier arbitration and mediation institutions, constituting an orchestrated hard-law agglomeration trinity similar to the Singapore SICC-SIAC-SIMC trio.<sup>160</sup> Second, the composition of the judicial personnel within the CICC also reflects a fusion between hard-law and norm-based dual-track models, with a bench of Chinese domestic judges together with an ICEC composed of both Chinese and foreign legal expertise, which is tasked with mediation power equivalent to “semi-adjudication.”<sup>161</sup> Third, the establishment of the CICC as one of the core BRI legal infrastructures arguably reflects China’s ambition to create a BRI *lex mercatoria* and legal harmonization via a hard-law legal structure.<sup>162</sup> The open and published CICC court judgments provide room for the CICC and China to exert influence on the international commercial rule of law discourse.

## 2. *Global Power Dynamics and Ideological Tug of War*

Viewed from a wider perspective, the CICC infrastructure can be situated in the global power dynamics and ideological tug of war between the conventional development model of the Washington Consensus and the alternative model of the Beijing Consensus. The dynamics of reshaping and

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<sup>159</sup> *Id.* at 39.

<sup>160</sup> Yip, *supra* note 7, at 83. The terminology of ‘Law-Positive Agglomeration Trinity’ was inspired by Man Yip’s observation in the Singapore context, where the author commented that the SICC, SIAC, and SIMC (in tandem with the SIMI) are “the hallmarks of the nation’s three-pronged strategy to become a premium dispute resolution hub through a comprehensive offering of dispute resolution services.” It also suggested that Singapore’s game plan was to “augment the menu of dispute resolution options for potential users.”

<sup>161</sup> CICC Provisions, *supra* note 20, art. 12.

<sup>162</sup> Gu, *supra* note 76, at 1328.

readjustment of the Beijing Consensus from a relatively norm-based model to a dual-track approach with both hard-law infrastructure and soft-law instruments should also be assessed in light of U.S.-China tension, especially in the gulf between China's BRI and the U.S. Indo-Pacific Strategy. For the BRI, China aspires to create an interregional economic bloc consisting of nations of ancient Belt and Road roadmap across the Eurasian region.<sup>163</sup>

As previously discussed, China's BRI development is infrastructure-based, focusing on funding and assisting infrastructure and transportation projects such as railway, oil, and energy, but is less institutionally focused, as it primarily relies on soft-law instruments such as MOUs and MOAs rather than legal architecture. With the newly established CICC, it may be said that the BRI is heading towards a dual-track developmental model, with emphasis on both hard-law dispute settlement mechanisms (the court and the judgment) as well as soft-law international agreements. This is accompanied by the establishment of the Asian Infrastructure Investment Bank, which is a multilateral financial institution spearheaded by China for financing Asian cross-regional projects, and the CIDCA as a state institution for coordinating foreign aid.<sup>164</sup> In addition, the CICC is also complementary to the "Rule of Law China" (*fazhi zhongguo* 法治中国) vision—a campaign which emphasizes governing China by rule of law.<sup>165</sup> If the CICC is successful in attracting international commercial parties, this may potentially elevate China's status as a legal hub for dispute resolution, particularly in BRI-related contracts. It may be too soon to see a BRI *lex mercatoria* in place, but the Hong Kong High Court has already begun to receive significant cases with BRI elements.<sup>166</sup> There is potential also

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<sup>163</sup> *Id.* at 1307–08.

<sup>164</sup> Wang, *supra* note 3, at 39.

<sup>165</sup> Cho, *supra* note 75, at 22; *see also* Benjamin Liebman, *Authoritarian Justice in China: Is there a Chinese Model?* in *THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT* 225 (Weitseng Chen ed., 2017).

<sup>166</sup> A dispute involving a port in Djibouti was recently heard by the Hong Kong High Court; *see* DP World Djibouti FZCO v. China Merchants Port Holdings Co Ltd [2019] HKCFI 3104.

for the CICC to make an impact on the BRI *lex mercatoria* given the high volume of BRI cases expected to be heard by the CICC.

### III. CONCLUSION

The China International Commercial Court—as a top-down, law-positive legal infrastructure established within China’s top court, the Supreme People’s Court—signifies a major step towards a dual-track model that places equal emphasis on both soft-law instruments and hard-law capacity building of legal infrastructure. Such a yin (soft law) and yang (hard law) combined approach may become the new direction of the Beijing Consensus in light of increasing U.S.-China tension, especially on issues of the Belt and Road Initiative and Indo-Pacific Strategy. As succinctly and aptly pointed out by Ginsburg, the missing word in law and development scholarship is “politics.”<sup>167</sup> From the above discussion, it is readily seen that the relationship between law and development should not be oversimplified. Instead, theories about any possible correlation between law and development should be rigorously tested against the cultural and normative reality of different jurisdictions.<sup>168</sup> One thing is certain: there is no absolute and universal model in law and development. Law and development are multidirectional and must be implemented in accordance with the state’s respective socio-historical traditions and present reality.

This paper explores China’s law and development path via the case study of the China International Commercial Court. Through a close examination of the legal framework, this article argues that the China International Commercial Court showcases a paradigm shift in the Beijing Consensus from a norm-based soft-law approach towards a dual-track model with emphasis on both soft-law instruments and hard-law infrastructure. Under the global power dynamics, the China International Commercial Court could be seen as an

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<sup>167</sup> Ginsburg, *supra* note 87, at 842.

<sup>168</sup> Bui, *supra* note 118.

integral part of China's active capacity building of the state-led initiatives for China and the international legal order, which includes both the Belt and Road Initiative and the Rule of Law China Initiative.

