

## Special Courts, Global China

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*This Article analyzes China's turn to specialized courts as a case study on how China's global ambitions are shaping its domestic law reforms. It argues that the country's rapid construction of more technocratic special courts in areas such as cyberspace and global commerce is best understood as a product of certain political benefits associated with judicial specialization. These include several internal-facing benefits often cited in China law scholarship: reducing agency problems posed by local actors, for example, or minimizing political risk. But they also include newer benefits keyed to a number of grand strategic priorities. What the evidence makes clearest, in fact, is that China's planners see specialized courts as a means of accelerating a limited set of professional reforms to further the party-state's developmental, technological, and geopolitical goals. Far from a precursor to liberalization, professional specialization is now being marshaled in an effort to service China's global strategies.*

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## INTRODUCTION

Recent scholarly works have begun to chronicle legal aspects of China's global rise. In general, these studies have focused on how China's global strategies have shaped legal paradigms outside China, within individual countries,<sup>1</sup> and at the level of international institutions and norms.<sup>2</sup>

Less prominent in this literature, but no less important, is the question whether China's global ambitions are also influencing legal changes within China. Since President Xi Jinping's ascent to power in 2012, general studies of China's legal system have largely focused on the party-state's internal-facing motivations for pursuing law reforms: the imperatives of maintaining social stability,<sup>3</sup> for example, or the desire to discipline local officials.<sup>4</sup> The lasting impression is that while China's global ambitions make for an interesting legal story outside China, geopolitics is far less of a factor in explaining legal developments at home.<sup>5</sup>

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1 See, e.g., Margaret K. Lewis, *Criminalizing China*, 111 J. CRIM. L. & CRIMINOLOGY 145, 200-20 (2021) (criticizing the Department of Justice's "China Initiative"); Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1696-1704, 1706-24 (2020) (cataloging interpretive challenges associated with U.S. courts' increasing exposure to Chinese law).

2 See, e.g., Joint Symposium, *China and the International Legal Order*, 62 HARV. INT'L L.J. & 46 YALE J. INT'L L. ONLINE (2021), <https://www.yjil.yale.edu/online-essays/china-symposium/>; Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 249-50 (2020) (discussing implications of China exercising "greater weight in the formation of international law"); Matthew S. Eric, *Chinese Law and Development*, 62 HARV. INT'L L.J. 51, 54-6 (2021) (analyzing how "Chinese Law and Development" departs from conventional law-and-development constructs); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 264 (2016) (detailing the WTO's struggles "to adjust to a rising China").

3 See, e.g., Donald Clarke, *Order and Law in China*, 2022 U. ILL. L. REV. 101 (2022) (developing an "order maintenance paradigm" to describe Chinese legal institutions); Benjamin L. Liebman, *Leniency in Chinese Criminal Law? Everyday Justice in Henan*, 33 BERKELEY J. INT'L L. 153, 157 (2015) ("[C]oncerns about stability often lead to surprisingly lenient outcomes . . . in routine criminal cases."); Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping*, 26 J. CONT. CHINA 64, 76 (2017) ("Economically damaging social instability, and reliance on law to address it, were prominent concerns under Hu, and have persisted under Xi."); Xin He, *Pressures on Chinese Judges Under Xi*, 85 CHINA J. 67 (2021) ("[C]oordination between the court and the Party and government entities has been strengthened under Xi in cases 'affecting social stability'").

4 See, e.g., Taisu Zhang & Tom Ginsburg, *China's Turn Towards Law*, 59 VA. J. INT'L L. 306, 370 (2019) (explaining the party-state's use of "legality" to "effectively control a less ideologically and politically homogenous state apparatus"); Hualing Fu, *Building Judicial Integrity in China*, 39 HASTINGS INT'L & COMP. L. REV. 167, 175-79 (2016) (explaining how the Party's removal of "control of local governments over the courts" is a "logical move to ensure . . . compliance with central decisions"); Carl F. Minzner, *Legal Reform in the Xi Jinping Era*, 20 ASIA POL. 4, 8 (2015) ("Both the judicial and disciplinary reforms are efforts to develop vertically integrated systems to circumvent the power of local officials."); MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA: LAWS, WORKERS, AND THE STATE* 31 (2017) (describing use of law to "manage principal-agent problems between levels of government").

5 There is a rich history of work on the legal dimensions of China's interfacing with the outside

This Article argues that China's global rise is influencing legal developments inside China, and is doing so in notable ways that should invite our attention. Just as great power competition has shaped legal changes in other historic settings,<sup>6</sup> China's global strategies are systematically altering its domestic legal pathways.

The Article advances this argument through a case study of an increasingly prominent trend in China's judicial reform agenda: the rapid construction of specialized courts in areas like finance, intellectual property, the internet, and international commerce. Since their inception, these courts have been extolled in domestic outlets as leading lights of China's judiciary.<sup>7</sup>

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world, the influence of foreign legal models, and the use of law to garner global respect. *See, e.g.*, James V. Feinerman, *The Rule of Law Imposed from Outside: China's Foreign-Oriented Legal Regime Since 1978*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 304, 308-10 (Karen G. Turner, James V. Feinerman, R. Kent Guy eds., 2015) (analyzing China's early foreign trade and investment laws); Nicholas Calcina Howson, *Panel IV – "Can the West Learn from the Rest?" – The Chinese Legal Order's Hybrid Modernity*, 32 *HASTINGS INT'L & COMP. L. REV.* 815, 829-30 (2009) (discussing Chinese legal borrowing); WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 85 (1995) (noting China's goal in 1991 to become a "patent powerhouse" by the turn of the century); William P. Alford, *A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction*, 11 *CULTURAL DYNAMICS* 193, 198 (1999) (describing efforts to "legitimate the existing regime" internationally through law). Few works, however, have focused on geopolitics and great power rivalry as a variable shaping domestic legal changes.

<sup>6</sup> *See, e.g.*, MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 252 (2000) (explaining how the Cold War "helped motivate civil rights reform" while also "limit[ing] the field of vision to formal equality . . . and away from a broader critique of the American economic and political system"); CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955*, 5 (2003) (describing how Cold War politics limited the broad rights agenda initially pursued by NAACP leaders in areas such as healthcare and housing); *cf.* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. REV.* 932, 935 (2010) ("[P]urpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states governed by the law of nations."); *but see* Paul B. Stephan, *The Cold War and Soviet Law*, *Proceedings of the Annual Meeting Soc'y Int'l L.*, vol 93, 1999, at 43 ("[T]he Cold War did not have as clear or decisive an impact on Soviet legal institutions as it did on those in the United States.").

<sup>7</sup> *See, e.g.*, Li Zhen & Wei Liangwei (李贞&魏良炜), *Hulianwang Sifa: "Zhijian Susong Zhangshang Banan"* (互联网诉讼: 指尖诉讼掌上办案) [*Internet Justice: Litigating with One's Fingertips, Case Handling in One's Palms*], *RENMIN RIBAO HAIWAI BAN* (人民日报海外版) [*PEOPLE'S DAILY OVERSEAS ADDITION*], Jan. 15, 2020, [http://www.cac.gov.cn/2020-01/15/c\\_1580625827015070.htm](http://www.cac.gov.cn/2020-01/15/c_1580625827015070.htm) (suggesting that the Internet Courts are more efficient than "traditional court trials").

They are portrayed as cosmopolitan,<sup>8</sup> even pioneering,<sup>9</sup> and are said to have “world-class” aspirations.<sup>10</sup> Such plaudits, though overstated, are not without some basis. Early evidence suggests that the new special courts may be achieving a higher level of legal professionalism compared to traditional Chinese courts.<sup>11</sup>

To explain the embrace of more technocratic special courts, this Article highlights three kinds of political benefits that have made judicial specialization especially attractive for China’s rulers. Some benefits are rooted in factors that are commonly said to drive legal outcomes in China; others, however, require a closer understanding of the party-state’s strategic goals, and the ways in which legal institutions—as with all other components of the country’s bureaucracy today—have been marshaled to service new central policies.

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8 See, e.g., *Shanghai Jinrong Fayuan Tongbao Yi Zhounian Gongzuo Qingkuang Fabu Wuda Gongzuo Jucuo Shixiang Chuangxin Jizhi* (上海金融法院通报一周年工作情况发布五大工作举措十项创新机制) [*The Shanghai Financial Court Reports on its Work Situation After One Year, Announcing Five Major Work Measures and Ten Innovative Mechanisms*], SHANGHAI GAOJI RENMIN FAYUAN WANG (上海高级人民法院网) [SHANGHAI HIGH PEOPLE’S CT. NET], Aug. 21, 2019, <http://www.hshfy.sh.cn/shfy/gweb2017/xxnr.jsp?pa=aaWQ9MjAxMzc4MDEmeGg9MSZsbWRtPWxtMTcxz&zdz=xwzx> (hereinafter Financial Court Report) (boasting that the Shanghai Financial Court has received “extensive international attention”); Chen Jinchuan, *Inside Beijing’s new IP Court*, 247 MANAGING INTELL. PROP. 10, 10 (2015) (noting on the cover page that the vice-president of the Beijing IP Court “listens to French radio every morning”).

9 See, e.g., Han Xuguang (韩绪光), *Guoji Shangshi Fating Zhe Yinian* (国际商事法庭这一年) [*This Year at the International Commercial Court*], ZHONGGUO SHENPAN XINWEN BANYUEKAN (中国审判新闻半月刊) [CHINA TRIAL NEWS SEMI-MONTHLY], July 25, 2019, <http://www.court.gov.cn/zixun-xiangqing-173282.html> (describing the China International Commercial Court’s “innovative breakthroughs”).

10 See, e.g., *China’s Internet Courts Play Big Role in Advancing Judicial System*, XINHUA, Sep. 23, 2020, [http://www.xinhuanet.com/english/2020-09/23/c\\_139391582.htm](http://www.xinhuanet.com/english/2020-09/23/c_139391582.htm) (Internet Courts “have forged a new path” for the country’s judiciary); Hou Ling (侯岭), *Jiaqiang Zhishi Chanquan Baohu Jianshe Guoji Yiliu Fayuan* (加强知识产权保护建设国际一流法院) [*Strengthening IP Protections and Building a World-Class Court*], ZHONGGUO ZHISHI CHANQUAN BAO (中国知识产权报) [CHINA INTEL. PROP. NEWS], Apr. 19, 2019, <http://www.cneip.org.cn/html/8/34198.html> (referencing report from the Shanghai IP Court on “constructing a world-class IP court”).

11 I define legal professionalism thinly to mean the increasing “monopolization” of legal work by trained professionals. See, e.g., Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People’s Court of China*, 25 COLUM. J. ASIAN L. 1, 12 (2012), and the privileging of associated legal-bureaucratic values such as expertise, consistency, transparency, and efficiency. In the Chinese-law setting, professionalism is often linked with “improv[ed] training for judges, procurators, and lawyers, and in [the use of] more formal legal procedures.” Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform, in MAO’S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA* 170 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011). Legal professionalism is often contrasted with legal “populism,” understood broadly as “promoting judicial responsiveness to and incorporation of public opinion.” Zhang, *supra* note 11, at 5; see also Liebman, *supra* note 11, at 174 (discussing revolutionary antecedents to modern legal populism). For studied treatment of the distinct challenges of professionalization in China, see WILLIAM P. ALFORD, WILLIAM KIRBY, & KENNETH WINSTON, PROSPECTS FOR THE PROFESSIONS IN CHINA (2010).

The first benefit of specialization is that it is an attractive means of signaling and accelerating law reforms in areas of strategic importance. In recent years, China's leaders have closely linked legal modernization to national priorities in innovation, development, and geopolitics. A shared feature of IP, finance, internet, and global commerce is that all involve disputes in which the party-state is especially drawn to more professional dispute resolution—to attract global capital, spur domestic innovation, support regional initiatives, and influence global standards. In this setting, judicial specialization has emerged as a targeted means of facilitating quick gains in professional performance. Some improvements flow from the courts' specialized and exclusive jurisdictions. Others result from policies directed towards professional specialization in particular courts.

A related benefit of specialization is that it enables a kind of calibration, a means of brokering the party's historic ambivalence over the role of law in the courts. It is no secret that adherence to formal legality varies across different legal subject areas in China, with political considerations mattering more in sensitive cases that threaten party rule or social instability. The appeal of specialization is that it offers a more fine-tuned tool for tailoring legality by subject area—more in areas where professional adjudication is desirable, less where political risks loom large. In this way, specialization can serve to drive, entrench, and potentially even deepen variations within China's legal system.

Finally, judicial specialization can be analyzed as part of the regime's broader centralization agenda. Xi-era governance has carved out a leading role for law in ensuring local conformity with central party-state priorities. To that end, features like exclusive jurisdiction and court-specific “model cases” serve not only the technocratic goal of treating like cases alike (*tongan tongpan*) but also to strengthen hierarchical control. While the effect may be to insulate courts from local protectionism in many cases, furthering professional goals, centralization also enhances the ability of national leaders to shape outcomes in cases of national interest. The tension between professional goals and central interests will likely constrain efforts to more fully improve the courts' global standing.

The Article advances these arguments through an analysis of party-state documents, official speeches, Chinese legal scholarship, and interviews with Chinese judges and lawyers. It also draws on a rich English-language literature on specialized courts, Chinese courts, and Chinese grand strategy.

In combination, these sources suggest that special courts have emerged as a kind of institutional technology, a means to accelerate limited legal reforms in several ascendant strategic domains. Notably, specialization is not targeted at eroding the Communist Party's control over the judiciary. Rather, it has become a favored tool for raising levels of expertise, consistency, and efficiency in areas deemed critical to Chinese grand strategy.

The Article makes several contributions. For observers of China's legal system, the Article offers a broad descriptive account of special courts in China from the Mao era to the present day. While recent studies have trained on specific special courts,<sup>12</sup> this Article is the first to engage in a historical, comparative, and conceptual analysis of Chinese judicial specialization generally. In so doing, the Article uncovers the critical role that new national ambitions have played in motivating the most recent turn to professional specialization, and shows how limited legal-professional values are being marshaled to serve China's global goals.

The Article also contributes to debates over the nature of China's legal system. Accounts of Chinese law have in recent years gravitated towards opposite poles. Some have argued that law is of unprecedented importance in China today as a result of new governance imperatives and popular demand.<sup>13</sup> Others have stressed the persistently extra-legal features of

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<sup>12</sup> Many such studies have addressed IP courts and the China International Commercial Court (hereinafter CICC). See, e.g., William Weightman, *Is the Emperor Still Far Away? Centralization, Professionalization, and Uniformity in China's Intellectual Property Reforms*, 19 UIC REV. INTELL. PROP. L. 145 (2020); Zhang Liguo & Nari Lee, *Institutional Reforms and Governance of Intellectual Property Rights in China—The Case of Specialized Intellectual Property Courts*, 8 QUEEN MARY J. INTELL. PROP. 59 (2018); Haien Shen & Xiaohong Wen, *The Reform of the Chinese Intellectual Property Trial System*, 5 GLOBAL J. COMP. L. 68 (2016); Zhengxin Huo & Man Yip, *Comparing the International Commercial Courts of China with the Singapore International Commercial Court*, 68 INT'L & COMP. L. Q. 903 (2019); Wei Cai & Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 68 INT'L & COMP. L. Q. 869 (2019); Weixia Gu, *China's Law and Development: A Case Study of the China International Commercial Court*, HARV. INT'L. L.J. ONLINE, <https://harvardilj.org/2021/07/chinas-law-and-development-a-case-study-of-the-china-international-commercial-court/>. Environmental courts have also attracted scholarly focus. See Rachel Stern, *The Political Logic of China's New Environmental Courts*, 72 CHINA J. 53 (2014); Alex Wang & Jie Gao, *Environmental Courts and the Development of Environmental Public Interest Litigation in China*, 3 J. COURT INNOVATION 37 (2010). Susan Finder—a member of the CICC's expert committee—has written a series of informative posts on the Shanghai Financial Court, IP courts, and the CICC. See, e.g., Susan Finder, *Some Quick Thoughts on Shanghai's Financial Court*, SUP. PEOPLE'S CT. MONITOR (Apr. 29, 2018), <https://supremepeoplescourtmontior.com/2018/04/29/some-quick-thoughts-on-shanghai-financial-court/>. Certain specialized courts are also discussed in other important works. See, e.g., Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 VA. J. INT'L L. 225 (2020); Pamela Bookman, *The Adjudication Business*, 45 YALE J. INT'L L. 227 (2020).

<sup>13</sup> Zhang & Ginsburg, *supra* note 4, at 312-13.

Chinese law.<sup>14</sup> This Article shows that while trends toward professionalization are observable in areas of Chinese law, the dynamics underlying those trends are hardly uniform, and can implicate largely unappreciated considerations involving industrial policy and global influence. It shows too that China's legal system can be increasingly professional in some ways while remaining essentially lawless in others.<sup>15</sup>

Such developments may be unsatisfying for many who have long advocated for China to pursue law-based reforms. More professional IP or finance adjudication in routine cases may well benefit businesses that favor predictable market rules. But for those who saw law reforms in China as pathways to judicial independence, even democratization,<sup>16</sup> China's turn to special courts is a sobering reminder that some legal-professional virtues can complement authoritarian rule.<sup>17</sup> And by helping to cabin the largest legal improvements to areas linked to Chinese power, specialized courts could serve in the long run only to aid the country's global strategies.

The remainder of the Article unfolds in four parts. Part I provides a tailored introduction to specialized courts generally, drawing on relevant understandings from law, politics, and practice. Part II then turns to China's historical experience with specialized courts, detailing their evolution from fairly unremarkable provincial entities into the relatively more professional institutions of the contemporary era. Part III situates the new special courts at the intersection of law and grand strategy, highlighting their appeal as a means of accelerating legal-professional reforms in nationally important areas. Part IV then explains additional governance benefits of judicial specialization for the regime.

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14 Clarke, *supra* note 3.

15 See, e.g., Donald Clarke, *No, New Xinjiang Legislation Does not Legalize Detention Centers*, LAWFARE (Oct. 11, 2018), <https://www.lawfareblog.com/no-new-xinjiang-legislation-does-not-legalize-detention-centers> (highlighting the continuing lack of legal basis for the detention camps in Xinjiang); Hualing Fu, *Duality and China's Struggle for Legal Autonomy*, CHINA PERSPECTIVES, No. 1 (116) (2019), at 3 (“[I]rrelevance of law over the mass internment in Xinjiang offers a perfect example of an exceptional state at work”).

16 See *infra* note 350.

17 See William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China*, in EAST ASIAN LAW: UNIVERSAL NORMS AND LOCAL CULTURES 182 (Lucie Cheng, Arthur Rosett, Margaret Woo eds., 2003) (challenging the prevalent convergence account of legal professionalism in China).



## I. SPECIALIZATION'S ROLE

Part I provides basic background on specialized courts in various traditions. Section A defines “specialized court.” Section B explains why specialized courts are often linked with professional values. Section C shows how politics can give rise to special courts across different regime types. Later parts will show that professionalism and politics both matter in explaining China’s turn to specialized courts, but in ways the general literature has not entirely foreseen.

*A. Definitions*

Specialized courts are courts with limited jurisdiction over one or more specific fields of law.<sup>18</sup> Unlike generalist courts that hear a range of civil and criminal matters, specialized courts concentrate on specific subjects like tax or bankruptcy.

Some level of specialization can be found in virtually every judicial system. In civil law countries, specialization is a pillar of judicial design.<sup>19</sup> Germany is known for its many special court systems dedicated to areas like administrative law, employment, and social security.<sup>20</sup> Common law courts can be highly specialized too. The High Court of England and Wales contains a Commercial Court, an Admiralty Court, a Mercantile Court, a Patents Court, and a Technology and Construction Court.<sup>21</sup> The United States, known otherwise as a bastion of generalist judging,<sup>22</sup> is no exception. At the federal level, the Court of International Trade, the Court of Appeals for Veterans Claims, and the Foreign Intelligence Surveillance Court typify the genre.<sup>23</sup> At the state level, there are courts concentrating in traffic,

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18 Markus B. Zimmer, *Overview of Specialized Courts*, INT’L J. CT. ADMIN. 1, 1 (2009). A specialized court might also hinge on “the attributes of litigants, such as people who are homeless.” LAWRENCE BAUM, *SPECIALIZING THE COURTS* 6 (2011).

19 Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary*, 37 WM. & MARY L. REV. 535, 600 (1996).

20 Zimmer, *supra* note 18, at 15; *see also* Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1756, 1761 (1997); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 851-52 (1985).

21 THE JUDICIAL SYSTEM OF ENGLAND AND WALES 10, <https://www.judiciary.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf>.

22 Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990); Wood, *supra* note 20, at 1756.

23 BAUM, *supra* note 18, at 14-15; Zimmer, *supra* note 18, at 8-11.

probate, family, business, tax, workers' compensation, housing, environment, and land.<sup>24</sup>

To better situate China's special courts within this analysis, a few more points are worth noting.

*First*, while subject-matter specificity is the hallmark of specialized adjudication, subject-matter exclusivity—the extent a court “hear[s] every case of a certain type”—is a relevant feature too.<sup>25</sup> Some scholars even define “specialized court[s]” based on their “limited and *frequently exclusive* jurisdiction” in particular areas of law.<sup>26</sup>

*Second*, specialized courts can serve varied purposes. Some courts—drug courts, domestic violence courts, homelessness courts—grew out of disenchantment with conventional modes of criminal justice.<sup>27</sup> They are sometimes called “problem-solving” courts—“specialized . . . courts that often substitute treatment, monitoring, or community service . . . for incarceration.”<sup>28</sup> Other special courts are known more for the technical complexity of their subject matter.<sup>29</sup> Their *raison d'être* is often rooted in what Justice White once called the “extreme specialization” to which these fields are given.<sup>30</sup> The courts later addressed in this Article more closely resemble this latter category of tribunals.

*Third*, specialization can occur at virtually every level of judicial organization—court systems, courts, and court divisions.<sup>31</sup> Relatedly, the question of what ranks as a “court” is often locally contingent, leading some scholars to use a more functional term—“adjudicative unit”—when analyzing special courts.<sup>32</sup> I follow this approach when appraising general

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<sup>24</sup> See BAUM, *supra* note 18, at 19; Zimmer, *supra* note 18, at 11-14. This is not to mention administrative law judging. See Wood, *supra* note 20, at 1765.

<sup>25</sup> Revesz, *supra* note 22, at 1121.

<sup>26</sup> Zimmer, *supra* note 18, at 1 (emphasis added).

<sup>27</sup> Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1486 (2017).

<sup>28</sup> *Id.* at 1482-83. They are sometimes called “problem-oriented” courts. *Id.* at 1483 n.1; Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1606 n.72 (2012).

<sup>29</sup> STEPHEN LEGOMSKY, *SPECIALIZED JUSTICE* 24 (1990) (“A high level of technicality in a particular field has traditionally been seen as an important reason [for] a specialized court.”); see also Zimmer, *supra* note 18, at 4-5 (“[T]he more intricate and difficult the field of law, the more likely it is that the generalist judge will misapply the law, confuse rather than clarify the issues, and inadvertently encourage additional litigation.”).

<sup>30</sup> N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 118 (1982) (White, J., dissenting). *But cf.* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 773 (2010) (“[B]ankruptcy . . . is hardly narrow, technical, or specialized in substance.”).

<sup>31</sup> Even generalist judges can specialize. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 526 (2008) (analyzing opinion-assignments data in federal appellate courts).

<sup>32</sup> See LEGOMSKY, *supra* note 29, at 33.

trends towards specialization in China's judiciary, which are discernible at both the court and divisional levels.

*Finally*, specialization is best understood on a spectrum. A court that hears only bankruptcy cases is more specialized than one that hears cases involving patents, trademark, government contracts, international trade, and veterans' benefits. In settings like China's, specialization is best used in a comparative sense, in that an IP division is more specialized than a general civil division whose jurisdiction includes but is not limited to IP.

### B. Professionalism

Academic studies of specialized courts have tended to associate specialization with certain improvements in professional performance.<sup>33</sup> They have focused on three virtues in particular: expertise, efficiency, and consistency.

First, specialized courts are often said to be more *efficient*, on the familiar theory that “the cost of production declines with specialization.”<sup>34</sup> By reducing the need for litigants to orient judges to a particular area of law, specialization may lower litigation costs and preserve judicial resources.<sup>35</sup> By removing complex cases from the dockets of ordinary courts, specialization may also increase the “research efficiency” of generalist courts.<sup>36</sup> And by

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<sup>33</sup> The literature on special courts tends to treat specialization as an independent variable and professional outcomes as a possible effect. See Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 788-806 (2008); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1148-74 (2004); Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 719-70 (2003); Amy Semet, *Specialized Trial Courts in Patent Litigation: A Review of the Patent Pilot Program's Impact on Appellate Reversal Rates at the Five-Year Mark*, 60 B.C. L. REV. 519, 556-77 (2019); Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 80-104; Carolina Arlota & Nuno Garoupa, *Do Specialized Courts Make a Difference? Evidence from Brazilian State Supreme Courts*, 27 EUR. BUS. L. REV. 487, 487-500 (2016). Studies on proposals for new special courts often follow a similar mode of analysis. See Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1674-98 (2015); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists versus Generalists*, 36 FORDHAM INT'L L.J. 788, 807-10 (2013); Mark R. Shulman, *National Security Courts: Star Chamber or Specialized Justice?*, 15 ILSA J. INT'L & COMP. L. 533, 543-48 (2009); Symposium, Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1553-60 (2010).

<sup>34</sup> See Ginsburg & Wright, *supra* note 33, at 793-94.

<sup>35</sup> See BAUM, *supra* note 18, at 32-33; LEGOMSKY, *supra* note 29, at 16-17.

<sup>36</sup> Zimmer, *supra* note 18, at 1; Revesz, *supra* note 22, at 1120 (“Proponents of specialized courts argue that the legal system can preserve high-quality generalist courts only by transferring jurisdiction over certain administrative areas to specialized courts.”).

dealing in only a narrow field of law, specialist courts may enable finer “tailoring” of procedure to a given subject.<sup>37</sup>

Another oft sung virtue of specialization is expertise.<sup>38</sup> Special-court judges are often drawn from the ranks of experienced practitioners.<sup>39</sup> Once appointed, specialist adjudicators are exposed repeatedly to a single area of law.<sup>40</sup> The result, scholars claim, is enhanced “technical facility”: a “substantively neutral improvement in the quality of decisions, as reflected in their clarity and logical rigor.”<sup>41</sup> Complex subjects—whether “due to the difficulty of the underlying law” or “the technical nature of the facts”—are thought to be particularly well suited to specialization.<sup>42</sup>

Finally, judicial specialization is said to bring uniformity and coherence to the law, promoting predictability and discouraging forum shopping.<sup>43</sup> Such effects are especially pronounced, it is said, if the court’s jurisdiction is central and exclusive—the more a field is concentrated in the hands of a few, the less of a chance the field will develop conflicts in the law.<sup>44</sup>

Specialist courts may also entail certain tradeoffs. Specialized judges may be more vulnerable to “capture” as a result of their narrow professional networks and the influence of special interests.<sup>45</sup> Once specialized, they may also lose their “generalist perspective,” leading to “inconsistency between the specialty area and other analogous areas”<sup>46</sup> and precluding “the cross-

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37 LEGOMSKY, *supra* note 29, at 17 (“When a tribunal must employ a common procedure for differing types of disputes, there is a risk of overjudicialization in some categories of cases.”).

38 BAUM, *supra* note 18, at 33; LEGOMSKY, *supra* note 29, at 7-12; Zimmer, *supra* note 18, at 2.

39 LEGOMSKY, *supra* note 29, at 7-8.

40 *Id.* at 8.

41 Ginsburg & Wright, *supra* note 33, at 797-98; *see also* Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 378 (1990) (“[A] specialized court’s sustained involvement with a field would facilitate superior decisionmaking.”).

42 Revesz, *supra* note 22, at 1117; Wood, *supra* note 20, at 1766.

43 *See* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 63 (1975) (“By minimizing actual and potential intercourt conflicts, [specialized courts] can reduce or eliminate disuniformity and uncertainty in the law . . . and the attendant forum shopping.”); LEGOMSKY, *supra* note 29, at 13-16 (“Improved consistency is often said to be one such benefit of specialization.”); Zimmer, *supra* note 18, at 2. Revesz distinguishes coherence from consistency: “Coherence . . . demands not only that the legal rules of a statutory scheme be consistent but also that they reflect a unitary vision of that scheme.” Revesz, *supra* note 22, at 1117.

44 BAUM, *supra* note 18, at 32. *But see generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (arguing that uniformity is over-emphasized as a legal value in federal law).

45 Revesz *supra* note 22, at 1149 (noting interest-group influence over specialized judicial appointments); Wood, *supra* note 20, at 1767; Ginsburg & Wright, *supra* note 33, at 801; Zimmer, *supra* note 18, at 47-50 (describing risk of specialist adjudicators becoming “captives of narrowly focused professional groups”).

46 LEGOMSKY, *supra* note 29, at 15.

fertilization of ideas” made possible by a more varied docket.<sup>47</sup> And while centralizing cases in a single court may lead to uniformity, the cost may be the “absence of diverse decisions on an issue that ultimately produce better policy.”<sup>48</sup> Specialization might even produce *inefficiencies* by incentivizing litigation of “jurisdictional boundaries” between specialist and generalist courts.<sup>49</sup> Finally, over-specialization could frustrate recruitment of quality jurists in jurisdictions where generalists enjoy higher status and prestige.<sup>50</sup>

The professionalist story provides a useful if limited framework for assessing China’s turn to special courts. Such values were emphasized in United States-China legal exchanges that helped promote China’s establishment of IP courts, for example, and official discourse on China’s new special courts is likewise replete with references to efficiency, expertise, and uniformity.<sup>51</sup> But because the literature recounted above is sourced mostly from liberal democracies, where baseline levels of judicial independence are less in doubt, it is not obvious that specialization can have similar appeal or similar effects in authoritarian settings. Nor does this literature tell us what is underlying the party-state’s apparent attraction to these values.

### C. Politics

While the technocratic benefits of specialized courts matter, an equally if not more important consideration is politics. A number of studies of specialized courts have stressed the political purposes underlying decisions to specialize.<sup>52</sup> Lawrence Baum, for example, has attributed a number of

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47 Wood, *supra* note 20, at 1767; *see also* Zimmer, *supra* note 18, at 48 (discussing how specialists have “little opportunity for the cross-pollination that fosters, tests, refines, and improves new ideas”); Ginsburg & Wright, *supra* note 33, at 804 (“[E]xposure to other areas of the law may give the generalist insights unavailable to a specialist.”).

48 BAUM, *supra* note 18, at 34; *see also* LEGOMSKY, *supra* note 29, at 15 (“The emergence of opposing views over a lengthy maturation period can aid the courts in developing their thoughts on difficult problems.”).

49 BAUM, *supra* note 18, at 33; *see also* Zimmer, *supra* note 18, at 48.

50 Zimmer, *supra* note 18, at 49.

51 Jamie P. Horsley, *Revitalizing Law and Governance Collaboration with China*, in THE FUTURE OF US POLICY TOWARD CHINA 1-2 (Ryan Hass et al. eds., 2020); Interview with Mark Cohen, Senior Fellow and Director, Berkeley Law Center for Law & Technology Asia IP Project (Apr. 6, 2021); *see infra* Part II.C.2.

52 Scholars have attributed special courts to an array of political, institutional, and technocratic motivations. *See, e.g.*, Wagner & Petherbridge, *supra* note 33, at 1115-16 (rooting the Federal Circuit’s “exclusive appellate jurisdiction over the patent law” in a desire to create “a clearer, more coherent,

American specialized courts to both the desire to change the substance of policy and the self-interest of key decision-makers.<sup>53</sup> In most cases, he argues, specific specialized courts were adopted to further the “instrumental goals” of policymakers or interest groups.<sup>54</sup>

If anything, the role of politics looms larger in non-democracies. Authoritarian regimes have at times set up “exceptional courts,” reserved for sensitive cases, that run parallel to their “regular court system.”<sup>55</sup> By controlling appointments and limiting procedural rights in the exceptional courts, autocrats can “contain judicial activism” while allowing their ordinary courts a measure of independence and professionalism.<sup>56</sup> A classical example of a fragmented judiciary is Franco’s Spain.<sup>57</sup> José Toharia describes “two parallel systems of justice: the ordinary and the extraordinary,” with the latter “in charge of all cases [of] political relevance” and “closely supervised by the regime.”<sup>58</sup> Such bifurcation enabled the government to “preserv[e] the independence of ordinary courts,” with returns to both “external image and internal legitimacy.”<sup>59</sup> Similar dynamics have been observed in the use of security courts by authoritarian governments in Brazil, Chile, and Argentina.<sup>60</sup>

As to China, several important works have analyzed the rise of environmental tribunals as an essentially political phenomenon. According to Alex Wang and Jie Gao, the early impetus for these tribunals was a series of major pollution outbreaks in 2007 and 2008.<sup>61</sup> Echoing this view, Rachel Stern has also rooted early environmental courts more broadly in local

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and more predictable patent doctrine” and to “reduce or eliminate forum shopping”); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 603 (2016) (tracing creation of drug courts to “[w]ell-intentioned judges and practitioners . . . respond[ing] to the social and economic pressures created by the War on Drugs”); John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1934-39 (2012) (describing the theory that business courts are “product[s] of competition among states to attract business activity”).

<sup>53</sup> BAUM, *supra* note 18, at 49.

<sup>54</sup> *Id.* at 43-44, 214; *see also id.* at 207 (discussing how the Federal Circuit was “spurred in part by business groups that sought a more lenient standard of patentability”).

<sup>55</sup> Tamir Moustafa & Tom Ginsburg, *Introduction* to RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1, 17 (Tom Ginsburg & Tamir Moustafa eds., 2008) [hereinafter RULE BY LAW].

<sup>56</sup> *Id.*

<sup>57</sup> *See* José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 L. & SOC’Y REV. 475, 495 (1975).

<sup>58</sup> *Id.* at 476.

<sup>59</sup> *Id.* at 495.

<sup>60</sup> Anthony W. Pereira, *Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile*, in RULE BY LAW, *supra* note 55, at 23, 23-24.

<sup>61</sup> *See* Wang & Gao, *supra* note 12, at 40.

responses to “pro-environment signals” from central leaders.<sup>62</sup> Stern sees these courts not as “a step toward judicial empowerment,”<sup>63</sup> but as part of the party-state’s continued deployment of law for “political ends”—as a tool of social stability, as a means of “drafting non-state actors” into policy enforcement, and as a way of bringing “judicial decisions into line” with pro-environment political values.<sup>64</sup>

Across a variety of regime types then, politics, sometimes even more than law, helps explain the rise of specialist judiciaries. This Article will elaborate on both to explain judicial specialization’s appeal to China’s leaders, focusing on how a mix of domestic and transnational politics is giving rise to new legal forms.

## II. SPECIALIZATION’S RISE

Part II chronicles China’s turn to specialized courts. Section A provides basic background on specialized courts in China. Section B provides a brief history of China’s experience with special courts before 2012. Section C concludes with an overview of the rapid turn to technocratic special courts under President Xi.

### *A. Special People’s Courts and Specialized Tribunals*

China has specialized its courts in two principal ways. First, there are a number of “special people’s courts” that sit outside of the generalist local people’s court system.<sup>65</sup> Although special people’s courts date back to the beginnings of Communist rule, they are nowhere defined in Chinese law.<sup>66</sup>

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<sup>62</sup> Stern, *supra* note 12, at 56-58.

<sup>63</sup> *Id.* at 54.

<sup>64</sup> *Id.* at 73.

<sup>65</sup> Local people’s courts are general-jurisdiction courts arranged “hierarchically by location.” STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 251 (1999). They consist of basic people’s courts at the county or district level, intermediate people’s courts at the prefectural or municipal level, and high people’s courts at the provincial level. People’s Courts Organic Law (promulgated by the Standing Comm. Nat’l People’s Cong., rev’d Oct. 26, 2018, effective Jan. 1, 2019), arts. 13, 20, 22, 24 (China). *See also* YUHUA WANG, *TYING THE AUTOCRAT’S HANDS: THE RISE OF THE RULE OF LAW IN CHINA* 61-63 (2015); RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 283 (2002). At the apex of both local and special people’s courts is the Supreme People’s Court (SPC), which decides cases, issues various judicial guidance documents, and supervises the other people’s courts. People’s Courts Organic Law, arts. 16, 18, 19 (China).

<sup>66</sup> The country’s first permanent constitution, adopted in 1954, vested “judicial power” in the “Supreme People’s Court [SPC], local people’s courts, and special people’s courts.” XIANFA art. 73

As a result, Chinese scholars have often looked to other sources for meaning. One legal dictionary defines them as courts “established in specified departments to hear specified cases.”<sup>67</sup> “Unlike ordinary people’s courts,” the entry explains, they “do not accept general civil and criminal cases.”<sup>68</sup>

Historically, special people’s courts have been established by several different institutions, including the National People’s Congress (NPC), the Supreme People’s Court (SPC), and local people’s congresses.<sup>69</sup> Special people’s court judges are generally appointed and supervised by the standing committees of local people’s congresses, and are funded by provincial and municipal governments.<sup>70</sup> Like local people’s courts, special people’s courts are also supervised by the SPC.<sup>71</sup> Outside the formal state apparatus, they are managed by party political-legal committees.<sup>72</sup> Most special people’s courts, including those in maritime, finance, and IP, are intermediate-level courts.<sup>73</sup>

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(1954) (China); see People’s Courts Organic Law, art. 1 (China). Temporary legislation enacted prior to the People’s Court Organic Law also contemplated specialized adjudicatory bodies. See Renmin Fayuan Zaxing Zuzhi Tiaoli (人民法院暂行组织调理) [Provisional Organizational Regulations of the People’s Courts] (promulgated by the Cent. People’s Gov’t Comm., Sept. 4, 1951), art. 2, <https://law.pkulaw.com/chinalaw/2bb790b40d19e8f0bdfb.html> (China).

67 Cheng Hu (程琥), Lun Woguo Zhuanmen Fayuan Zhidu de Fansi yu Chonggou (论我国专门法院制度的反思与重构) [*On the Reflection and Reconstruction of China’s Special People’s Courts System*], Zhongguo Yingyong Faxue (中国应用法学) [APPLIED JURISPRUDENCE], no. 3, 2019, at 175, 176 (quoting the Faxue Cidian).

68 *Id.* Other scholars have looked to statements from state bodies. From the SPC’s refusal to sanction a new special court, one scholar concludes that special courts are appropriate where a “highly mobile” population and “cross-provincial” disputes would otherwise present “jurisdictional uncertainties.” Liu Shude (刘树德), Guanyu Renmin Fayuan Zuzhifa Zhuanmen Renmin Shezhi de Ruogan Sikao (关于人民法院组织法专门法院设置的若干思考) [*Some Thoughts on the Setup of Special People’s Courts under the Organic Law of the People’s Courts*], Fazhi Yanjiu (法治研究) [RESEARCH ON RULE OF LAW], no. 4, 2017, at 3, 5 (describing a 1982 SPC reply).

69 It is not certain, however, whether special people’s courts *must* be established by the NPC Standing Committee. See P.R.C. People’s Courts Organic Law (promulgated by the Standing Comm. Nat’l People’s Cong., rev’d Oct. 26, 2018, effective Jan. 1, 2019), art. 15 (China) (“The setup, organization, functions and powers, and appointment and dismissal of judges of special people’s courts shall be prescribed by the Standing Committee of the National People’s Congress.”); Cheng, *supra* note 67, at 183 (proposing two possible interpretations of Article 15).

70 Cheng, *supra* note 67, at 185–86.

71 XIANFA art. 132 (2018) (China).

72 See Cheng, *supra* note 67, at 185. On the role of political-legal committees (*zhengfa wei*) in Chinese courts, see WANG, *supra* note 65, at 77; ALBERT HONGYI CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 132 (2004); Benjamin L. Liebman, *Legal Reform: China’s Law-Stability Paradox*, 143 DAEDALUS 96, 98 (Spring 2014).

73 Cheng, *supra* note 67, at 180. This means, among other things, that first-instance judgments rendered in these courts are appealable to the relevant high people’s court. *Id.*



The other major form of specialized judging in China occurs via “tribunals” (*shenpan ting*), which are adjudicative units within ordinary courts.<sup>74</sup> Tribunals can be highly specialized, or not, depending upon the circumstances of each court. The division between criminal and civil tribunals is “standard,” with larger courts in more developed regions evincing higher levels of specialization.<sup>75</sup> While a “typical” basic people’s court has one or two civil tribunals,<sup>76</sup> the basic people’s court in one of Beijing’s business districts has five civil tribunals differentiated by subject matter.<sup>77</sup> The SPC’s tribunals also fall along familiar divisions: civil, criminal, administrative, and environmental.<sup>78</sup>

The division of courts into specialist units are of more than formal significance. Sociologically, tribunals “loom[] large in the ways Chinese judges work together as an organizational unit,” providing the basic “work context within which a judge conducts her daily business.”<sup>79</sup> Cases are assigned by division chiefs, trainings are held at the divisional level, and informal case discussions mostly happen with other division members.<sup>80</sup>

### B. Special Courts Before 2012

Though specialized courts have existed since the early days of Mao’s China, they have historically been fairly weak institutions, even more beholden to bureaucratic overseers than ordinary Chinese courts, and

<sup>74</sup> People’s courts also include various administrative offices as well as enforcement bureaus. See CHEN, *supra* note 72, at 138.

<sup>75</sup> KWAI HANG NG & XIN HE, EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA 32 (2017).

<sup>76</sup> WANG, *supra* note 65, at 64.

<sup>77</sup> *Beijing Shi Chaoyang Qu Renmin Fayuan Jigou Shezhi Qingkuang* (北京市朝阳区人民法院机构设置情况) [Structure of the People’s Court of Chaoyang District, Beijing, CHINA CT. Chaoyang District People’s Court], Chaoyang Fayuan Wang (朝阳法院网) [Chaoyang Court Network] (June 21, 2019), <http://cyqfy.chinacourt.gov.cn/article/detail/2019/06/id/4240264.shtml>.

<sup>78</sup> *Jigou Shezhi* (机构设置) [Institutional Setup], *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan* (中华人民共和国最高人民法院) [Supreme People’s Court of the People’s Republic of China], THE SUPREME PEOPLE’S CT. OF THE PEOPLE’S REPUBLIC OF CHINA, <http://www.court.gov.cn/jigou.html> (last visited Sept. 11, 2020). The SPC also engages in significant non-adjudicatory work. The SPC Research Office, for example, “is responsible for drafting judicial interpretations” and “compiling accounts of typical cases.” Research Office, THE SUPREME PEOPLE’S CT. OF THE PEOPLE’S REPUBLIC OF CHINA (Nov. 3, 2015), [http://english.court.gov.cn/2015-11/03/content\\_22357699.htm](http://english.court.gov.cn/2015-11/03/content_22357699.htm). There are also six circuit courts based in different cities across the country, each covering certain province-level cases within a specified macro-region. Zhang & Ginsburg, *supra* note 4, at 329. Technically these are tribunals (*ting*), not courts (*yuán*), but prevailing English translations have referred to them as circuit “courts,” and I follow that convention here.

<sup>79</sup> NG & HE, *supra* note 75, at 32.

<sup>80</sup> *Id.* at 32-34.

lacking the sort of outward-facing, professional mandate that is increasingly characteristic of their modern counterparts.

### 1. *The Mao Era*

China first special people's courts consisted of military courts, railway transport courts, and water transport courts.<sup>81</sup> Reflecting both revolutionary traditions and Soviet influence, these early courts functioned similarly to other Chinese courts of the era, evidencing the inchoate, highly politicized state of the judiciary.<sup>82</sup>

The earliest special people's courts were widely regarded as “emulations of the Soviet judicial system,” part of a broader project of imitating Soviet legal models.<sup>83</sup> China's 1954 Constitution followed the 1936 Soviet Constitution in recognizing specialized courts as an institutional category.<sup>84</sup> The new government then erected the same three special courts installed in the Soviet Union.<sup>85</sup>

The early special courts grew to serve several functions. Railway courts, which were first instituted by the Tianjin government in 1953,<sup>86</sup> purported to protect railway travel by “timely cracking down on criminal acts endangering railway transportation.”<sup>87</sup> Eligible crimes at the time could be

81 PRC Organic Law of the People's Courts (Sept. 21, 1954), art. 26 (China).

82 China had just dismantled the Nationalist legal apparatus and directed that “judicial work” serve “political ends” through suppression of counterrevolutionaries. Jerome Alan Cohen, *The Chinese Communist Party and “Judicial Independence”: 1949-1959*, 82 HARV. L. REV. 967, 977 (1969) (quoting Shen Juru, the first SPC President); see also JEROME ALAN COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963: AN INTRODUCTION* 9 (1968) (The criminal process between 1949-1953 “served as a blunt instrument of terror”).

83 A Ji (阿计), *Zhuanmen Fayuan: Biange yu Chuangxin* (专门法院变革与创新) [*Specialized Courts: Change and Innovation*], 10 ZHEJIANG RENDA (浙江人大) [ZHEJIANG PEOPLE'S CONG.] 30, 31, (2018); see also Cheng, *supra* note 67, at 181; Jerome Alan Cohen, *China's Changing Constitution*, 1 NW. J. INT'L L. & BUS. 57, 62 & n.18 (1979) (China's “1954 constitution . . . was in large part borrowed from the Soviet Union and the Eastern European people's democracies.”); Glenn Tiffert, *Epistrophe: Chinese Constitutionalism and the 1950s*, in BUILDING CONSTITUTIONALISM IN CHINA 59, 62 (Stephanie Balme & Michael Dowdle eds., 2009).

84 XIANFA art. 73 (1954) (China); KONSTITUTSIJA SSSR (1936) [Konst. SSSR] [USSR CONSTITUTION] art. 102.

85 Compare PRC Organic Law of the People's Courts (Sept. 21, 1954), art. 26 (China) (“Special people's courts includes: (1) military courts; (2) railway transport courts; (3) water transport courts.”), with Act Concerning the Judicial System of the USSR, and of the Union and the Autonomous Republics, VEDOMOSTI 1938, art. 53 (listing, as special courts, “military tribunals,” “railroad line courts,” and “water-transport line courts”).

86 Li Lihui (李立惠), *Sishi Nian Tielu Yunsbu Fayuan Gaige Huigu yu Zhanwang* (四十年铁路运输法院改革回顾于展望) [*Reviewing 40 Years of Railway Transport Court Reform, and Looking Ahead*], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA COURT NETWORK] (June 14, 2019), <https://www.chinacourt.org/article/detail/2019/06/id/4052550.shtml>.

87 A Ji, *supra* note 83, at 31.

highly political—one railroad worker was tried by a railway transport court for writing “Mao Zedong is dead” on a piece of paper.<sup>88</sup> Because the “cross-regional” nature of railroad travel often made it impracticable for local people’s courts to assert jurisdiction over appropriate parties, railway courts offered some administrative convenience over local courts.<sup>89</sup>

Military courts had an older history, tracing to the military law departments (*junfa chu*) erected during the Second Sino-Japanese War and the revolutionary military tribunals (*geming junshi fating*) of the Chinese Soviet Republic.<sup>90</sup> These predecessor “courts” dealt mostly with People’s Liberation Army (PLA)-related offenses, including desertion, espionage, and counterrevolutionary activity.<sup>91</sup> By the time of the Communist victory in 1949, the military law departments were functionally separated from civilian courts.<sup>92</sup> In 1955, they were incorporated into the national judicial system.<sup>93</sup> Like railway courts, military courts served a highly political function, trying cases involving “contradictions [with] the enemy.”<sup>94</sup>

China’s early special courts fared no better than the rest of the judiciary under Mao. Like ordinary courts, they underwent some regularization and institutionalization prior to the Anti-Rightist Campaigns of 1957.<sup>95</sup> Railway transport judges were known to consult Soviet codes.<sup>96</sup> Military courts followed a more “formalized,” “jural” model of dispute resolution.<sup>97</sup> But as political campaigns intensified, the early special courts fell into disrepair. The

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88 Cohen, *supra* note 82, at 986-87.

89 A Ji, *supra* note 83, at 31.

90 Zhang Jiantian (张建田), Guanyu Junshi Fayuan Tizhi Gaige Wenti de Sikao (关于军事法院体制改革问题的思考) [*Thoughts on Reforming the Military Court System*], Faxue Zazhi (法学杂志) [L. SCI. MAG.], 2016 no. 2, at 2; Cheng Jinfei (程进飞), *Woguo Junshi Fayuan Lishi Fazhan Yange* (我国军事法院历史发展沿革) [*The Historical Development of My Country’s Military Courts*], BEIJING FAYUAN WANG (北京法院网) [BEIJING COURT NETWORK], (June 14, 2019), [bjgy.chinacourt.gov.cn/article/detail/2010/08/id/877559.shtml](http://bjgy.chinacourt.gov.cn/article/detail/2010/08/id/877559.shtml).

91 Zhang, *supra* note 90, at 2; David C. Rodearmel, *Military Law in Communist China: Development, Structure, and Function*, 119 MIL. L. REV. 1, 20-32 (1988).

92 Rodearmel, *supra* note 91, at 32.

93 Cheng Hu, *supra* note 67; Zhang Jiantian, *supra* note 90, at 2; Rodearmel, *supra* note 91, at 33-38.

94 Rodearmel, *supra* note 91, at 39.

95 See, e.g., Tiffert, *supra* note 83, at 21 (noting “brief surge of legal construction” in the early post-constitutional period); Cohen, *supra* note 82, at 989 (“Publications that appeared in 1956 and 1957 frequently refer to court decisions that frustrated prosecutions brought by police and procuracy.”); SIDA LIU & TERENCE C. HALLIDAY, CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK 20 (2016).

96 Cohen, *supra* note 82, at 986.

97 Rodearmel, *supra* note 91, at 37, 40; see also Cohen, *supra* note 82, at 977; Zhang Jiantian, *supra* note 90, at 2.

first to go were the country's 19 railway and water transport courts, abolished in 1957.<sup>98</sup> The military courts lasted a decade longer before they too were dismantled during the Cultural Revolution.<sup>99</sup> It was not until the reform period that some of the old courts were revived and new ones created.

## 2. *The Reform Era*

Following the Party's Third Plenum in 1978, China began to reconstruct its legal system in support of economic modernization.<sup>100</sup> Law reform became a multi-faceted response to the demands of marketization, legitimation, order maintenance, and the country's persistently fragmented governance structure.<sup>101</sup> During this period, the government opened and re-opened a number of special people's courts.

In the 1980s, the government created special people's courts in forest affairs, petroleum, mining, and farmland.<sup>102</sup> Like railway courts, these courts handled cases arising in certain industrial settings.<sup>103</sup> Forest courts, for example, arose initially within state forestry bureaus in heavily forested parts of the country: Jilin, Heilongjiang, Yunnan, and Gansu.<sup>104</sup> Their primary aim was to maintain security and order in those areas through enforcing criminal laws and mediating civil disputes.<sup>105</sup> Forest courts were not any more

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98 Guowuyuan Guanyu Chexiao Tielu, Shuishang Yunshu Fayuan de Jueding (国务院关于撤销铁路, 水上运输法院的决定) [Decision of the State Council on Revocation of Railway and Water Transport Courts] (promulgated by the St. Council, Sept. 7, 1957, effective Sept. 7, 1957), <http://temp.pkulaw.cn:8117/chl/161571.html>.

99 Rodearmel, *supra* note 91, at 47.

100 In the next two decades, China enacted a new constitution, hundreds of new laws, and thousands of new regulations. Alford, *supra* note 5, at 193, 194-95. State officials began promoting "court adjudication according to formal law as the preferred means of resolving civil disputes." Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 941 (2011). Judicial personnel grew from 32,000 persons in 1960 to ten times that in the 1990s. The legal profession as a whole grew from 3,000 in 1980 to over 120,000 in 1998. Alford, *supra* note 5, at 195; *see also* RACHEL E. STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE 21 (2013).

101 Alford, *supra* note 5, at 199-200.

102 Of these, forest courts were the only ones explicitly mentioned in the 1980 People's Court Organic Law's illustrative list of special people's courts. Huan Shengkui (宦盛奎), *Zhuanyehua or Dijianghua Chongtuzhong de Linye Fayuan* (专业化和地方化冲突中的林业法院) [*Forest Courts amid the Conflict between Professionalization and Localization*], FAXUE ZAZHI (法学杂志) [L. SCI. MAG.], 2011, at 130.

103 Cheng Hu, *supra* note 67, at 181; Huan Shengkui, *supra* note 102, at 131 (describing how forest courts arose out of "regional" rather than technical concerns).

104 Huan Shengkui, *supra* note 102, at 130.

105 *Id.*; *see also* Linyebu deng Guanyu zai Zhongdian Linqi Jianli yu Jianquan Linye Gongan,

empowered than ordinary courts, as they were deeply embedded within local agencies or state-owned forest farms.<sup>106</sup> Nor were they particularly specialized given their jurisdiction over a range of criminal, civil, and economic cases.<sup>107</sup>

Several previously shuttered special courts were revived over the same period. In 1980, the Ministries of Justice and Railways jointly reconstituted a multi-tier system of railway transport courts, with jurisdiction over crimes endangering railway transport and civil disputes involving railway parties.<sup>108</sup> Though ostensibly guided by local high people's courts, they were, for practical purposes, "enterprise" courts managed by the railway bureaucracy.<sup>109</sup> In fact, each of the 17 intermediate-level railway courts corresponded to the country's 17 railway bureaus.<sup>110</sup> Like forest courts, the new railway courts were firmly ensconced within the administrative apparatus.<sup>111</sup>

Perhaps the most notable special people's court to emerge from this period is the maritime court.<sup>112</sup> In 1984, the SPC and the former Ministry of Communications established intermediate-court level maritime courts in Shanghai, Tianjin, Qingdao, Dalian, Guangzhou, and Wuhan.<sup>113</sup> Official

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Jiancha, Fayuan Zuzhi Jigou de Tongzhi (林业部等关于在重点林区建立与健全林业公安, 检察, 法院组织机构的通知) [Notice of the Ministry of Forestry and Others on Establishing and Improving Forestry Public Security, Procuratorial, and Court Organizations in Key Forest Areas], (promulgated by the Ministry of Forestry et al. on Dec. 1, 1980, effective Dec. 1, 1980), <https://www.66law.cn/tiaoli/150832.aspx>.

<sup>106</sup> Huan Shengkui, *supra* note 102, at 131.

<sup>107</sup> *Id.*

<sup>108</sup> Li Lihui, *supra* note 86; Zhang Wujie (张武婕), *Qiantan Tielu Yunshu Fayuan Sifa Gaige* (浅谈铁路运输法院司法改革) [A Brief Discussion on the Judicial Reform of Railway Transport Courts], ZHONGGUO FAXUE WANG (中国法学网) [CHINESE LEGAL STUD. NETWORK], Jan. 7, 2013, <http://www.iolaw.org.cn/global/en/new.aspx?id=32800>.

<sup>109</sup> *Id.*

<sup>110</sup> Zhang Wujie, *supra* note 108.

<sup>111</sup> The PLA military courts were revived in 1978. Rodearmel, *supra* note 91, at 52. In the early 1980s, they were organized into a tiered system with levels resembling the local people's court system. Zhang Jiantian, *supra* note 90, at 3. Military courts applied China's Criminal Law and other supplemental military laws. Rodearmel, *supra* note 91, at 55, 56, 59, 61-62. As with civilian judges during this period, military judicial workers lacked basic legal education and training. *Id.* at 53. The PLA began offering rudimentary instructional programs, telling legal workers to cease "making random arrests" and to "base your work on the facts and the law." *Id.* at 54. Once trained, some military workers were transferred to civilian judicial posts. *Id.* at 53.

<sup>112</sup> See Zhao Wei (赵微), *Fayu Haishi Fayuan Xingshi Shenpanquan zhi Zhengdangxing Fenxi* (赋予海事法院刑事审判权之正当性分析) [*Analyzing the Legitimacy of Conferring Criminal Adjudicatory Authorities upon Maritime Courts*], FAZHI YANJIU (法治研究) [RULE OF L. STUD.], no. 1, 2015, at 29, 30 (on how foreign shipping was virtually nonexistent in the early Mao years).

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

documents described the courts as meeting new “needs in the development of the country’s maritime transport and in its economic relations and trade with foreign countries.”<sup>114</sup> Like other “industry” courts, maritime courts were subject to significant administrative direction; until 1999, they were managed by the Ministry of Communications and Transport.<sup>115</sup> Still, early maritime courts might be viewed as precursors to the more technocratic, outward-facing special courts of the Xi era. Unlike railway or forest courts, maritime courts had from the beginning been described as a response to maritime law’s technical complexity.<sup>116</sup> Maritime courts were also the first special court in China to regularly encounter foreign parties and international conventions.<sup>117</sup> Notably, whereas many industry courts have since been closed or recast into generalist courts, four more maritime courts were added in the 1990s, and another in Nanjing in 2019.<sup>118</sup>

The 1980s and 1990s also saw increasing specialization within ordinary courts.<sup>119</sup> As controls over firms began to loosen, economic tribunals were installed to hear business cases—disputes that were once mediated by state organs.<sup>120</sup> In the late 1980s, courts began establishing administrative tribunals, initially to hear cases involving administrative penalties imposed by public security organs.<sup>121</sup> Their writ expanded following enactment of the 1989 Administrative Litigation Law (ALL), which permitted citizens to

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114 Quanguo Renda Changweihui Guanyu zai Yanhai Gongkou Chengshi Sheli Haishi Fayuan de Jueding (全国人大常委会关于在沿海港口城市设立海事法院的决定) [Decision of the Standing Committee of the National People’s Congress on the Establishment of Maritime Courts in Coastal Port Cities] [hereinafter 1984 Maritime Decision], (promulgated by the Standing Comm. of the Nat. People’s Cong. on Nov. 14, 1984, effective Nov. 14, 1984), <http://www.lawinfochina.com/display.aspx?lib=law&id=57>.

115 Zhao Wei, *supra* note 112, at 30; CHEN, *supra* note 72, at 138 n.73 (citing interview with Xiao Yang, former SPC President, 1998-2008).

116 Zhao Wei, *supra* note 112, at 30 (describing how local courts were not able to handle “technical maritime problems”).

117 1984 Maritime Decision, *supra* note 114, at 2 (creating maritime courts “so as to safeguard the lawful rights and interests of both Chinese and foreign litigants”); Zhao Wei, *supra* note 112, at 30.

118 Zhao Wei, *supra* note 112, at 30.

119 CHEN, *supra* note 72, at 138.

120 *Id.*; see generally Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 713 (2013) (offering background on broader economic-law reforms during this period); James V. Feinerman, *The Evolving Chinese Enterprise*, 15 SYRACUSE J. INT’L L. & COM. 203, 207-14 (1989).

121 Minxin Pei, *Citizens vs. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832, 832, 834 (1997).

challenge certain concrete administrative acts.<sup>122</sup> To handle these cases, the ALL called on the people's courts to "set up administrative tribunals."<sup>123</sup>

Over the next decade and a half, China's planners took further steps to professionalize the courts. The SPC laid out its first five-year reform plans in 1999 and 2005, introducing a number of "technical changes designed to address competence and fairness" in the judiciary.<sup>124</sup> Judges had to meet higher qualification standards; judicial opinions contained more reasoning.<sup>125</sup>

In the special people's court domain, the reformist impulse manifested less in the creation of new courts than in their administrative reorganization. Until the early 2000s, state enterprise bureaus largely controlled personnel and funding of most special people's courts, fostering a "deep blood relationship" between courts and their administrative overseers.<sup>126</sup> Railway court judges, for instance, were at once "judges" and "railway employees," a setup that tended towards judgments favoring department interests.<sup>127</sup> In the late 1990s, maritime courts were severed from the Ministry of Communications and brought under local management.<sup>128</sup> In the early 2000s, forestry and railway courts—among other industry courts—started on a similar path to local supervision and funding.<sup>129</sup> These reforms took a decade to complete, and they did not convert the special people's courts

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122 Zhonghua Renmin Gongheguo Xingzheng Susong Fa (中华人民共和国行政诉讼法) [Administrative Procedure Law of the People's Republic of China] (promulgated by the President of the People's Republic of China, Apr. 4, 1989, effective Apr. 4, 1989), art. 5, 11, [http://english.court.gov.cn/2015-09/11/content\\_21845451.htm](http://english.court.gov.cn/2015-09/11/content_21845451.htm) [hereinafter 1989 ALL]. Challengeable acts include administrative sanctions like detentions or permit/licensure rescissions and failure to issue pensions according to law. *See id.* at art. 11(1), 11(6).

123 1989 ALL, *supra* note 122, at art. 3; Minxin Pei, *supra* note 121, at 835 n.12. The SPC became more specialized during this period, too. It established a Communications and Transport Tribunal in 1987 and an Administrative Tribunal in 1988. Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 161 (1993). By 1993, it had—in addition to the two just listed—two criminal tribunals, one civil tribunal, and an economic tribunal. *Id.*

124 Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620, 625 (2007).

125 *See id.* at 625-26. By 2005, a majority of Chinese judges had university degrees, up from less than 7% in 1995. *Id.* at 625.

126 Cheng Hu, *supra* note 67, at 180.

127 Zhang Wujie, *supra* note 108.

128 *Id.* at 182.

129 *Id.* at 180. The SPC's first five-year judicial reform plan called for gradual change of the "administrative or enterprise management of railway, farmland, forest, and oil field courts." Zuigao Renmin Fayuan Yinfa <Renmin Fayuan Wunian Gaike Gangyao> (最高人民法院印发《人民法院五年改革纲要》) [The Supreme People's Court Issued the "Outline of Five-Year Reforms for the People's Courts"] (promulgated by the Jud. Reform Off. of the Supreme People's Ct., Oct. 20, 1999), art. 43, <https://www.chinacourt.org/article/detail/2013/04/id/941425.shtml>.

into independent bodies,<sup>130</sup> but they did mitigate one significant source of extrajudicial influence.<sup>131</sup>

In the mid-2000s, the party-state took a more skeptical view of formal legal institutions. State-led campaigns stressed populist dispute resolution; mediation rates grew.<sup>132</sup> But this shift, known in the literature as a “return to populist legality”<sup>133</sup> or even a “turn against law,”<sup>134</sup> did not halt the engine of formal legal construction. The state enacted new laws in areas like torts, anti-monopoly, and enterprise bankruptcy, and passed a new constitutional amendment on private property rights.<sup>135</sup> While no new special people’s courts were created, new tribunals continued to proliferate.

In the mid-2000s, local officials began constructing environmental tribunals in places like Dalian, Nanjing, Guiyang, Kunming, and Wuxi.<sup>136</sup> Early environmental tribunals were not known for high levels of professional specialization. Many suffered from low case counts and proceeded cautiously when big cases came.<sup>137</sup> In carrying out a more pro-environment mandate, however, several courts began experimenting with new rules: giving social organizations standing to sue in the public interest,<sup>138</sup> enabling injunctions, and enacting plaintiff-friendly fee policies.<sup>139</sup> In that sense, environmental tribunals became a kind of problem-solving court, focused less on technical specialization than on fashioning novel procedures to “bring judicial decisions into line with political values.”<sup>140</sup> Over a

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130 See A Ji, *supra* note 83, at 33.

131 Cheng Hu, *supra* note 67, at 185. See also A Ji, *supra* note 83, at 32 (discussing how biased railway court decisions led to a “general crisis in confidence” in the fairness of railway courts).

132 See Minzner, *supra* note 100, at 943-47; Liebman, *supra* note 72, at 98-99; Zhang & Ginsburg, *supra* note 4, at 317-18; Benjamin L. Liebman, *A Populist Threat to China’s Courts?*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 269, 303 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

133 Liebman, *supra* note 11, at 165.

134 Minzner, *supra* note 100, at 935.

135 See Albert H.Y. Chen, *China’s Long March towards Rule of Law or China’s Turn Against Law?*, 4 CHINESE J. COMP. L. 1, 1 (2016).

136 STERN, *supra* note 100, at 115-17.

137 Stern, *supra* note 12, at 64-65 (“[M]any environmentalists have been disappointed by the courts’ caution and an embarrassing lack of cases.”); STERN, *supra* note 100, at 120.

138 See STERN, *supra* note 100, at 118; Wang & Gao, *supra* note 12, at 45.

139 Wang & Gao, *supra* note 12, at 47.

140 Stern, *supra* note 12, at 73. Other tribunal-level entities in China might also be compared to problem-solving courts: juvenile tribunals placing “more emphasis on education and rehabilitation than punishments” and family-law tribunals, staffed not only by judges but also by social workers and child psychologists. Spencer D. Li & Tzu-Hsuan Liu, *Problem-Solving Courts in China: Background, Development, and Current Status*, 14 VICTIMS & OFFENDERS 360, 365, 368 (2019).



thousand environmental tribunals have since been established, including within the SPC.<sup>141</sup>

The rise of environmental tribunals was part of a larger trend of accelerating specialization within the people's courts generally. Civil and criminal tribunals became increasingly differentiated along subject-matter lines, especially in urban centers with complex commercial dockets.<sup>142</sup> In such locations, or in many provincial courts, it was not unusual to see three, four, five, or even six separate civil tribunals—each concentrating on a more limited share of the court's general civil docket. The most economically important ones in major cities were simply known as Civil Tribunals Two (*minerting*) and Three (*minsanting*)<sup>143</sup> (and in many places Four (*minsiting*)). Focusing on commercial, IP, and foreign-related law respectively, these tribunals began drawing greater local resources in light of their economic significance.<sup>144</sup> Their rise foreshadows the more full-throttled, center-backed embrace of professional specialization that commenced after 2012.

#### *B. The Xi Era and the New Special Courts*

Shortly after President Xi's ascension in 2012, the populist shift in Chinese law began to turn. At its 2014 plenum, the party's central committee formalized both a more party- and law-centered governance model.<sup>145</sup> For the judiciary generally, this meant instituting a number of technical reforms designed to reduce local influences over judicial decision-making, while maintaining the leading role of the party in guiding legal developments.<sup>146</sup> In the special-courts domain, the reform program has included the construction of new courts in a number of technocratic areas, including IP, finance, Internet, and international commercial law.<sup>147</sup>

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141 *Zhongguo Huanjing Ziyuan Shenpan (2019) Ji Niandu Dianxing Anli Zhongguo Huanjing Sifa Fazhan Baogao (2019) Xinwen Fabuhui* (《中国环境资源审判(2019)》暨年度典型案例《中国环境司法发展报告(2019)》新闻发布会) [*"China Environmental Resource Trial (2019)" and Annual Typical Case "China Environmental Judicial Development Report (2019)" Press Conference*], ZUIGAO RENMIN FAYUAN WANG (最高人民法院网) [SPC NET], May 8, 2020, <http://www.court.gov.cn/zixun-xiangqing-228351.html>; Adjudication Tribunal for Environmental Resources, Supreme People's Court of the People's Republic of China, [http://english.court.gov.cn/2015-11/03/content\\_22357022.htm](http://english.court.gov.cn/2015-11/03/content_22357022.htm).

142 Ng & He, *supra* note 75, at 27.

143 *Id.*

144 *Id.* (describing the first two).

145 See Zhang & Ginsburg, *supra* note 4, at 326; deLisle, *supra* note 3, at 70.

146 See *infra* Part IV.B (for a deeper discussion of Xi-era legal reforms).

147 Other technocratic special courts to arise during this period include the Shenzhen Qianhai

Later sections will show that the new special courts stand out in their commitment to certain legal-professional values.<sup>148</sup> This section provides an initial overview of these courts, and explains why their emergence is both puzzling and notable.

### 1. *The Courts*

The IP courts were the first special people's courts to emerge in the Xi era. Established in Beijing, Shanghai, and Guangzhou in 2014, they are intermediate-level special people's courts with territorial jurisdiction over Beijing, Shanghai, and Guangdong province respectively.<sup>149</sup> In 2014, those three regions accounted for over half of China's IP caseload.<sup>150</sup>

The IP Courts have original jurisdiction over civil and administrative cases involving patents, new plant varieties, integrated circuit layout designs, technical secrets, and computer software; administrative cases regarding copyright, trademark, and unfair competition; and civil cases relating to well-known trademarks.<sup>151</sup> This grant of jurisdiction relieved intermediate courts in Beijing, Shanghai, and Guangdong of their jurisdiction over most IP-related disputes, centralizing authority within the new judicial bodies.<sup>152</sup> Unique among the three, the Beijing IP court has exclusive first-instance jurisdiction over certain State Council agency decisions involving the granting of patents and compulsory licenses.<sup>153</sup> The courts also have appellate jurisdiction over certain other IP-related basic people's court

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Cooperation Zone People's Court, a 39-judge court established by the SPC in 2014, with jurisdiction over *inter alia* Shenzhen-area commercial cases that involve parties from Hong Kong, Taiwan, Macau, and foreign countries, and general IP cases in the Qianhai and Shekou Free Pilot Area. *See* Jurisdiction of the Court, SHENZHEN QIANHAI COOPERATION ZONE PEOPLE'S COURT, <http://en.szqhcourt.gov.cn/About/Index/7.html?&cId=23>; and a new maritime court established in 2019, *see* Zhao Wei, *supra* note 112, at 30. In addition, between 2015 and 2017, China's total number of bankruptcy tribunals rose from 5 to 97. *See Current Trends in China's Bankruptcy Filings*, JDSUPRA (Aug. 21, 2019), <https://www.jdsupra.com/legalnews/current-trends-in-china-s-bankruptcy-49571/>.

148 *See infra* Part III.B.

149 Zhang & Lee, *supra* note 12, at 64.

150 *See* Nari Lee & Liguang Zhang, *Specialized IP Courts in China - Judicial Governance of Intellectual Property Rights*, 48 INT'L REV. INTELL. PROP. & COMPETITION L. 900, 910 (2017). These include decisions of the Trademark Review and Adjudication Board and the Patent Review Board.

151 Zuigao Remin Fayuan Guanyu Beijing, Shanghai, Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia de Guiding (最高人民法院关于北京、上海、广州知识产权法院案件管辖的规定) [Provisions of the Supreme People's Court on the Jurisdiction of Intellectual Property Courts in Beijing, Shanghai, and Guangzhou] (promulgated by the Sup. People's Ct., Oct. 27, 2014, effective Nov. 3, 2014), Oct. 31, 2014, art. 1, <http://www.court.gov.cn/zixun-xiangqing-13655.html> [hereinafter IP Jurisdiction Provisions].

152 *Id.* at art. 3.

153 *Id.* at art. 5.

decisions.<sup>154</sup> At the end of 2020, the NPCSC established a fourth IP Court in Hainan, with similar coverage.<sup>155</sup>

In 2017 and 2018, the SPC established specialized IP Tribunals in 18 cities. Unlike IP Courts—each their own administrative entity—the new IP Tribunals are divisions contained within various municipal intermediate people’s courts.<sup>156</sup> But in geographic scope, the Tribunals very much resemble their IP Court counterparts.<sup>157</sup> The Wuhan IP Tribunal, for example, has jurisdiction over IP disputes in Hubei Province, while the Suzhou and Nanjing IP Tribunals together hear cases arising in all of Jiangsu Province.<sup>158</sup> This departs from the older IP tribunals and their more limited territorial jurisdictions.

In 2019, the SPC set up its own specialized IP tribunal, reserved mainly for “technically complex” patent and other IP appeals.<sup>159</sup> The SPC IP Court oversees appeals in civil and administrative disputes involving invention patents, utility model patents, new plant varieties, integrated circuit layout designs, technical secrets, and monopoly-law related penalties.<sup>160</sup> It hears direct appeals from first-instance judgments rendered in the high people’s courts, the new IP courts, and the new IP tribunals.<sup>161</sup> In addition, the SPC IP Tribunal may serve as a court of first instance for “complex” and “nationally important” IP matters.

The Shanghai Financial Court was established in 2018. Like the Shanghai IP Court, it is an intermediate-level special people’s court with

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<sup>154</sup> *Id.* at art. 6.

<sup>155</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Hainan Ziyou Maoyigang Zhishi Chanquan Fanyuan de Jueding (全国人民代表大会常务委员会关于设立海南自由贸易港知识产权法院的决定) [Decision of the Standing Committee of the National People’s Congress on the Establishment of the Intellectual Property Court of the Hainan Free Trade Port] (promulgated by the NPCSC on Dec. 26, 2020, effective Jan. 1, 2021), <http://www.npc.gov.cn/npc/c30834/202012/d092af7776574497804c486cc44611e2.shtml>.

<sup>156</sup> Weightman, *supra* note 12, at 160.

<sup>157</sup> The exception is Shenzhen, given the Guangzhou IP Court’s jurisdiction over Guangdong Province as a whole. *Id.* at 160.

<sup>158</sup> *Id.* The IP Tribunals were established in Shenzhen, Chengdu, Nanjing, Suzhou, Wuhan, Hefei, Hangzhou, Ningbo, Fuzhou, Jinan, Qingdao, Xi’an, Tianjin, Changsha, Zhengzhou, Nanchang, Changchun, and Lanzhou, each with their own separate building. *Id.*

<sup>159</sup> Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fating Ruogan Wenti de Guiding (最高人民法院关于知识产权法庭若干问题的规定) [Provisions of the Supreme People’s Court Regarding Several Issues with the IP Tribunal], (promulgated by the Sup. People’s Ct., Dec. 27, 2018, effective Jan. 1, 2019), art. 1, <http://www.court.gov.cn/zixun-xiangqing-137481.html>.

<sup>160</sup> *Id.* art. 2.

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

both original and appellate jurisdiction over cases of a certain type.<sup>162</sup> Essentially, the Court has taken exclusive jurisdiction over a range of financial cases from Shanghai's intermediate courts. The Financial Court's original jurisdiction includes disputes over securities, futures trading, trusts, insurance, bills, letters of credit, financial borrowing contracts, bank cards, financial leasing contracts, P2P (peer to peer) lending, letters of guarantee, financial-institution bankruptcies, and finance-related arbitrations and judgments enforcement.<sup>163</sup> The Court also hears financial-related administrative cases where financial regulators are themselves being sued, and certain non-criminal cases relating to financial market infrastructures (FMIs) based in Shanghai.<sup>164</sup> Finally, the Court hears appeals in financial civil, commercial, and administrative cases arising out of all basic people's courts in Shanghai.<sup>165</sup>

The NPCSC established the Beijing Financial Court in 2021.<sup>166</sup> The Court's jurisdiction is similar to Shanghai's, with additional exclusive jurisdiction over other areas, including cases involving harm to domestic investors by overseas companies.<sup>167</sup> Beijing's selection owed in part to the number of major financial institutions and financial regulatory agencies headquartered in the city.<sup>168</sup> Like the other special courts surveyed here, the

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162 *Zuigao Renmin Fayuan Guanyu Shanghai Jinrong Fayuan Anjian Guanxia de Guiding* (最高人民法院关于上海金融法院案件管辖的规定) [Provisions of the Supreme People's Court on the Jurisdiction of the Shanghai Financial Court], (promulgated by the Sup. People's Ct., Aug. 7, 2018, effective Aug. 10, 2018), art. 1, [https://www.pkulaw.com/en\\_law/60495d1c45e1c15ebdfb.html](https://www.pkulaw.com/en_law/60495d1c45e1c15ebdfb.html). [hereinafter *Financial Court Provisions*].

163 *Id.*

164 *Id.* at arts. 2, 3.

165 *Id.* at art. 4.

166 *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Sheli Beijing Jinrong Fayuan de Jueding* (全国人民代表大会常务委员会关于设立北京金融法院的决定) [Decision of the Standing Committee of the National People's Congress on the Establishment of the Beijing Financial Court] (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 23, 2021, effective Jan. 23, 2021), <http://cpc.people.com.cn/n1/2021/0123/c64387-32009476.html>. The Court also has special jurisdictional rules for administrative disputes involving the People's Bank of China and several Beijing-headquartered regulatory agencies. *Id.*

167 *See Zuigao Renmin Fayuan Guanyu Beijing Jinrong Fayuan Anjian Guanxia de Guiding* (最高人民法院关于北京金融法院案件管辖的规定) [Regulations of the Supreme People's Court on the Jurisdiction of Beijing Financial Court Cases] (promulgated by the Sup. People's Ct., Mar. 1, 2021, effective March 16, 2021), <https://mp.weixin.qq.com/s/WHY8SuuqxDANNRoWJE9UkQ>.

168 *Jintian, Beijing Jinrong Fayuan Zhengshi Liangxiang* (今天, 北京金融法院正式亮相) [*Today, the Beijing Financial Court Officially Unveiled!*], PEOPLE'S COURTS PRESS, Mar. 18, 2021, <http://www.court.gov.cn/zixun-xiangqing-291581.html>.

Beijing Financial Court's establishment is described in official outlets as a "major decision of the Party center with Comrade Xi Jinping at the core."<sup>169</sup>

In 2017, the SPC established the first Internet Court in Hangzhou, China's most significant e-commerce hub. A year later, the SPC added two more in Guangzhou and Beijing. All three are basic-level people's courts with exclusive first-instance jurisdiction over a number of internet-related disputes within their respective cities. Jurisdiction extends to online shopping, network, and loan contracts; ownership or infringement of copyrights of internet works; infringement of personal, property, and other civil rights on the internet; defects in products purchased through e-commerce platforms; and certain internet-related administrative acts.<sup>170</sup> Litigants may appeal to intermediate courts within each city, except that appeals of certain online copyright and domain-name disputes in Guangzhou and Beijing go to their respective IP Courts instead.<sup>171</sup> Virtually all of the Courts' cases are conducted online.

In 2018, the SPC established the China International Commercial Court (CICC) in Shenzhen and Xi'an—Shenzhen because of its proximity to Hong Kong and Macau; Xi'an because of its historic role in the Silk Road and anticipated Belt-and-Road Initiative (BRI) disputes.<sup>172</sup> The CICC is a standing judicial tribunal of the SPC, overseen by the SPC's Fourth Tribunal, and all decisions are final.<sup>173</sup> The CICC's jurisdiction is limited to commercial cases with an "international" component, meaning that a party is a foreigner or foreign enterprise, or is domiciled abroad; the object of the dispute lies abroad; or the legal facts that produced, modified, or

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<sup>169</sup> *Id.*

<sup>170</sup> *Zuigao Renmin Fayuan Guanyu Hulianwang Fayuan Shenli Anjian Ruogan Wenti de Guiding* (最高人民法院关于互联网法院审理案件若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts] (promulgated by the Sup. People's Ct., Sept. 3, 2018, effective Sept. 7, 2018), art. 2, <http://www.court.gov.cn/zixun-xiangqing-116981.html> [hereinafter Provisions on Internet Courts]; George G. Zheng, *China's Grand Design of People's Smart Courts*, 7 *ASIAN J.L. SOC'Y* 561, 576 (2020).

<sup>171</sup> Provisions on Internet Courts, *supra* note 170, at art. 4.

<sup>172</sup> *Weisbenme Zai Shenzhen, Xian Sheli Guoji Shangshi Fating? Zuigaofa Huiying* (为什么在深圳, 西安设立国际商事法庭? 最高法回应) [*Why Set Up International Commercial Courts in Shenzhen and Xi'an? Supreme People's Court Response*], *ZHONGGUO XINWEN WANG* (中国新闻网) [CHINA NEWS NET], June 28, 2018, <http://www.chinanews.com/gn/2018/06-28/8549700.shtml>.

<sup>173</sup> *Zui Gao Renmin Fayuan Guanyu Sheli Guoji Shangwu Fating Ruogan Wenti de Guiding* (最高人民法院关于设立国际商事法庭若干问题的规定) [Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of International Commercial Courts], (promulgated by the Sup. People's Ct., June 27, 2018, effective July 1, 2018), art. 1, <http://www.court.gov.cn/zixun-xiangqing-104602.html> [hereinafter CICC Provisions]. Losing parties may apply for retrial. *Id.* at art. 16.

extinguished the commercial relationship occurred outside China.<sup>174</sup> The Court can receive cases in several ways, including upon recommendation by the high people's courts or if the case is deemed to have "significant nationwide impact."<sup>175</sup> Parties may also choose in writing to utilize the CICC if the amount in controversy exceeds 300 million RMB.<sup>176</sup> The CICC bills itself as a "one-stop" platform for cross-border commercial dispute resolution, allowing parties to choose between litigation, mediation, and arbitration.<sup>177</sup> Early cases have involved disputes from Japan, Thailand, and Italy, many relating to the validity of arbitration agreements.<sup>178</sup>

## 2. *The Puzzle*

The turn to specialized courts is puzzling for several reasons. First, in the decade preceding 2012, there was something of an unofficial moratorium on new special people's courts. One former American official recalls that in conversations with a senior Chinese IP judge, he was "repeatedly told" that "it was nearly impossible to get new courts established, as the momentum in China was away from specialized courts."<sup>179</sup> When the government did focus on special people's courts during this period, it was generally to abolish obsolete courts in areas like railways and forestry, rather than to create new ones.

Nor was it that new special courts were absent from the policy stream before 2012. Indeed, many had been earlier proposed. Gao Lulin, former chair of the China Intellectual Property Research Association, first proposed establishing a patent court in 1996.<sup>180</sup> Wu Boming, an official with the State

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<sup>174</sup> *Id.* at art. 3. The definition of "commercial" is quite broad, but it generally excludes investor-state disputes. Huo & Yip, *supra* note 12, at 917.

<sup>175</sup> CICC Provisions, *supra* note 173, at art. 2.

<sup>176</sup> *Id.*

<sup>177</sup> Long Fei, *Innovation and Development of the China International Commercial Court*, 8 CHINESE J. COMP. L. 40, 42 (2020).

<sup>178</sup> Xiangzhuang Sun, *A Chinese Approach to International Commercial Dispute Resolution: The China International Commercial Court*, 8 CHINESE J. COMP. L. 45, 47 (2020). Unlike the other special courts described here, the CICC does not have its own separate headcount, or *bianzhi*—the party-state's "system for creating and eliminating" government posts. Susan Finder, *Controlling Judicial Headcount in the New Era*, SUP. PEOPLE'S CT. MONITOR (Mar. 21, 2020), <https://supremepeoplescourtmonitor.com/tag/bianzhi/>.

<sup>179</sup> Interview with Mark Cohen, *supra* note 51.

<sup>180</sup> Luoma Bushi Yitian Jiancheng de, *Zhishi Changquan Fayuan Dangran ye Bushi* (罗马不是一天建成的, 知识产权法院当然也不是) [*Rome Wasn't Built in a Day; Neither Were IP Courts*], ZHICHANLI (知产力), Nov. 2, 2014, <https://bit.ly/3IFNFLG> [hereinafter Luoma].

Intellectual Property Office, offered a similar idea in 2001.<sup>181</sup> IP-court proposals appeared in high-level policy documents as early as 2008,<sup>182</sup> yet the first such courts were not established until 2014. Similarly, the concept of a financial court was first proposed by law scholar Wang Lanjun in 2000.<sup>183</sup> The idea was proposed by members of the Shanghai Political Consultative Conference in 2010,<sup>184</sup> and again by Gui Minjie, then Chairman of the Shanghai Stock Exchange Council that same year.<sup>185</sup> But the Shanghai Financial Court was not established until 2018.

Finally, the turn to technocratic specialized courts is notable for its speed. The following timeline illustrates how rapidly the turn to specialized judging has progressed in the Xi Era:

- 2014 IP Courts (Beijing, Shanghai, Guangzhou)
- 2017-18 IP Tribunals (eighteen cities); Internet Courts (Hangzhou, Guangzhou, Beijing)
- 2018 Shanghai Financial Court; China International Commercial Court
- 2019 SPC IP Court
- 2020 Hainan IP Court
- 2021 Beijing Financial Court

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181 *Id.*; Wu Boming (吴伯明), *Guanyu zai Woguo Sheli Zhisbi Chanquan Fayuan de Jianyi* (关于在我国设立知识产权法院的建议) [*Suggestions on Establishing Intellectual Property Courts in my Country*], ZHISHI CHANQUAN (知识产权) [INTELL. PROP.], June 15, 2001, at 3-4.

182 Outline of the National Intellectual Property Strategy (issued by the State Council of the People's Republic of China on June 5, 2008), art. 45, WIPO IP PORTAL, <https://wipo.int/ipportal/en/text/125982> (hereinafter IP Strategy Outline).

183 Wang Lanjun (王兰军), *Guanyu Zujian Zhongguo Jinrong Fayuan de Sikao* (关于组建中国金融法院的思考) [*Thoughts on the Establishment of a Chinese Financial Court*], 4 SHANGHAI JINRONG GAODENG ZHUANKE XUEXIAO XUEBAO (上海金融高等专科学校学报) [J. SHANGHAI FIN. COLL.] 19, 19-21 (2000).

184 Liu Man & Cheng Shuwei (刘嫚&程姝雯), *Sheli Shanghai Jinrong Fayuan Zhengxie Weiyuan Liansu Hnyu 8 Nian* (设立上海金融法院政协委员连续呼吁 8 年) [*To Establish the Shanghai Financial Court, Political-Consultative Committee Member Advocated for Eight Years*], NANFANG DUSHI BAO (南方都市报) [SOUTHERN METROPOLIS DAILY], Apr. 26, 2018, [https://www.sohu.com/a/229484371\\_161795](https://www.sohu.com/a/229484371_161795).

185 Gui Minjie: *Jianyi zai Shanghai Sheli Jinrong Fayuan* (桂敏杰: 建议在上海设立金融法院) [*Gui Minjie: I Recommend Establishing a Financial Court in Shanghai*], SHANGHAI ZHENGJUAN BAO (上海证券报) [SHANGHAI ZHENGJUAN BAO], Mar. 6, 2015, <http://news.cnstock.com/event,2015lh-2015lh-taya-201503-3359646.htm>.

While the rise of a single court is more readily attributable to idiosyncratic factors, the embrace of multiple courts at this scale suggests a broader structural shift. Indeed the push to specialization appears to have acquired new momentum following President Xi's ascension to power, spurring the creation of not just one court, or one set of courts, but a whole range of new special courts across several areas. The following Part will show how new national strategies are partially responsible for this shift.

### III. SPECIALIZATION'S STRATEGIC APPEAL

China's turn to special courts can be traced to strategic objectives that are either new or have become increasingly prominent under President Xi. Section A explains how new national objectives have increased the leadership's commitment to forging more credible dispute resolution institutions across several strategic domains, and how the judiciary has sought to "service" these goals by establishing specialized courts to accelerate legal-professional reforms. Section B documents how the new special courts have sought to improve levels of expertise, consistency, and efficiency in aid of their global-professional mandates. Section C highlights a core tension between the party-state's new professional goals and its desire to shape outcomes in cases of national interest.

#### *A. "National Rejuvenation" and New Professional Imperatives*

At a high level, Chinese policymaking now centers around President Xi's call for the "great . . . rejuvenation of the Chinese nation," a set of Party-led objectives premised on restoring China's "past glories."<sup>186</sup> The goal is to propel China into a "new era" by 2049—the People's Republic of China's centenary—as "a leading country in comprehensive national strength and international influence."<sup>187</sup> This is thought to require China to become a "global leader in innovation," develop a "world-class military," and take a more assertive role in shaping global governance.<sup>188</sup> The strategic premise is not only that China is rising, but also that the United States is in decline. In

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<sup>186</sup> ELIZABETH C. ECONOMY, *THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE* 3-4 (2018).

<sup>187</sup> RUSH DOSHI, *THE LONG GAME: CHINA'S GRAND STRATEGY TO DISPLACE AMERICAN ORDER* 262 (2021) (quoting from Oct. 18, 2017 speech at the Communist Party's 19th Party Congress).

<sup>188</sup> *Id.*; Elizabeth Economy, *Xi Jinping's Superpower Plans*, *WALL ST. J.* (July 19, 2018), <https://www.wsj.com/articles/mr-xis-superpower-plans-1532013258>.



a 2018 Central Foreign Affairs Work Conference, President Xi said: “At present, China is in the best development period since modern times, . . . the world is in a state of great change not seen in one hundred years, and these two [trends] are simultaneously interwoven and mutually interacting.”<sup>189</sup> Thus in Xi’s mind, “China’s global rise and the apparent decline of the West were trends that reinforced each other.”<sup>190</sup> And global competition, far more than in the past, is key to the new dynamic.

Some of these objectives reflect ambitions that predate Xi, part of a longer-term emphasis on setting “national strategic objectives” (*guojia zhanlue mubiao*) to obtain “great power status in the economic, technological, social, and military realms.”<sup>191</sup> For example, innovation promotion has long been thought necessary for China to transition from a labor-intensive economy to a more high-tech services-based growth model.<sup>192</sup> In the Xi-era, however, these economic imperatives have taken on a geopolitical quality. China’s leaders now see the country as locked in a race to lead the world in AI, quantum information, big data, and biotechnology—what Xi and other party leaders have called “the Fourth Industrial Revolution.”<sup>193</sup> The State Council has issued several blueprints—the “Made in China 2025” master plan in 2015 and the “A Next Generation Artificial Intelligence Development Plan” in 2017—which together chart a course for China to become the world’s AI leader by 2030.<sup>194</sup> In keeping with these goals,

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<sup>189</sup> DOSHI, *supra* note 187, at 267 (explaining that the phrase “great changes unseen in a century” is widely understood to be a reference to American decline).

<sup>190</sup> *Id.*

<sup>191</sup> Susan Finder, *How the Supreme People’s Court Serves National Strategy and ‘Makes Law’: The Pilot FTZ Opinion and Its Implications*, 51 INT’L ECON. L. AND THE CHALLENGES OF THE FREE TRADE ZONES 279 (2019) (quoting Michael Swaine); *see also* ANDREW SCOBELL ET AL., CHINA’S GRAND STRATEGY 9-21 (2020) (outlining the various components of China’s national strategy).

<sup>192</sup> *See, e.g.*, Hu Jintao’s Report at 17th Party Congress, CHINA DAILY, Oct. 25, 2007, [http://www.chinadaily.com.cn/china/2007-10/25/content\\_6225977\\_5.htm](http://www.chinadaily.com.cn/china/2007-10/25/content_6225977_5.htm) (The “core of our national development strategy” is to “[e]nhance China’s capacity for independent innovation”); ANUPAM CHANDER, THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD IN COMMERCE 194 (2013).

<sup>193</sup> *The China Challenge: Realignment of U.S. Economic Policies to Build Resiliency and Competitiveness: Hearing Before the S. Comm on Com., Scie., and Transp.*, 116th Cong. 2 (220) [hereinafter *Hearing Before the S. Comm.*] (statement of Dr. Rush Doshi, Dir., Brookings Inst. China Strategy Initiative Fellow, Yale L. Sch. China Ctr.) (“Beijing believes that the competition over technology is about more than whose companies will dominate particular markets. It is also about which country will be best positioned to lead the world.”); JAMES A. LEWIS, TECHNOLOGICAL COMPETITION AND CHINA 1-2 (2018); CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (2017) (stating in a 2017 revision that the “Party shall . . . build China into a country of innovation and a global leader in science and technology”).

<sup>194</sup> Zheng, *supra* note 170, at 4-5; WILLIAM A. CARTER & WILLIAM D. CRUMPLER, SMART

President Xi has called on China's entrepreneurs to align their business goals with "national needs," noting that though "marketing knows no borders," "entrepreneurs have a motherland."<sup>195</sup> Xi has also described "science and technology" as "the main battle ground of global power rivalry."<sup>196</sup>

Even more explicitly geopolitical is the Belt-and-Road Initiative (BRI), Xi's signature foreign policy initiative. Initially framed as an infrastructure plan to connect China to its regional neighbors via ports, railways, and highways, the BRI has grown into a behemoth catch-all program, covering a full range of other linkages: telecommunications, culture, and financial and free trade accords.<sup>197</sup> BRI programs now encompass over 130 nations, including countries in Africa and Latin America, and have "stretched into the Arctic, cyberspace, and outer space."<sup>198</sup> These initiatives respond to a number of national imperatives, from the need to offload excess capacity in steel, cement, and coal to the grander vision of placing "a rejuvenated Chinese nation . . . at the epicenter of Asia and beyond."<sup>199</sup> While not all BRI projects are narrowly tailored to geopolitical goals, "there is little question that many of [its] marquee projects are motivated by strategic designs."<sup>200</sup>

At a somewhat lower register is another facet of the country's growth strategy: fostering free trade zones (FTZs) and special economic zones in important commercial hubs, including Shanghai, Fujian, Guangdong, and Tianjin.<sup>201</sup> FTZs are meant "to pilot measures aimed [at] both domestic economic policies [and] foreign investment."<sup>202</sup> The Shanghai Free Trade Zone, for example, is a 120 square kilometer section of Shanghai with eased restrictions on foreign investment and simplified processes for filing and

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MONEY ON CHINESE ADVANCES IN AI (2019), <https://www.csis.org/analysis/smart-money-chinese-advance-ai>; *Hearing Before the S. Comm.*, *supra* note 193 (statement of Dr. Rush Doshi).

195 Frank Tang, *Xi Jinping Rallies China's Tech Champions as Rivalry with US Intensifies*, S. CHINA MORNING POST (July 22, 2020), <https://www.scmp.com/economy/global-economy/article/3094247/xi-jinping-rallies-chinas-tech-champions-rivalry-us>.

196 Coco Feng, *Chinese President Xi Jinping Seeks to Rally Country's Scientists for "Unprecedented" Contest*, S. CHINA MORNING POST (May 29, 2021), <https://www.scmp.com/news/china/politics/article/3135328/chinese-president-xi-jinping-seeks-rally-countrys-scientists>.

197 ECONOMY, *supra* note 186, at 191.

198 JONATHAN E. HILLMAN, *THE EMPEROR'S NEW ROAD: CHINA AND THE PROJECT OF THE CENTURY* 4 (2020).

199 HILLMAN, *supra* note 198, at 4; ECONOMY, *supra* note 186, at 190-91.

200 DOSHI, *supra* note 187, at 242.

201 Finder, *supra* note 191, at 278.

202 *Id.* at 280.

registration.<sup>203</sup> It hosts over 50,000 member companies, about evenly divided between domestic and foreign companies.<sup>204</sup> The ultimate aim is to establish Shanghai as a “trading center, financial center, commercial center, and transit center,” and to “benchmark a world standard for Free Trade Zones.”<sup>205</sup> FTZs are often discussed as mutually supportive of other national strategies, including BRI. SPC commentary to one “typical case” described FTZs as “foundational platforms, important nodes, and strategic footholds for China’s promotion of” BRI.<sup>206</sup>

These initiatives have mobilized whole-of-government implementation efforts.<sup>207</sup> Courts too have been marshaled into service. Consistent with the rule that major initiatives must be sanctioned by the Party center, special courts in each of the four domains surveyed here were approved at key meetings of the Central Leading Group for Deepening Reform—the party’s paramount reform body, chaired by President Xi.<sup>208</sup>

Most notable about the *judicial* components of these national strategic initiatives: the emphasis on legal professionalism. Consider recent SPC guidance on how courts should “implement the major strategic plans of the CPC Central Committee . . . for further expanding the opening to the outside world.”<sup>209</sup> Documents like these are part of a broader trend of the SPC issuing policy documents—now numbering over a dozen—that supply “judicial services and guarantees” (*sifa baozhang*) for “major government

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203 Nathan Jaye, *The Shanghai Free Trade Zone Continues Its Growth*, CFA INSTITUTE MAG. (Sept. 17, 2018), <https://www.cfainstitute.org/research/cfa-magazine/2018/the-shanghai-free-trade-zone-continues-its-growth>.

204 Eleanor Albert, *Taking Stock of Shanghai’s Free Trade Zone*, THE DIPLOMAT (Aug. 19, 2019), <https://thediplomat.com/2019/08/taking-stock-of-shanghai-free-trade-zone/>.

205 Jaye, *supra* note 203.

206 *Siemens International Trading (Shanghai) Co., Ltd. and Shanghai Golden Landmark Company Limited, A Case of an Application for the Recognition and Enforcement of a Foreign Arbitral Award*, STAN. L. SCH. GUIDING CASES PROJECT (May 15, 2017), [hereinafter *Siemens International Trading (Shanghai) Co., Ltd.*], <http://cgclaw.stanford.edu/belt-and-road/b-and-r-cases/typical-case-12>.

207 See, e.g., ECONOMY, *supra* note 186, at 193.

208 *Id.* at 98; Luoma, *supra* note 180; Xiong Jianmei et al., (熊剪梅等), *Weishenme Quanguo Diyijia Hulanwang Fayuan Dansheng zai Zhongguo?* (为什么全球第一家互联网法院诞生在中国) [*Why Was the World’s First Internet Court Born in China?*], RENMINWANG (人民网) [PEOPLE’S NET] (Nov. 1, 2019), <http://politics.people.com.cn/n1/2019/1101/c429373-31433352.html>; Han, *supra* note 9; Man, *supra* note 184.

209 Guiding Opinions on Further Expanding People’s Court Service Safeguards for Expanding the Opening Up to the World, CHINA L. TRANSLATE (Sept. 25, 2020), <https://www.china.com/en/guiding-opinions-on-courts-opening-up/> [hereinafter *Opening Up Guiding Opinions*]. As used in this setting, “opening to the outside world” is not a stand-in for liberalization; rather, it is a concept explicitly tied to “building a new higher-level open economic system” and “promoting reforms of the global governance system.” In other words, “opening” means promoting China’s economic power and enhancing China’s global influence.

strategies or initiatives.”<sup>210</sup> This document draws a direct line between “major national strategic measures” including “the belt and road initiative” and “the establishment of free trade pilot zones” and the need to assure domestic and foreign parties “judicial services that are inclusive and impartial, convenient and efficient, intelligent and precise.”<sup>211</sup> It also highlights substantive areas seen as particularly important for carrying out the party’s agenda: “[s]trengthen[ing] the force of intellectual property rights protections”; “[i]mprov[ing] diverse dispute resolution mechanisms for international commercial disputes”; and support[ing] Internet courts . . . to innovate judicial service methods.”<sup>212</sup>

Professional specialization is thought to serve national strategies in several ways. First, by offering more expert, reliable, and credible dispute resolution in areas like IP and finance, courts can help encourage innovation and investment. While such motivations have existed for many years, they have become more urgent in view of new national priorities focused on technological and financial competition. Second, China’s leaders increasingly appreciate that in order for China’s legal institutions to be globally influential, they must be, to some significant degree, globally appealing. Therefore, whether the goal is to center China as a key dispute resolution forum or to enhance China’s influence in global bodies, China’s planners see great value in both raising the professionalism of Chinese courts and also innovating in those spaces. Not least, attracting more cases to Chinese forums is likely to expand Chinese jurisdiction and control over cases involving important Chinese firms and development interests. In law as in other domains of statecraft, China’s global strategies must rely on not just the hard “tools of coercion,” but also softer tools of “attraction.”<sup>213</sup>

This connection between professional adjudication and national strategy is clearly expressed in the laws and regulations governing each special

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210 Susan Finder, *Supreme People’s Court Updates its Belt & Road Policies*, SUP. PEOPLE’S CT MONITOR (Jan. 28, 2020), <https://supremepeoplescourtmonitor.com/2020/01/28/supreme-peoples-court-updates-its-belt-road-policies/>.

211 Opening Up Guiding Opinions, *supra* note 209, at II.3.

212 *Id.* at III.8, 9; IV.11.

213 See Joseph Nye, Comment, *Soft Power: The Origins and Political Progress of a Concept*, 3 PALGRAVE COMMNS 1, 1-2 (2017). This is not to say that the party-state adheres to attraction-based diplomacy in all domains. See PETER MARTIN, CHINA’S CIVILIAN ARMY (2021) (analyzing China’s “wolf warrior” diplomacy).

court.<sup>214</sup> IP Courts were established not only to “strengthen the judicial protection of intellectual property rights,” but also to “promote the implementation of the national strategy of development driven by innovation.”<sup>215</sup> The Shanghai Financial Court aims not only for “improving the financial trial system,”<sup>216</sup> but also for “serving and safeguarding the construction of Shanghai as an international financial enter.”<sup>217</sup> Internet Courts contribute to both “improving professional trial mechanisms” and “strengthening the international discourse power and rulemaking power of China in cyberspace governance.”<sup>218</sup> And the CICC hears cases in an “impartial and timely way,” thereby “serving and guarding the construction of the Belt and Road.”<sup>219</sup>

China’s leaders are particularly invested in advancing professionalism in certain key areas. For example, Chinese policymakers have long seen greater legal protections for IP rightholders as supportive of its “long-term” “economic” interests.<sup>220</sup> In 2008, a high-level State Council document indicated that the country would have to address IP “abuse” and “infringement” to “improve China’s capacity for independent

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214 Cf. Lawrence J. Liu, *The Rules of the (Belt and) Road: How Lawyers Participate in China’s Outbound Investment and Infrastructure Initiatives*, 46 YALE J. INT’L L. ONLINE 168, 178 (2021) (observing, in context of guidance on China’s cross-border lawyers, the tying of “legal practice and expertise” to “government policies and service to the nation”).

215 *Quanguo Renda Changweibui Guanyu zai Beijing, Shanghai, Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding* (全国人大常委会关于在北京、上海、广州设立知识产权法院的决定) [*Decision of the Standing Committee of the National People’s Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai, and Guangzhou*] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2014), BEIDA FABAO (北大法宝).

216 *Quanguo Renmin Daibiao Dabui Changwu Weiyuanhui Guanyu Sheli Shanghai Jinrong Fayuan de Jueding* (全国人民代表大会常务委员会关于设立上海金融法院的决定) [*The NPCSC’s Decision to Establish a Shanghai Financial Court*] (promulgated Apr. 27, 2018), BEIDA FABAO (北大法宝), <https://npcobserver.com/wp-content/uploads/2021/09/NPCSC-Shanghai-Financial-Court-Decision.pdf>.

217 Financial Court Provisions, *supra* note 162; *see also* Finder, *supra* note 191, at 297 (“[T]he ability of the Chinese courts to have greater international credibility and influence is linked to having some basic legal infrastructure that better meets the expectations of international litigants.”).

218 Zuigao Renmin Fayuan Yinfu Guanyu Zengshe Beijing Hulianwang Fayuan, Guangzhou Hulianwang Fayuan de Fangan de Tongzhi (最高人民法院印发《关于增设北京互联网法院、广州互联网法院的方案》的通知) [SPC Notice on Issuing the “Plan on Adding the Beijing and Guangzhou Internet Courts”] (promulgated by the Sup. People’s Ct., Sept. 8, 2018, effective Sept. 8, 2018), <http://temp.pkulaw.cn:8117/chl/321364.html>.

219 CICC Provisions, *supra* note 173.

220 Mark Cohen, *China’s Current Intellectual Property Plan, Policies & Practices*, 15 SMU SCI. & TECH. L. REV. 17, 24 (2011); deLisle, *supra* note 3, at 72 (discussing how the ascendancy of a knowledge-intensive, “high-quality” growth model reliant on IP has carved out “significance places for law in sustaining growth and modernization”).

innovation.”<sup>221</sup> The same document proposed studying the establishment of special tribunals and courts of appeal dedicated to IP.<sup>222</sup> Historically poor IP enforcement has been attributable to a number of deficits—in expertise, institutional capacity, rights awareness—made worse by local protectionism.<sup>223</sup> More expert, consistent treatment of IP issues is now frequently cited as a means not merely to promote innovation, but to help China develop into a “world science and technology power.”<sup>224</sup> In addition, more professional IP adjudication is now increasingly tied to IP influence. Recent SPC documents have called for “active participation in the global governance of IP” to “improve relevant international rules and standards” in ways presumably favorable to Chinese interests.<sup>225</sup>

Similarly, officials appear to believe that the ascendancy of cities like Shanghai as competitive financial hubs will depend partially on their ability to offer credible dispute resolution in financial cases. As Matthew Erie has explained, municipalities like Shanghai and Shenzhen have set up special FTZs, motivated in part by regional and global competition, that seek to offer distinct “legal infrastructures, legal services, and legal cultures” to stimulate trade and investment.<sup>226</sup> These efforts underscore a general view that China’s success in attracting global investment, capital, and talent will depend on its capacity to further professionalize business-related institutions, including dispute resolution services.<sup>227</sup> As with IP, historic sources of abuse in financial and other commercial disputes have traced in

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221 IP Strategy Outline, *supra* note 182, at I.3, I.4.

222 *Id.* at V.4.45.

223 Cheryl Xiaoning Long & Jun Wang, *Judicial Local Protectionism in China: An Empirical Study of IP Cases*, 42 INT’L REV. L. & ECON. 48 (2015) (finding that IP plaintiffs were more likely to win cases when filed in their hometowns, but that such effects dissipated at the appellate level).

224 Wu, *supra* note 181, at 3; Zhonggong Zhongyang Bangongting Guowuyuan Bangongting Yinfa “Guanyu Jiaqiang Zhishi Chanquan Shenpan Lingyu Gaige Chuangxin Ruogan Wenti de Yijian” (中共中央办公厅国务院办公厅印发《关于加强知识产权审判领域改革创新若干问题的意见》) [The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council issued the “Opinions on Strengthening Reform and Innovation in the Field of Intellectual Property Trials”], XINHUA, [http://www.xinhuanet.com/politics/2018-02/27/c\\_1122462230.htm](http://www.xinhuanet.com/politics/2018-02/27/c_1122462230.htm) (rooting IP Courts within this general strategy).

225 Renmin Fayuan Zhishi Chanquan Sifa Baohu Guihua (2021-2025) (人民法院知识产权司法保护规划 2021-2025 年) [Plan for Judicial Protection of IP Courts] (promulgated by the Sup. People’s Ct., Apr. 22, 2021), <http://www.court.gov.cn/fabu-xiangqing-297981.html>.

226 Erie, *supra* note 12, at 279.

227 See *Siemens International Trading (Shanghai) Co., Ltd.*, *supra* note 206 (“Aligning [China’s practices] with common international practices, supporting the development of pilot free trade zones, and improving international arbitration and other non-litigation dispute resolution mechanisms will [all] help strengthen the international credibility and influence of China’s rule of law.”).

part to deficits in expertise and local interference.<sup>228</sup> These problems have become more pressing as financial cases have grown in number and complexity.<sup>229</sup> The Shanghai Financial Court has been billed as a means of not just keeping pace with these challenges, but also of developing innovative products to help establish a “Chinese plan” and “Shanghai practice” for financial dispute resolution, helping China “gain international influence with regard to rules for international financial markets.”<sup>230</sup>

With BRI, the official view is that China must be seen as offering credible dispute resolution mechanisms if it wishes more BRI-connected disputes to be heard in Chinese courts.<sup>231</sup> Party-state documents have framed the CICC as the core of BRI-related dispute resolution mechanisms.<sup>232</sup> Several scholars have gone so far as to describe the CICC as “created to ensure the consolidation of Chinese control in [BRI] dispute resolution,” a means of “safeguard[ing] Xi’s signature foreign policy theme . . . against unexpected legal risks.”<sup>233</sup> For the CICC to have any major role in supporting BRI initiatives, however, disputants must be convinced to opt for CICC dispute resolution. To aid this effort, the CICC must tell a convincing story about its expertise, efficiency, and even-handedness—not an easy task given the shaky reputation of Chinese courts and the competitive global marketplace for dispute resolution services.<sup>234</sup> Officials

228 deLisle, *supra* note 3, at 75.

229 Chao Deng & Chun Han Wong, *China Updates Financial Court System as Cases Grow More Complex*, WALL ST. J. (Apr. 27, 2018), <https://www.wsj.com/articles/china-updates-financial-court-system-as-cases-grow-more-complex-1524834049> (finding that since 2013, Shanghai courts had seen finance-related civil cases increase by an average of 51% annually in areas such as securities, insurance, debt, internet finance, and cryptocurrency).

230 See Lester Ross, *China’s New Financial Court*, JDSUPRA (June 6, 2019), <https://www.jdsupra.com/legalnews/china-s-new-financial-court-38524/>; see THE PEOPLE’S CT. PRESS, *supra* note 168 (showing that court media has said that the Beijing Financial Court’s goals include “enhancing the global influence and global discourse power of Chinese finance”).

231 *Zuigao Renmin Fayuan Guanyu Renmin Fayuan Jinyibu Wei Yidai Yilu Jianshe Tigong Sifa Fannu he Baozhang de Yijian* (最高人民法院关于人民法院进一步为“一带一路”建设提供司法服务和保障的意见) [*Opinions of the SPC on the People’s Court Further Providing Judicial Services and Guarantees for the Construction of the “Belt and Road”*], (promulgated by the Sup. People’s Ct., Dec. 9, 2019), BEIDA FABAO (北大法宝).

232 See Zhonggong Zhongyang Bangong Ting, *Guonanyuan Bangongting Yinfa Guanyu Jianli “Yidaiyilu” Guoji Shangshi Zhengduan Jiejue 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》) [*The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council issued “Opinions on Establishing ‘One Belt One Road’ International Commercial Dispute Resolution Mechanism and Institutions”*], XINHUA (June 27, 2018), [http://www.xinhuanet.com/2018-06/27/c\\_1123046194.htm](http://www.xinhuanet.com/2018-06/27/c_1123046194.htm).

233 Huo & Yip, *supra* note 12, at 912.

234 See Bookman, *supra* note 12 (“CICC is designed with an eye toward establishing international

see the institutional professionalism of the CICC as tightly wedded to its international credibility.<sup>235</sup>

Finally, China's planners appear to realize that their technological ambitions are well served only if those technologies and their associated institutions actually work—to wit, that they are credible, exportable products. To that end, Internet Courts should be understood as a response to several demands. First, the Courts reflect the state's desire to fairly and efficiently process burgeoning e-commerce caseloads.<sup>236</sup> For a regime that sources its legitimacy in part from performance, specialized Internet Courts address a growing “practical need” among Internet users.<sup>237</sup> But Internet Courts also reflect more ambitious policy goals. As Qi Qi, one of the Courts' proponents, described it, “the establishment of an online court will help China fight for the right to speak and lead the formulation of relevant international judicial rules and business rules.”<sup>238</sup> In a recent white paper, the Beijing Internet Court describes itself as “an important initiative to implement General Secretary Xi Jinping's strategic thinking for building China's strength in cyberspace . . . and to enhance China's voice in . . . international Internet governance.”<sup>239</sup> The Court chronicles, among other programs, a concerted campaign to “show the world a good image of China's Internet justice” through institutional and commercial partnerships, visits, trainings, and exchange.<sup>240</sup> There are now memorandums of exchange and other soft-law instruments between China and other countries to

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expertise and reliability.”); *see also* Vivienne Bath, *Dispute Resolution Along the Belt and Road*, EAST ASIA FORUM (June 7, 2019), <https://www.eastasiaforum.org/2019/06/07/dispute-resolution-along-the-belt-and-road/>.

<sup>235</sup> The SPC describes the CICC as an effort to “establish a fair, efficient, convenient, and low-cost international commercial dispute settlement mechanism” in the service of creating a “stable, transparent, rule-of-law based international business environment in support of the BRI.” Long, *supra* note 177, at 41.

<sup>236</sup> Between 2013 and 2016, e-commerce cases in Hangzhou courts rose from 600 to 10,000. *See* Xiong, *supra* note 208 (explaining that China has hundreds of millions of Internet users and a digital economy valued in the trillions).

<sup>237</sup> *Id.* (quoting Wang Jiangqiao, the Hangzhou Internet Court's Vice-President).

<sup>238</sup> Huang Xiaoyun (黄晓云), *Qi Qi Daibiao, Zhao Guangyu Weiyuan Jianyi Hangzhou Shidian Hulianwang Fayuan* (齐奇代表, 赵光育委员建议杭州试点互联网法院) [*Delegate Qi Qi and Committee Member Zhao Guangyu Suggest Piloting Internet Courts*], ZHONGGUO SHENPAN (中国审判) [CHINA TRIAL], Mar. 16, 2018, <http://www.chinatrial.net.cn/magazineinfo1429.html>.

<sup>239</sup> BEIJING INTERNET CT., White Paper on Trials of Beijing Internet Court (2019), <https://www.chinadaily.com.cn/specials/20190820-B-0003-0904-F-trialswhitepaper.pdf> [hereinafter Beijing Internet Court White Paper].

<sup>240</sup> *Id.* at 33-39.



transfer Internet Court-related technologies.<sup>241</sup> This underscores China's desire to become an exporter of legal institutions and ideas after decades learning from foreign legal models.

### *B. Accelerating Professionalism*

China's turn to special courts makes sense against the backdrop of new professional demands. As explained, specialized courts are widely associated with enabling a number of technical legal improvements.<sup>242</sup> Limited subject-matter jurisdiction promotes both technical proficiency and research and output efficiencies. Exclusive jurisdiction reduces the likelihood of conflict.<sup>243</sup> Awareness of these links can be found not only in official rhetoric, but also in the courts' institutional design. Thus the turn to special courts appears less a superficial exercise in signaling, reflecting instead a deeper commitment to certain legal-professional virtues in service of broader political mandates.

#### *1. Expertise*

One way special courts have sought to fulfill their global-professional expectations is by building expert capacity, on the theory that technical issues demand well-trained personnel. IP Court judges must be chosen from "outstanding judges engaged in IP and related trial work" or "equivalently situated" practitioners and scholars.<sup>244</sup> The average judge on the Beijing IP

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<sup>241</sup> Erie, *supra* note 2; see also Susan Finder, *How the Supreme People's Court Provides Services and Safeguards to the BRI* (unpublished manuscript) (on file with author) (describing how the SPC-affiliated National Judges College has begun training over 1000 foreign judges from 58 jurisdictions on China's judicial system, often focusing on smart courts).

<sup>242</sup> See *supra* Part I.B.

<sup>243</sup> Interestingly, many of the alleged downsides of specialized courts do not appear to have worried Chinese planners. Because several of the new special courts have higher credentialing requirements and address politically important subjects, China's planners have faced no special hardships recruiting high-caliber judges (at least from the rankings of the existing judiciary), as is sometimes the case in the United States where the generalist federal judge represents the apex of judicial status. And while there may be loss of a "generalist" perspective in special courts, China's planners have not expressed such concerns, prizing bureaucratic virtues over what might be thought of as more experimentalist values.

<sup>244</sup> *Zhishi Chanquan Fayuan Faguan Xuanren Gongzuo Zhidao Yijian (Shixing)* (知识产权法院法官选任工作指导意见(试行)) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Selecting and Appointing Judges for Intellectual Property Right Courts (for Trial Implementation)] (promulgated by the Sup. People's Ct., Oct. 28, 2014), BEIDA FABAO (北大法宝), art. 3, [http://rmfyb.chinacourt.org/paper/html/2014-11/03/content\\_89980.htm?div=-1](http://rmfyb.chinacourt.org/paper/html/2014-11/03/content_89980.htm?div=-1). Appointees must have level-four senior judge status, over six years of relevant trial experience, a bachelor's degree in law or higher, and strong legal abilities. *Id.* at art. 4.

Court has ten years of judicial experience, a graduate degree, and has presided over at least 100 cases.<sup>245</sup> IP Tribunal judges are similarly credentialed.<sup>246</sup> Of the SPC IP Court's inaugural cohort of twenty-five judges, all had graduate degrees, half had doctorates, a third had science or engineering degrees, and a fourth had studied overseas.<sup>247</sup> The aim, according to the Court's president, is to "leave professional matters to the professionals."<sup>248</sup>

Other special courts tell a similar story. Of the Financial Court's twenty-eight judges, twenty-six have masters degrees and six have doctorates.<sup>249</sup> The Court is led by a former SPC judge, and includes judges known for previous work in high-profile financial cases.<sup>250</sup> Similarly, all eighty-four inaugural Internet Court judges came to the job with at least ten years of trial experience.<sup>251</sup> A higher proportion of Guangzhou Internet Court judges have graduate degrees (67%) than Guangzhou Intermediate Court Judges (40%), even though the latter sits at a higher tier of the judiciary.<sup>252</sup> As for the CICC, its adjudicators must be senior judges with "experience in . . . trial work," familiarity with international trade and investment treaties and practices, and skilled proficiency in both English and Chinese.<sup>253</sup> All current judges have graduate degrees and many have studied at foreign universities.<sup>254</sup>

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<sup>245</sup> Chen, *supra* note 8, at 12; Zhang & Lee, *supra* note 12, at 65.

<sup>246</sup> Weightman, *supra* note 12, at 162 (noting that all of the Nanjing IP Tribunal's judges have graduate degrees, and most Chengdu IP Tribunal judges do too).

<sup>247</sup> Cheng Shuwen & Liu Man (程姝雯&刘嫒), *Guojia Cengmian Zhishi Chanquan Shangsu Fating Weibe Shezai Zuigaofa? Zuigaofa Fuyuanzhang Dujia Jiemi* (国家层面知识产权上诉法庭为何设在最高法? 最高法副院长独家揭秘) [*Why is the National IP Appeal Court Located in the SPC? SPC Vice-President Exclusively Reveals*], NANFANG DUSHI BAO (南方都市报) [S. METROPOLIS DAILY], Mar. 14, 2019, <https://dy.163.com/article/EA70U26E05129QAF.html>.

<sup>248</sup> *Id.*

<sup>249</sup> Wang Wenjuan & Xuan Zhaoqiang (王文娟、轩召强), *Quanguo Shoujia Jinrong Fayuan zai Hu Chengli Zhong Yingwen Guanwang Shangxian* (全国首家金融法院在沪成立中英文官网上线) [*The Nation's First Financial Court Established in Shanghai: Official Chinese and English Websites Online*], RENMINWANG (人民网) [PEOPLE.CN], [https://www.sohu.com/a/249167562\\_114731](https://www.sohu.com/a/249167562_114731).

<sup>250</sup> *Id.* (referencing series of cases on establishing causation in insider-trading claims).

<sup>251</sup> CHINESE COURTS AND INTERNET JUDICIARY, at 6, 63 (Ding Lina ed., 2019), [wlf.court.gov.cn/upload/file/2019/12/03/11/40/20191203114024\\_87277.pdf](http://www.wlf.court.gov.cn/upload/file/2019/12/03/11/40/20191203114024_87277.pdf) [hereinafter INTERNET COURT REPORT].

<sup>252</sup> See Yuane Faguan Xinxixi (员额法官信息) [JUDICIAL PERSONNEL INFORMATION], GUANGZHOU SHENPAN WANG (广州审判网), <http://www.gzcourt.gov.cn/fyjj/ck495/ck98/index.html>. Due to a now broken link, the Guangzhou Internet Court statistics are on file with author.

<sup>253</sup> CICC Provisions, *supra* note 173, at art. 4.

<sup>254</sup> *About the CICC Judges*, CHINA INT'L COM. CT. <http://cicc.court.gov.cn/html/1/219/>

Once selected, special-court judges are expected to grow their expertise over time. Their specialized docket repeatedly exposes them to a limited set of legal issues, helping to develop (at least in theory) higher levels of technical facility.<sup>255</sup> This is said to depart from the old system, where even in specialized tribunals judges were “regularly transferred in and out” of each tribunal, limiting opportunities to develop specialized knowledge.<sup>256</sup>

Several special courts have also made use of specialized committees or consultants. The CICC has an expert’s committee composed of commercial law scholars, practitioners, and retired judges from in and outside of China.<sup>257</sup> CICC leaders describe the committee as a kind of in-house “think tank.”<sup>258</sup> Committee members may offer advisory opinions on questions of international and foreign law and inform the SPC’s formulation of judicial interpretations and policies.<sup>259</sup> Experts may also mediate CICC disputes if the parties so elect.<sup>260</sup> As Chinese law does not permit appointment of foreign judges, the expert’s committee is often described as an alternative way to access specialized knowledge.<sup>261</sup> The CICC’s website lists around fifty experts from several dozen countries.<sup>262</sup>

IP Courts have made use of a system of “technical investigators”—experts who provide “investigation, examination, analysis, and judgment of technical issues” in IP disputes.<sup>263</sup> Technical investigators may recommend

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193/196/index.html (last visited Mar. 21, 2022). In contrast, none of the judges of the Fourth Circuit, another SPC-level tribunal that handles fewer foreign-related cases, report foreign study experience (which is not to say they all lacked it). *See Fating Faguan* (法庭法官) [Tribunal Judges], ZUIGAO RENMIN FAYUAN DISI XUNHUI FATING (最高人民法院第四巡回法庭) [SPC FOURTH CIRCUIT COURT], <http://www.court.gov.cn/xunhui4/fatingfaguan.html> (last visited Mar. 21, 2022). While bankruptcy tribunals are not this paper’s focus, a recent study found that cases entering those courts are 60% more likely to be handled by judges from an “elite” law school compared with traditional civil courts. *See* Bo Li & Jacopo Ponticelli, *Going Bankrupt in China*, PBCSF-NIFR Research Paper 5 n.7 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3251570](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251570) (defining elite schools as “Project 985 universities and the top 5 top professional law schools in China”).

255 *See* LEGOMSKY, *supra* note 29, at 8.

256 Chen, *supra* note 8, at 12.

257 CICC Provisions, *supra* note 173, at art. 11.

258 Sun, *supra* note 178, at 48.

259 Long, *supra* note 177, at 42. Such consultations have occurred only occasionally so far. Interview with Member of CICC Expert’s Committee (June 7, 2021) (on file with author) (referencing consultation on a products liability matter).

260 CICC Provisions, *supra* note 173, at arts. 12, 13; Interview with Member of CICC Expert Committee (June 7, 2021) (on file with author).

261 *See, e.g.*, Huo & Yip, *supra* note 12, at 926; Cai & Godwin, *supra* note 12, at 880.

262 Expert Directory, CHINA INT’L COM. CT., <http://cicc.court.gov.cn/html/1//219/235/237/index.html> (last visited on Dec. 23, 2020).

263 *Zuigao Renmin Fayuan Guanyu Yinfa Zhishi Chanquan Fayuan Jishu Diaochaguan Xuanren Gongzuo*

investigatory methods, participate in interviews and hearings, identify other potential experts in the field, and provide technical review opinions to the court, but they do not vote on final judgments.<sup>264</sup> They are typically drawn from government agencies, universities, or recommended by industry groups, and must have both educational and work experience in the relevant field.<sup>265</sup> IP courts have made greater use of technical investigators over time. The Beijing IP Court reports that in its first year, its 37 technical investigators assisted in around 300 cases.<sup>266</sup> In the first quarter of 2019, 89 investigators assisted in 1,376 cases, rendering 780 technical review opinions.<sup>267</sup> The growth in technical investigators is attributed to “increasing demand” from judges, some of whom have enlisted multiple investigators in cases demanding “multi-disciplinary” expertise.<sup>268</sup>

Another potential way to promote quality decisions is to permit “minority opinions”—a largely foreign concept in Chinese law but permitted in several of these courts, including the CICC and the Beijing IP Court.<sup>269</sup> At their best, dissents can sharpen reasoning and promote transparency, but it remains to be seen how dissents will be used in these contexts.<sup>270</sup>

It is a separate question whether better credentials, more experience, or expert consultants translate to improved decision-making. I make no general

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*Zhidao Yijian (Shixin)* (最高人民法院关于印发《知识产权法院技术调查官选任工作指导意见(试行)》的通知) [*Notice of the Supreme People's Court on Issuing the Guiding Opinions on the Selection and Appointment of Technical Investigators of Intellectual Property Courts (for Trial Implementation)*] (promulgated by the Sup. People's Ct., Aug. 8, 2017, effective Aug. 14, 2017), BEIDA FABAO (北大法宝), art. 1 [hereinafter *Investigator Notice*], <http://temp.pkulaw.cn:8117/chl/305003.html>.

264 *Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fayuan Jishu Diaochaguan Canyu Susong Huodong Ruogan Wenti de Zhanhang Guiding* (最高人民法院关于知识产权法院技术调查官参与诉讼活动若干问题的暂行规定) [*Interim Provisions on Several Issues Concerning the Participation of Technical Investigators in Intellectual Property Courts in Litigation Activities*] (promulgated by the Sup. People's Ct., Jan. 28, 2019, effective May 1, 2019), BEIDA FABAO (北大法宝), <http://www.hncourt.gov.cn/public/detail.php?id=177538>.

265 Investigator Notice, *supra* note 263, at art. 2, 4, 5.

266 Xu Weilun (徐伟伦), *Beijing Zhishi Chanquan Fayuan Dier Pi Jishu Diaocha Guan Shanggang Bannian* (北京知识产权法院第二批技术调查官上岗半年) [*The Second Batch of the Beijing IP Court's Technical Investigators Have Assumed their Posts for Half a Year*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (May 21, 2019).

267 *Id.*

268 *Id.*

269 CICC Provisions, *supra* note 173, at art. 5 (“The minority opinion may be specified in the adjudicatory instruments.”); Mark Cohen, *The Widening Impact of China's Publication of IP Cases*, CHINA IPR (Apr. 10, 2018), <https://chinaipr.com/2018/04/10/the-widening-impact-of-chinas-publication-of-ip-cases/> (explaining that the Beijing IP court also solicits the opinions of third parties “in a manner akin to an amicus brief”).

270 See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

causal claims here, but note some promising signs. First, the new special courts have helped develop the law in reasonably significant ways. The Hangzhou Internet Court, for instance, issued a decision in 2018 clarifying legal relations in the country's growing webcast industries, where individuals perform online for tips (*dashang*).<sup>271</sup> The decision held that webcast platforms and their paying users were legally related through an “internet service contract,” and helped specify conditions under which tipping constituted a gift rather than a service contract.<sup>272</sup> Given the Court's foray into an area that codified law had not specifically addressed, the SPC published the decision as a “typical case” to guide future courts.<sup>273</sup>

There is also evidence suggesting—though far from proving—that several new courts may be committed to stronger enforcement of private rights. In the Beijing IP Court's first 4.5 years, the success rates of foreign parties in civil IP suits (excluding cases where both parties are foreign) was 68%.<sup>274</sup> IP Courts may also be awarding higher damages for patent infringement than traditional courts (including, increasingly, punitive damages),<sup>275</sup> and have shown a heightened willingness to enter preliminary

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<sup>271</sup> Zheng, *supra* note 170, at 16-17.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*; see also *Financial Court Report*, *supra* note 8 (summarizing significant Financial Court cases that have a larger “guidance” function).

<sup>274</sup> DEQI Intellectual Property Law Corp., *Beijing Intellectual Property Court: Foreign-related Intellectual Property Cases Increasing Year by Year*, LEXOLOGY (Jan. 20, 2020), <https://www.lexology.com/library/detail.aspx?g=62f25070-8679-4b84-bf67-202b3109e949>. It is of course possible that foreign patentholders should have won in even more cases, or that many meritorious suits were not brought for fear of biased adjudication. For empirical studies on how foreigners fare in IP adjudication in China, see Brian J. Love, Christian Helmers & Markus Eberhardt, *Patent Litigation in China: Protecting Rights or the Local Economy?*, 18 VAND. J. ENT. & TECH. L. 713, 720 (2020) (finding that foreign litigants in Chinese patents suits “fare just as well in their suits as privately owned Chinese firms”); Renjun Bian, *Many Things You Know about Patent Infringement Litigation in China are Wrong*, SSRN (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3063566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063566) (finding that foreign patent holders have better results than domestic patent holders in patent enforcement cases). *But see* Mark Cohen, *Patent Litigation, Local Protectionism and Empiricism: Data Sources and Data Critiques*, CHINA IPR (Mar. 10, 2016), <https://chinaipr.com/2016/03/10/patent-litigation-local-protectionism-and-empiricism-data-sources-and-data-critiques/>.

<sup>275</sup> See Richard Li et al., *China's Specialized IP Courts*, KLUWER PAT. BLOG (Apr. 10, 2017), <http://patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/> (noting that the Beijing IP Court's 1.41 million RMB average damages award in 2016 exceeds the 2014 nationwide average of 800,000 RMB); Weightman, *supra* note 12, at 159 (describing a significant 49 million RMB damage award based on calculation of “actual sales data” instead of “statutory damage amounts”). Punitive damages are increasingly popular as well. See Justin Davidson & Phoebe Poon, *More Chinese Punitive Damages Being Awarded*, BRAND PROT. BLOG (Aug. 13, 2020), <https://www.thebrandprotectionblog.com/more-chinese-punitive-damages-being-awarded/> (describing trademark case where the Guangzhou IP Court found malicious infringement and awarded 50 million RMB, including punitive damages).

injunctions and evidence-preservation orders.<sup>276</sup> The Beijing IP Court has in some years reversed Patent Re-examination Board (PRB) decisions at rates “substantially higher than the historical reversal rates.”<sup>277</sup> One leading litigator with experience in eight of the new IP Courts and Tribunals states that the new courts are “more expert,” which he attributes mostly to “specialization of judges” and increasing use of technical investigators.<sup>278</sup> He adds, however, that IP Tribunals in mid-tier cities would benefit from more technical investigators, a key, he believes, to recent improvements.<sup>279</sup>

## 2. *Efficiency*

China’s planners have also sought to promote efficiency by instituting policies to streamline litigation and facilitate decision-making. Perhaps the leading example: the Internet Courts’ use of “online trial for online disputes.”<sup>280</sup> One official report states that as of the end of 2019, the rate of online filing in the three Internet Courts was 96.8%, with 80,819 of 88,401 concluded cases “proceed[ing] online throughout the whole process.”<sup>281</sup> The report also states that the typical online hearing lasted 45 minutes and took 38 days to conclude, which is said to represent 60% and 50% reductions respectively compared to “the case handling before.”<sup>282</sup> The

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<sup>276</sup> Li et al., *supra* note 275 (describing how all three IP Courts have issued “typical cases” on evidence preservation and injunctions, “indicating that [they are now] a real potential option for IP owners”); Weightman, *supra* note 12, at 159-60 (describing cases, including one where the Shanghai IP Court ordered technical experts to preserve evidence on 400 computers in a Shanghai firm on claim of infringement from U.S. companies).

<sup>277</sup> Li, *supra* note 275.

<sup>278</sup> Interview with anonymous Chinese IP lawyer (Sept. 11, 2020).

<sup>279</sup> *Id.*

<sup>280</sup> Internet Court Report, *supra* note 251, at 16, 73. To access the online features, users must upload a national ID or passport, verified through facial recognition, and fees are typically made through an online payment platform. Litigants may engage with the court through the court website, smartphone application, or WeChat. Jason Tashea, *China’s All Virtual Specialty Internet Courts Look Set to Expand into Other Areas of the Law*, A.B.A. J. (Nov. 1, 2019), <https://www.abajournal.com/magazine/article/china-all-virtual-specialty-internet-courts>. “(Concluding cases) at a faster speed is a kind of justice, because justice delayed is justice denied,” said Hangzhou Internet Court Vice President Ni Defeng. *AI Judges and Verdicts via Chat App: The Brave New World of China’s Digital Courts*, AFP (Dec. 6, 2019).

<sup>281</sup> Internet Court Report, *supra* note 251, at 64.

<sup>282</sup> *Id.* at 6, 64. However, it is not clear whether the comparison is to civil cases generally or to Internet-related cases only, and whether it is to a national average or figures from traditional courts in Hangzhou, Beijing, and Guangzhou. The fact that online trials are reducing litigation costs makes intuitive sense, however. In its first year, only 22.3% of the Beijing Internet Court’s cases involved parties both located in Beijing; 77.7% involved at least one party outside Beijing—in the prior system, these out-of-jurisdiction parties “were supposed to appear in the courts in Beijing for case trial.” Guodong Du, *Beijing Internet Court’s First Year at a Glance: Inside China’s Internet Courts Series -05*, CHINA

Hangzhou Internet Court has also conducted at least several thousand trials under “asynchronous” review—allowing litigants and their representatives to log on at different times.<sup>283</sup> The Guangzhou Internet Court has developed a “demonstration case” system whereby in similar contract disputes, the Court chooses a representative case and invites litigants from similar cases to “audit the hearing online.” Among the parties who have audited such hearings, 37% are said to have proactively resolved their cases out of court.<sup>284</sup> As part of the larger shift to AI adjudication,<sup>285</sup> Internet Courts are also expected to develop “factorized legal doctrines that will become the basis for developing algorithms covering cases arising from online transactions.”<sup>286</sup>

The new IP Courts and Tribunals have also reported statistics that suggest efficiency-related gains. A year after introducing technical assessors, the Beijing IP Court’s closing-rate in “technically complicated cases” rose by over 80% compared to the previous year.<sup>287</sup> While such improvement may not be wholly attributable to technical assessors, qualitative evidence suggests that the introduction of expert assessors has led to cost savings. One attorney who has litigated over 20 cases in four of the new IP Courts and Tribunals explains it by example:

Based on my representations before the IP Courts over the past few years, the professional level of the IP Courts has indeed greatly

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JUST. OBSERVER (Oct. 19, 2019), <https://www.chinajusticeobserver.com/a/beijing-internet-courts-first-year-at-a-glance>.

<sup>283</sup> Internet Court Report, *supra* note 251, at 16, 74; *see also* Guodong Du & Meng Yu, *A Close Look at Hangzhou Internet Court: Inside China’s Internet Courts Series -06*, CHINA JUST. OBSERVER (Nov. 3, 2019), <https://www.chinajusticeobserver.com/a/a-close-look-at-hangzhou-internet-court> (detailing asynchronous trial procedures).

<sup>284</sup> Du & Yu, *supra* note 283.

<sup>285</sup> *See generally* Rachel E. Stern, Benjamin L. Liebman, Margaret E. Roberts & Alice Z. Wang, *Automating Fairness? Artificial Intelligence in the Chinese Courts*, 59 COLUM. J. ASIAN L. 515 (2021).

<sup>286</sup> Zheng, *supra* note 170, at 16. The courts have adopted other technologies to improve efficiency and reliability. The Beijing IP Court uses programs that automatically generate pleadings by posing structured questions to parties, and that automatically generate draft judgments based on inputs from trial transcripts and relevant legal rules. *See* BEIJING INTERNET COURT, [https://english.bjinternetcourt.gov.cn/2019-03/26/c\\_26.htm](https://english.bjinternetcourt.gov.cn/2019-03/26/c_26.htm) (last visited Feb. 7, 2022). Internet Courts have also led the use of blockchain technology to help store, protect, and authenticate digital evidence—a practice that has since been adopted by a number of other courts. Zheng, *supra* note 170, at 18 (describing, for example, how the Beijing Internet Court created “a permissioned blockchain called Libra Chain” and began admitting evidence stored on one of its nodes); *see also* Sophie Hunter, *China’s Innovative Internet Courts and Their Use of Blockchain Backed Evidence*, CONFLICT OF LAWS.NET (May 28, 2019), <https://conflictoflaws.net/2019/chinas-innovative-internet-courts-and-their-use-of-blockchain-backed-evidence/> (describing the use of blockchain technology to authenticate evidence in China’s internet courts and suggesting this model could be exported to Western courts).

<sup>287</sup> Weightman, *supra* note 12, at 165.

improved. Take the Shanghai IP Court. I once represented a software copyright infringement case in that court. The case involved a comparison of the infringement of a piece of software source code. According to previous court practices, such cases require commissioning an [outside body] for evaluation. However, because the Shanghai IP Court has set up technical investigators with technical background in software, this helped assist judges in completing infringement comparisons, shortening the trial time of the case.<sup>288</sup>

The Beijing IP Court has also introduced “abridged written judgments” for trademark review cases, which is said to have reduced disposal times by 30%.<sup>289</sup>

The CICC too has been designed with efficiency goals in mind. It is oft touted by its affiliates as a “one-stop” dispute resolution platform that integrates litigation, mediation, and arbitration.<sup>290</sup> Under this design, parties may elect the dispute resolution method that best suits their purposes, based on considerations that include cost,<sup>291</sup> though few if any have chosen to arbitrate or mediate so far. Parties who elect arbitration by one of the pre-approved Chinese arbitral institutions “may directly apply to the CICC for judicial assistance in arbitration.”<sup>292</sup> The Court’s rule that first-instance decisions are final is also intended to “save time and cost” of litigation.<sup>293</sup>

Finally, several of the new special courts have emerged as sites of experimentation for other efficiency-related reforms. In 2019, the NPCSC authorized the SPC to carry out a pilot project for “promoting the separation of complicated and simple cases”—including adopting summary procedures for easier cases to “optimize the distribution of judicial resources.”<sup>294</sup> At a party work conference the following year, President Xi

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<sup>288</sup> Interview with anonymous Chinese IP Lawyer (Dec. 19, 2020).

<sup>289</sup> Zhongguo Fayuan Zhishi Chanquan Sifa Baohu Zhuangkuang (2019) (中国法院知识产权司法保护状况(2019)) [The Status of Judicial Protection of Intellectual Property in Chinese Courts (2019)], ZUIGAO RENMIN FAYUAN (最高人民法院) [SUP. PEOPLE’S CT.] (Apr. 21, 2020), <http://www.court.gov.cn/zixun-xiangqing-226501.html>.

<sup>290</sup> Sun, *supra* note 178, at 48.

<sup>291</sup> *Id.* at 49.

<sup>292</sup> Gu, *supra* note 12.

<sup>293</sup> See Long, *supra* note 177.

<sup>294</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Shouquan Zuigao Renmin Fayuan zai Bufen Diqu Kaizhan Minshi Susong Chengxu Fanjian Fenliu Gaige Shidian Gongzuo de



said the purpose of the pilot was to “divide the simple from the complex, the light from the heavy, the fast from the slow.”<sup>295</sup> Among the courts so authorized are all three IP Courts, all three Internet Courts, and the Shanghai Financial Court.<sup>296</sup>

### 3. Consistency

Finally, the new special courts are designed to promote consistent rulings. As explained, the IP Courts, IP Tribunals, the Shanghai Financial Court, and the Internet Courts each have exclusive centralized jurisdiction over their subject matter within their territorial limits. In the process, various basic and intermediate people’s courts lost their jurisdiction over the same disputes. The Beijing IP Court, for example, replaced a system of three intermediate-level IP tribunals in Beijing, each with “rulings . . . [that] were not always consistent” despite residing within the same court level.<sup>297</sup> By 2017, the number of intermediate courts with patent jurisdiction decreased by 55% (82 to 46), and the new IP courts and tribunals—by dint of their location in high-commercial regions—began hearing the vast majority of newly-filed IP cases.<sup>298</sup> *Ceteris paribus*, fewer courts should lead to fewer conflicts.<sup>299</sup>

To further minimize conflicts, the SPC has also established an IP appellate court with centralized jurisdiction over technically complex IP matters from both high and intermediate courts. Luo Dongchuan, the SPC IP Court’s president, pointed to “non-uniformity among appellate courts” as the Court’s animating force.<sup>300</sup> The SPC had considered an earlier proposal to establish three to five appellate courts instead, but preferred

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Jueding (全国人民代表大会常务委员会关于授权最高人民法院在部分地区开展民事诉讼程序繁简分流改革试点工作的决定) [Decision of the Standing Committee of the National People’s Congress on Authorizing the Supreme People’s Court to Implement the Pilot Work of Dividing Complicated from Simple Cases in Civil Litigation Procedures] (promulgated by the NPCSC on Dec. 28, 2019), <http://www.court.gov.cn/zixun-xiangqing-213111.html> [hereinafter Civil Litigation Pilot].

295 Yao Jianjun (姚建军), Jiji Tuidong Minshi Susong Fanjian Fenliu Gaige (积极推动民事诉讼繁简分流改革) [Actively Promote Reform Regarding the Division of Complicated from Simple Cases in Civil Litigation], RENMIN FAYUAN BAO (人民法院报) [PEOPLE’S CT. DAILY] (Mar. 29, 2020), <https://www.chinacourt.org/article/detail/2020/03/id/4871502.shtml>.

296 Civil Litigation Pilot, *supra* note 294.

297 Chen, *supra* note 8, at 11 (quote from IP Court judge).

298 Weightman, *supra* note 12, at 161.

299 For an example of prior inconsistencies in IP, see Zhang & Lee, *supra* note 12, at 61 (describing differences in how the Beijing and Jiangsu High People’s Court calculated copyright damages).

300 Cheng & Liu, *supra* note 247.

having dispositions emanating from a single body.<sup>301</sup> One current SPC IP Court judge named uniformity as “the most important reason for establishing the court,” citing “more unified standards of adjudication in technology-intensive cases” as the Court’s biggest achievement.<sup>302</sup>

Beyond centralized jurisdiction, the new special courts have pursued other policies to advance uniformity. The Financial Court has established three specialized committees in banking, securities, and insurance charged with promoting consistency within the Court.<sup>303</sup> IP courts have sought to ensure, to the extent “practicable,” that same-patent cases are handled by a single judge.<sup>304</sup>

Several of the new special courts have also followed the general practice of issuing model cases to guide future adjudications. In the absence of precedent, Chinese courts sometimes issue “model” or “typical” cases designed to demonstrate how legal rules apply to different facts—not as binding precedent but for persuasive, educative, or illustrative purposes in subsequent adjudications.<sup>305</sup> In 2019, for example, the Beijing Internet Court issued ten “significant” cases and their key holdings—for example, “a short video’s originality is independent of its length.”<sup>306</sup> Similarly, the Financial Court issued six typical cases in 2020, including Shanghai’s first oil-swap contracts case.<sup>307</sup> And the CICC has designated twenty SPC cases as model cases that ostensibly relate to “construction” of the CPC’s BRI initiative.<sup>308</sup> In 2019, the SPC’s IP Court issued 36 typical cases in technology-related IP cases and 40 “adjudication essentials”—decisional rules extrapolated from typical cases that bear some resemblance to

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301 *See id.*

302 Interview with SPC IP Court Judge (June 6, 2021).

303 Cheng & Liu, *supra* note 247.

304 Interview with SPC IP Court Judge (June 6, 2021).

305 *See* Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2215-17 (2016).

306 Beijing Internet Court White Paper, *supra* note 239.

307 *Shanghai Gaoyuan Fabu Zhongyingwenban 24 Tiao Yijian Wei Jinyibu Kuoda Jinrong Ye Duinvai Kaifang Zuohao Fumu Baozhang* (上海高院发布中英文版 24 条意见为进一步扩大金融业对外开放做好服务保障) [*Shanghai High People’s Court Issued 24 English-Chinese Opinions To Provide Service Guarantees for Further Opening of the Financial Industry*], SHANGHAI GAOJI RENMIN FAYUAN WANG (上海高级人民法院网) [SHANGHAI HIGH PEOPLE’S COURT NET] (Nov. 23, 2020), <https://www.hshfy.sh.cn/shfy/gweb2017/xxnr.jsp?pa=aaWQ9MjAxOTYwNTUmeGg9MSZsbWRtPWxtMTcxz&zdz=xwzx>.

308 *See, e.g.*, Model Cases Regarding Providing Judicial Services and Safeguards by the People’s Courts for the Construction of the “Belt and Road,” CHINA INT’L COMMERCIAL CT. (May 15, 2017), <http://cicc.court.gov.cn/html/1/219/199/204/812.html>.

“holdings” in Anglo-American law.<sup>309</sup> Court officials have called for trainings on adjudication essentials and have experimented with digital databases incorporating AI and big data to facilitate case search.<sup>310</sup> Many of the new IP courts employ a “3-in-1” model combining administrative, civil, and criminal law—designed to ensure that IP experts hear IP cases, and that judgments are internally consistent.<sup>311</sup>

Finally, some special courts have begun using AI to further legal consistency. The Beijing IP Court has partnered with an analytics company to create a database containing IP cases with “guiding effect,” along with a smart function to suggest relevant cases based on draft judgments. Beijing IP Court judges are beginning to reference these decisions in their judgments.<sup>312</sup> Although such decisions are not quite common-law precedents,<sup>313</sup> they are increasingly used for similar ends.

### C. Professionalism and Control

As the special courts continue to develop, they are likely to confront a core tension between two political mandates: to act professionally and impartially in routine cases, but to favor national interests in cases that are nationally important. After all, the new special courts are not independent institutions. Like other Chinese courts, they are supervised by party committees, “difficult” cases may be routed to adjudication committees to weigh broader political and social considerations, and ideological education is routine.<sup>314</sup> The difference, compared with prior special courts, is that the party-state expects these courts to resolve a great many of their routine cases in a more consistent and expert fashion, and to withstand efforts by local actors to intervene in aid of private interests.

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309 Zuigao Renmin Fayuan Zhishi Chanquan Fating Caipan Yaozhi (最高人民法院知识产权法庭裁判要点(2019)摘要) [Summary of the Judgment Points of the SPC IP Court (2019), ZUIGAO RENMIN FAYUAN (最高人民法院网) [SPC] (Apr. 16, 2020), <http://www.court.gov.cn/zixun-xiangqing-225831.html>.

310 Cui Yadong, *Adjudication Essentials of Intellectual Property Cases: Highlighting the Progress of Judicial Protection of Intellectual Property Rights in China*, STAN. GUIDING CASES PROJECT (June 15, 2020), <https://cgc.law.stanford.edu/commentaries/clc-9-202006-31-cui-yadong/>.

311 See Interview with Mark Cohen, *supra* note 51.

312 *Id.*; Fan Yang & Mark Cohen, *More on Guiding Cases, Precedents, and Databases*, CHINA IPR (Nov. 12, 2017), <https://chinaipr.com/2017/11/12/more-on-guiding-cases-precedents-and-databases/> (calculating a “big increase” in citation rates over time).

313 See Note, *supra* note 305, at 2228-34.

314 See, e.g., Cheng, *supra* note 67, at 185; Financial Court Report, *supra* note 8.

In cases involving national interests, however, the special courts are expected to carry out different political aims. Chinese courts have recently begun issuing expansive anti-suit injunctions—orders preventing another party from initiating or continuing their lawsuit in another forum—in aid of the country’s leading domestic technology companies. The trend began in 2020 when the SPC’s IP Court enjoined Conversant Wireless Licensing, a Luxembourg company, from seeking enforcement of a German court’s injunction against Huawei Technologies, one of China’s leading technology companies, for infringing Conversant’s European patents.<sup>315</sup> Other Chinese IP courts have since followed suit. In *Xiaomi v. InterDigital*, a Chinese court blocked InterDigital, a United States-headquartered firm, from seeking injunctive relief against Xiaomi in India, where it had sought relief, as well as all other jurisdictions, and from asking any other court to determine FRAND rates for the relevant patents.<sup>316</sup> And in *Sharp v. Guangdong Oppo Mobile*, the SPC’s IP Court affirmed a Shenzhen IP Tribunal’s ruling setting global licensing rates for certain standard essential patents despite the litigation involving parallel suits in Germany, Japan, and Taiwan.<sup>317</sup> The SPC boasted that *Sharp* marked a significant transformation of Chinese courts from “a follower of property rights rules” into a “guide of international intellectual property rules.”<sup>318</sup>

Underlying these developments is a tension between the special courts’ professional mandate and the national strategic goals that motivated this mandate to begin with. As earlier explained, China’s planners appear to see little contradiction between professionalism and grand strategy; more expert and consistent courts are thought to enhance credibility, serving broader strategic goals including fostering a greater role for Chinese courts in resolving China-related disputes. On one level, they may be right, insofar as more professional resolution of routine, non-sensitive matters will likely make these courts a more attractive forum to some. But in a deeper sense,

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315 Huawei v. Conversant (Sup. People’s Ct., Aug. 28, 2020), <https://patentlyo.com/media/2020/10/Huawei-V.-Conversant-judgment-translated-10-17-2020.pdf>.

316 Li Wu & Nick Liu, *China Begins Issuing Anti-suit Injunctions in SEP Cases*, MANAGINGIP (Dec. 9, 2020), <https://www.managingip.com/article/b1plvjpir9gyzg/china-begins-issuing-anti-suit-injunctions-in-sep-cases>.

317 Aaron Wininger, *China’s Supreme People’s Court Affirms Right to Set Royalty Rates Worldwide in OPPO/Sharp Standard Essential Patent Case*, NAT’L L. REV. (Sept. 5, 2021), <https://www.natlawreview.com/article/china-s-supreme-people-s-court-affirms-right-to-set-royalty-rates-worldwide>.

318 Mark Cohen, *Three SPC Reports Document China’s Drive to Increase its Global Role on IP Adjudication*, CHINA IPR (May 5, 2021), <https://chinaipr.com/2021/05/05/three-spc-reports-document-chinas-drive-to-increase-its-global-role-on-ip-adjudication/>.

well illustrated by these recent IP cases, the party-state's desire to shape judicial outcomes in strategic cases will likely pose a barrier to the courts' ability to prove themselves modern, professional institutions to a global audience. A single case of national consequence, handled with the appearance of favoritism, may do more to affect a court's reputation than dozens, hundreds, even thousands of smaller, less noticed disputes.<sup>319</sup>

It is unclear how sophisticated the party-state will be in negotiating this tension. Consider the CICC, which—despite being a court designed to serve BRI—has yet to hear a true BRI-related case. When the first major BRI dispute comes before the Court, it is an open question whether the CICC will invariably favor the Chinese party, thus minimizing BRI risk for China's going-out enterprises, or not, perhaps aware that the Court's long-term credibility will depend on the appearance of impartiality. How the court acts may depend on other factors: the case's level of sensitivity, the political embeddedness of the Chinese firm(s) involved, and the institutional and political savvy of the adjudicators. The larger point, however, is that unless the new special courts begin to rule against Chinese interests in cases of strategic consequence, perceptions of judicial favoritism will likely impose a ceiling on the courts' ambitions to meaningfully raise their global standing.

Finally, even ignoring differing political expectations, there are other reasons why the new special courts are still some distance from accomplishing their professional missions. The Internet Courts' reliance on major technology companies to verify payment, encrypt data, and provide transaction evidence may risk conflict given how often those same companies are parties in these disputes.<sup>320</sup> IP courts sometimes appear caught between competing professional values—the desire to issue quality decisions on the one hand, and pressures to meet efficiency metrics on the other.<sup>321</sup> The CICC's goal to become a “world-class” court competitive with other international commercial courts will depend on its ability to make a

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319 Indeed, the use of anti-suit injunctions has been the subject of a recently filed WTO case launched by the European Union against China. See Finbarr Bermingham, *EU Launches WTO Case against China over Huawei, Xiaomi Tech Infringements*, S. CHINA MORNING POST (Feb. 18, 2022), [https://www.scmp.com/news/china/diplomacy/article/3167551/eu-launches-wto-case-against-china-over-huawei-xiaomi-tech?module=lead\\_hero\\_story&pgtype=homepage](https://www.scmp.com/news/china/diplomacy/article/3167551/eu-launches-wto-case-against-china-over-huawei-xiaomi-tech?module=lead_hero_story&pgtype=homepage).

320 See Zhuhao Wang, *China's E-Justice Revolution*, JUDICATURE, Spring 2021.

321 Part of the efficiency imperative in IP stems from competition with administrative agencies, which cannot award damages but are otherwise relatively well-resourced, expert, and have a history of faster completion rates. Interview with Mark Cohen, *supra* note 51. One IP judge names rising caseloads as the IP courts' biggest challenge. Interview with SPC IP Court Judge (June 6, 2021).

number of changes, some of them quite fundamental. So long as Chinese law prohibits foreign judges from presiding, foreign lawyers from litigating, and English from being the language of judgment, it is hard to see foreign parties preferring the CICC over other global dispute resolution alternatives.<sup>322</sup>

#### IV. SPECIALIZATION'S GOVERNANCE APPEAL

Finally, the new special courts also serve several internal governance functions that reinforce their strategic benefits. Section A explains how specialized courts can help compartmentalize the legal system by better enabling the regime to tailor legality by subject matter. Section B shows how specialization is also a means of entrenching hierarchical control over the judiciary, empowering courts against local but not national interests.

##### *A. Calibrating Legality*

One notable benefit of specialized courts is their ability to enable professional changes in some areas *without* necessarily enabling corresponding changes in others. By permitting courts to reform on multiple schedules, specialization allows the party-state to fine-tune legality by field, supplying more where the strategic benefits outweigh the political risks.

China's leaders have long been aware that legal modernization entails certain benefits and risks. Law's potential benefits include facilitating market-driven economic development, maintaining social order, reigning in local and bureaucratic misconduct, legitimating political rule, managing social discontent, and providing efficient dispute resolution.<sup>323</sup> Law's primary risk is that it might evolve into an institutionalized check on party discretion, converting instrumentalist legal rule into something resembling

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<sup>322</sup> See *Building the Judicial Guarantee of International Commercial Court "Belt and Road" Construction: An Exclusive Interview with Gao Xiaoli, Vice President of the Fourth Civil Division, The Supreme People's Court, PRC*, CHINA INT'L COM. CT. (Mar. 19, 2018), <http://cicc.court.gov.cn/html/1/219/208/209/774.html> (reviewing legal barriers to these reforms). The CICC faces other institutional problems. The lack of a separate headcount, or *bianzhi*, means that it is in some sense a part-time court, with judges focused on other competing duties. Interview with Member of CICC Expert Committee (June 7, 2021).

<sup>323</sup> See Alford, *supra* note 5, at 199-200 (listing reasons why China's leadership supported its early legal construction project); Fu, *supra* note 4, at 170-72 (explaining how law in China confers legitimacy, helps rein in local governments, and serves as an "effective mechanism for dispute resolution"); deLisle, *supra* note 3, at 68 (discussing law's various "supporting functions" through the Deng, Jiang, and Hu eras).

the rule of law.<sup>324</sup> There is a fear too that law is a flawed governance device, ill-suited to managing societal tensions and sometimes itself a source of unrest.<sup>325</sup>

The leadership's perception of these risks and benefits has undergone subtle shifts over time. In the early reform era, the party-state proceeded aggressively in some areas yet cautiously in others, wishing to "reap the advantages of liberal legality" while avoiding law's "constraints."<sup>326</sup> In the 2000s, the judiciary's so-called "turn against law" reflected a growing belief that law's benefits were illusory.<sup>327</sup> Even today, as law's subjective value has appreciated with the regime's centralization and modernization goals, political concerns remain paramount.<sup>328</sup>

A persistent feature of China's modern relationship with law is that the benefit-risk calculus varies by subject. While cases of any variety are potentially sensitive, such cases tend to recur in certain politically or socioeconomically fraught areas of the law.<sup>329</sup> The most extreme cases involve secession, state overthrow, persecution, terrorism, or high corruption; many such cases are brought by activist lawyers or dissidents, and are generally "perceived to threaten[] the authority of the ruling regime."<sup>330</sup> There are also what Fu Yulin and Randall Peerenboom term "sensitive socioeconomic cases" in areas such as pensions, labor disputes, takings, and environmental harms.<sup>331</sup> As these claims have higher potential

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324 Thus the party-state has been highly wary of empowering courts with anything resembling constitutional review. See Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 E. ASIA L. REV. 51 (2012); Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, 9 CHINA BRIEF, no. 7, Apr. 2, 2009, at 4, [http://www.jamestown.org/uploads/media/cb\\_009\\_7\\_02.pdf](http://www.jamestown.org/uploads/media/cb_009_7_02.pdf); Mark Jia, *China's Constitutional Entrepreneurs*, 64 AM. J. COMP. L. 619, 621 (2016). Political discretion might also be limited in more subtle ways, in that "adherence to a system of consistently and visibly enforced rules tends to limit even the well-intentioned exercise of discretion by those in power." Alford, *supra* note 5, at 198. This latter kind of constraint has been more tolerable to party leaders, who have come to see regularization as practically necessary and crucial to the country's modernization agenda.

325 See Liebman, *supra* note 72, at 97 (China's leaders have "in recent years perceived adherence to legal rules as a constraint on efforts to maintain social stability," and remain uncertain "about the utility of law in managing a period of rapid change.").

326 Alford, *supra* note 5, at 198-99.

327 See Minzner, *supra* note 100, at 938; Liebman, *supra* note 72, at 96-97.

328 See *infra* Part III.C.

329 In theory, any case that might affect social stability, threaten regime control, or undermine state objectives can be sensitive. See Liebman, *supra* note 72, at 97.

330 Fu Yulin & Randall Peerenboom, *A New Analytic Framework for Understanding and Promoting Judicial Independence in China*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 95, 101 (Randall Peerenboom ed., 2010).

331 *Id.* at 112; see also Wenzheng Mao & Shitong Qiao, *Legal Doctrine and Judicial Review of Eminent Domain in China*, L. & SOC. INQUIRY (Feb. 22, 2021) (on how courts "confine their own judicial review

for stability-threatening unrest, involving mass actions or drawing media attention, their treatment has over time evinced “a trend toward dejudicialization.”<sup>332</sup> Criminal law, too, is more likely to implicate traditional sensitivities, with the state continuing “to focus on law and order as a mechanism for maintaining legitimacy and . . . control.”<sup>333</sup>

In sensitive subjects, the regime sees less to gain and more to lose from delegating discretion to professional adjudicators. Entertaining a Falun Gong suit, for example, not only undermines the regime’s no-tolerance suppression policies, but also risks converting courts into general forums for anti-CPC grievances. Similarly, professional judges would seem ill-equipped to manage something like tainted milk litigation through law only; for a regime that sources legitimacy from popular responsiveness, rigid adherence to procedures could seem self-defeating. Recent SPC guidance has specified that certain categories of cases, all of them sensitive in nature, should receive “special handling within the court system” by court leaders.<sup>334</sup>

In contrast, there are a number of subjects associated with closer observance of formal law and procedure. This includes a variety of run-of-the-mill civil cases—traffic torts, divorce claims, vendor disputes, e-commerce claims—where adherence to clear, facially reasonable rules is unlikely to threaten party authority or undermine its objectives.<sup>335</sup> While such cases are not immune from stability concerns, populist impulses, or local corruption, law’s function here—more than in any other areas—is increasingly to provide efficient dispute resolution for the state.<sup>336</sup> The

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power for purposes of self-preservation” in eminent domain cases); Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 *YALE L.J.* 1675, 1706 (book review) (describing how courts in China may “become [a] locus of political conflict”).

<sup>332</sup> Fu & Peerenboom, *supra* note 330, at 112.

<sup>333</sup> Benjamin L. Liebman, *Leniency in Chinese Criminal Law? Everyday Justice in Henan*, 33 *BERKELEY J. INT’L L.* 153, 216 (2015). Even routine criminal cases are often dealt with under community-based concerns that may be “in tension with formal law.” *Id.* at 216. See also WILLIAM HURST, *RULING BEFORE THE LAW: THE POLITICS OF LEGAL REGIMES IN CHINA AND INDONESIA* 31 (2018) (characterizing reform-era Chinese criminal law as a “neotraditional legal regime” whereby “nonlegal actors, drawn from a closed and fixed polity, . . . intervene heavily into the adjudication of individual cases”).

<sup>334</sup> Susan Finder & Straton Papagiannas, *Guidance on the Special Handling of Four Types of Cases & its Implications*, *SUP. PEOPLE’S CT. MONITOR* (Feb. 21, 2022), <https://supremepeoplescourtmonitor.com/2022/02/21/guidance-on-the-special-handling-of-four-types-of-cases-its-implications/>.

<sup>335</sup> Fu & Peerenboom, *supra* note 330, at 125 (noting that sensitive civil cases “are but a small fraction of the more than 4 million civil cases handled by the courts every year”).

<sup>336</sup> Fu, *supra* note 4, at 172 (referencing “emerging consensus among political elites that dispute resolution, based on the rule of law and legal principles, is the most cost-effective way to resolve the vast majority of the cases”).



party-state has also shown historic interest in providing higher quality adjudication of disputes in commercial areas to secure capital, promote innovation, and raise the country's global profile.<sup>337</sup> Greater legalization in economic areas has generally been pursued since the early reform era, but the current leadership's pursuit of new strategic goals has only increased the perceived benefits of law in these subjects. For these reasons, China's legal system is sometimes said to be "bifurcated," or at least highly variable, with law mattering far more in some areas than in others.<sup>338</sup>

Specialization is a means of driving, formalizing, and possibly deepening these bifurcations within China's legal system. By erecting separate courts in areas where professionalism is in high demand, the party-state institutionalizes the privileged position of these subjects, accelerating improvements to their performance *without* having to entertain the same changes in more sensitive subjects. This helps free the party-state from the double bind of authoritarian legality, where more law generally would seem to correlate with more risk. By "specializing out" the strategic low-risk subjects, more sensitive subjects can remain in ordinary courts where political-managerial values are often prized over legal-professional ones.

Specialization's role here parallels Toharia's description of special courts in Franco's Spain.<sup>339</sup> In both examples, special courts diverge from ordinary courts in their adherence to legal values; the result is to aid the regime in reaping the benefits of having *some* respectable courts without having to cede political control. The difference is that Spain reserved politicized justice for its special courts, while here, special courts are segmented out to enable targeted professionalism in areas that are more politically safe. Either way, specialization can help crystallize a multi-track legal system to more optimally calibrate law's risks and benefits.

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<sup>337</sup> See WANG, *supra* note 65; Fu, *supra* note 4, at 174-75 (describing how the CPC is generally "satisfied to leave . . . resolution [of commercial disputes] to the courts"); Nicholas Calcina Howson, *Judicial Independence and the Company Law in Shanghai Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 134, 139 (Randall Peerenboom ed., 2010) (finding from a sample of 200 corporate opinions in Shanghai that in cases "where there [was] a discernable political interest, the Shanghai courts supported the nonstate/party interest"); James V. Feinerman, *New Hope for Corporate Governance in China?*, 2007 CHINA Q. 590, 590 (arguing that improved corporate governance is a "vital link in bringing capital to China," with benefits to employment, tax revenue, and shareholder wealth). Commercial matters also entail fewer sensitivities. Well before dedicated IP courts were installed, judges reported that they were "rarely under pressure" in IP cases because they did not implicate "core Party interests." Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 15 (2007).

<sup>338</sup> STERN, *supra* note 100, at 229.

<sup>339</sup> Toharia, *supra* note 57, at 276.

### B. *Centralizing Control*

Specialized courts have also emerged as a means to implement the regime's centralization agenda. In routine cases, centralization helps insulate special courts from local protectionism, furthering professional goals. In nationally sensitive cases, however, centralization can have the opposite effect, enabling party leaders to more easily dictate judicial outcomes. While I have earlier noted a tension between these interests, the party-state does not appear to see it as such, viewing centralization as an attractive means of enhancing both professionalism *and* control.

Since Xi's ascent to power, central policies have contemplated a greater role for formal law and institutions in a variety of areas. Notable reforms include efforts to transfer appointment and budgetary authorities from local to provincial governments, eliminate administrative-approval requirements for judicial decisions, set up procedures for tracking political interference, and create cross-jurisdictional circuit courts less beholden to provincial and municipal governments.<sup>340</sup> The national legislature has enlarged the scope of judicial review of agency action, broadening the circumstances in which citizens may sue the bureaucracy.<sup>341</sup>

Eyeing these reforms, some scholars have labeled the Xi era as more "legalist,"<sup>342</sup> more "professional[ist],"<sup>343</sup> even evincing a "turn toward law."<sup>344</sup> But as the same scholars are quick to note, the recent shift has not been towards wholesale liberal legality.<sup>345</sup> Rather, law has begun to occupy a more prominent role in administration and statecraft, viewed as an increasingly important tool for enhancing the center's governance capacity and to reduce agency costs associated with local officials "engaging in

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340 deLisle, *supra* note 3, at 75; Fu, *supra* note 4, at 178-79; Minzner, *supra* note 4, at 6-7. For an empirical analysis of recent judicial reforms, see Yueduan Wang, "Detaching" Courts from Local Politics? Assessing the Judicial Centralization Reforms in China, 246 CHINA Q. 545 (2021); Yueduan Wang, *Overcoming Embeddedness: How China's Judicial Accountability Reforms Make its Judges More Autonomous*, 43 FORDHAM INT'L L.J. 737 (2020).

341 Zhang & Ginsburg, *supra* note 4, at 330, 337-42; see also He Haibo, *How Much Progress Can Legislation Bring? The 2014 Amendment of the Administrative Litigation Law of PRC*, 13 U. PA. ASIAN L. REV. 137 (2018); Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121 (Mar. 2014).

342 deLisle, *supra* note 3, at 70 (defining "legalist" as "giving law a larger role").

343 Minzner, *supra* note 4, at 6 (noting a "return to concepts of judicial professionalism").

344 See Zhang & Ginsburg, *supra* note 4, at 306.

345 See, e.g., *id.* at 316 (disavowing the assertion that "the Party-state is moving toward the *rule of law* in which the exercise of regular political power at all levels is effectively constrained and regulated by law").

predation towards enterprises” or providing “de facto immunity from legal rules and obligations to favored firms and people.”<sup>346</sup> Viewed in this light, many of the centralization reforms are best seen as efforts to “circumvent the power of local officials” by enhancing judicial autonomy vis-à-vis horizontally situated local actors.<sup>347</sup> The focus has been on eliminating what the party-state considers to be “illegitimate” sources of influence—informal local relationships and personal ties—rather than “legitimate” supervisory sources of influence and instruction from higher-level leaders.<sup>348</sup> Indeed, there is evidence that politically sensitive cases are now handled under “strengthened” coordination mechanisms between judicial, government, and Party entities, “so that they can synchronize the public consequences.”<sup>349</sup>

Against this backdrop, many of the new special courts have emerged as an attractive means of helping the center curb local indiscretions, transferring de facto power from local governments to specialized courts. The conferral of exclusive jurisdiction is one potent feature in this regard. For example, by reducing the absolute number of courts nationwide that address important IP controversies, IP-court reform in China has effectively delinked IP adjudication in many areas from local governments, limiting opportunities for local officials to meddle with same-level local courts. Power over IP disputes has resultingly shifted from a larger dispersed group of local judges to a smaller set of specialized adjudicators who are less dependent than their predecessors—financially, politically, and institutionally—on lower-level local governments.

But while centralizing power through specialized courts is well targeted at reducing concerns about *local* protectionism, it may also have the effect of enhancing central control in cases of *national* interest. To see how this works, consider how some scholars have characterized China’s pursuit of “algorithmic justice”:

Centralization of law has long been linked to centralization of political power and, in promoting consistency and oversight of lower courts and judges, algorithmic justice cedes decision-making power to the person or persons who write the algorithm (or contract

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<sup>346</sup> deLisle, *supra* note 3, at 74.

<sup>347</sup> Minzner, *supra* note 4, at 8. *See also* Zhang & Ginsburg, *supra* note 4, at 334.

<sup>348</sup> He, *supra* note 3, at 49.

<sup>349</sup> *Id.* at 67.

out such writing). As long as those overseeing software development are attentive to what the leadership wants, as is the case in China, algorithmic analytics can be a powerful tool of central control over local courts.<sup>350</sup>

Similarly here, a core group of specialized adjudicators can help facilitate central control so long as they are made “attentive” to central concerns. Such a process may not require direct party interventionism in particular cases, so long as political expectations are made clear *ex ante* and on a continuing basis to the specialized judges. Toggling between different political mandates may not be easy—many routine cases will need to be resolved professionally and impartially, while a nationally sensitive case may require judges to know how precisely to guard China’s development interests in a given instance. But whatever the center wishes, it will have an easier time achieving its agenda by charging it to a smaller set of elite and savvy adjudicators than to a greater collection of ordinary judges spread out across many local courts.

#### CONCLUSION

In the coming years, China’s projected ascendancy as an authoritarian superpower will likely shape its domestic legal institutions in distinctive ways. New global ambitions may influence not only how China wishes some of its legal institutions and practices to be seen, but also how they function in practice. The case of special courts illustrates some of the emerging themes: growing professionalism and capacity in key areas, increasing centralization of strategy, and continued tensions between the two.

China’s pursuit of professional special courts likely would not have occurred but for the ascendant priorities that inspired them. Each court has been rooted, rhetorically and practically, in Xi-era national strategies, and each was approved by the Party’s leading Xi-chaired reform commission. Central leaders were the ones who sent out signals on the primacy of innovation, standard setting, and BRI, and who ultimately endorsed a judicial reform program stressing professional specialization as a “guarantee” for these aims. The speed at which these courts have been constructed suggests that they are more than an idiosyncratic trend or a

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<sup>350</sup> Stern et al., *supra* note 285, at 532.

minor concession to pragmatic court leaders—instead, they are best understood as concerted national strategy.

The seeming compatibility of at least *some* professional virtues with Party rule and Party aspirations may give pause to those who have sought legal reform in China as a path to political liberalization or a democratic peace. While sophisticated Western advocates of Chinese law reform in the 1980s and 1990s were not avowedly pursuing a project of democratization through law,<sup>351</sup> a great many Western politicians and civil society leaders believed that economic-law reforms would, once adopted, “take on a life of their own” and induce political change.<sup>352</sup> In the words of one State Department official: “Once the Chinese open the door to legal reform, they won’t be able to control it.”<sup>353</sup> But as others cautioned as early as 2000, the Chinese government might very well be able to introduce “extensive legal and judicial reform in certain areas” and at the same time “maintain close control over politically sensitive issues.”<sup>354</sup> This Article shows how judicial specialization can play a leading role in driving and maintaining this duality.

The question remains whether specialization’s compartmentalizing effects—as epitomized by the new special courts—will be sustainable over the long run. That is, will the party-state maintain a stable equilibrium between what Ernst Fraenkel termed the extra-legal or “prerogative state” and the more regularized “normative state”?<sup>355</sup> The alternative is a world where the prerogative state eventually swallows the normative state, or where rules-based professionalism spills over to constrain the extra-legal.<sup>356</sup> As I see it, some amount of dualism is likely sustainable because the regime has not ceded ultimate political control in any domain. Even the new special

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351 See, e.g., Jerome A. Cohen, Essay, *Was Helping China Build Its Post-1978 Legal System A Mistake?*, 61 VA. J. INT’L L. ONLINE 1, 7 (2020); Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 604-05, 609-10 (2003); William P. Alford, *Exporting “The Pursuit of Happiness,”* 113 HARV. L. REV. 1677, 1696 n.34 (2000); Feinerman, *supra* note 5, at 318.

352 Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 78-80 (2000) (describing what the author terms a “Trojan Horse” strategy for liberalizing China); see Cohen, *supra* note 351, at 9 (describing the view of “some American government officials, bar association leaders, foundation executives, lawyers and scholars” who hoped that law reforms in China would “stimulate Western-style democracy”); see also Alford, *supra* note 17 (raising doubts about professional convergence).

353 Stephenson, *supra* note 352, at 79.

354 *Id.* at 84.

355 ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941).

356 Fu, *supra* note 15, at 6-8.

courts are subject to party oversight—allowing party leaders to intervene in nationally important cases, but to otherwise recede.

It is too soon to reliably assess how well the new special courts will support the party-state's competitive aspirations. The courts are young institutions, still beholden to central interests, and must overcome the Chinese legal system's generally poor reputation, especially as the party-state pursues increasingly repressive policies in other domains. Even if the party-state is able to bifurcate its institutions at home, it will still have to delink areas of professionalization from areas of arbitrariness in the minds of its intended audiences. But while the delinking project will not be easy, it may yet achieve some limited success in an age of industry specialization. Consider a recent expert declaration filed in federal district court from a former chief judge of a U.S. court of appeals stating that China's IP courts have "achieve[d] an unrivaled assessment of quality and fairness amongst Chinese courts."<sup>357</sup>

Special courts are not the only area of domestic Chinese law affected by superpower competition. As enterprises such as Huawei and ZTE have come under increased legal scrutiny in America and other democracies, China's government has shown a heightened interest in developing "foreign-related" (*shewai*) legal capacity at home.<sup>358</sup> A recent Ministry of Education initiative has called for cultivating domestic "legal talents in foreign matters" to better meet the demands of "changing global governance structures," "China's increasing movement to the center of the world's stage," and the increasing "going out" pace of Chinese enterprises.<sup>359</sup> Even within their fields, special courts are but one of several reforms intended to professionalize China's dispute resolution offerings: IP

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<sup>357</sup> Declaration of Randall R. Rader in *Ericsson Inc. v. Samsung Elecs. Co.*, No. 2:20-cv-380-JRG, Doc. No. 26-13 (E.D. Tex. filed Jan. 11, 2021) ("China's court system in the IP area is led by experienced and sophisticated judges who will provide a full and fair opportunity to be heard.").

<sup>358</sup> See Robert D. Williams, *Is Huawei a Pawn in the Trade War? The Politics of the Global Tech Race*, FOREIGN AFFS. (Jan. 30, 2019), <https://www.foreignaffairs.com/articles/china/2019-01-30/huawei-pawn-trade-war>. This forms part of a broader trend, worrying to Chinese officials, of Chinese companies' increasing exposure to legal liability or sanction in the United States. See Jia, *supra* note 1, at 1727-34 (discussing Chinese export cases in U.S. courts, including the Supreme Court).

<sup>359</sup> *Guanyu Shishi Falu Shuoshi Zhuanye Xuwei (Shewai Lushi) Yanjiusong Peiyang Xiangmu de Tongzhi* (关于实施法律硕士专业学位(涉外律师)研究生培养项目的通知) [Notice on the Implementation of a Postgraduate Training Program for Master of Law Degrees (Foreign-Related Lawyers)], Zhonghua Renmin Gongheguo Jiaoyu Bu (中华人民共和国教育部) [Ministry of Education of the People's Republic of China] (Feb. 2, 2021), [http://www.moe.gov.cn/s78/A22/tongzhi/202102/t20210226\\_515055.html](http://www.moe.gov.cn/s78/A22/tongzhi/202102/t20210226_515055.html).

courts are part of a broader set of state-backed IP initiatives,<sup>360</sup> while Internet Courts are not the only Chinese courts experimenting with AI and “LawTech.”<sup>361</sup>

It follows that China’s global politics are facilitating legal changes in areas tied to enhancing China’s economic and political power. This trend will be increasingly important as the country’s play for global centrality intensifies. State funding will gravitate towards domains that can be best justified politically; and domestic scholars, judges, and other actors who wish to promote specific legal policies may increasingly seek to frame their proposals around enhancing Chinese competitiveness.<sup>362</sup> Outside China, judges, including in the United States, may more frequently encounter the outputs of China’s new legal priorities, and must grapple with how they fit in with doctrines of transnational law and procedure.<sup>363</sup>

What China’s global ambitions do not promise are fundamental changes in public law or human rights. Because China’s most egregious rights violations occur in areas deemed core to Party interests, the prerogative state is unlikely to give way even if geopolitical gains could be had. Activist movements in China to leverage international criticism have been suppressed before they have become a source of domestic pressure. Indeed China’s growing clout may be enabling even more rights abuses, as greater political and economic leverage may mean the country can more easily elude sanction for domestic repression. In time, political shifts in and outside of China may alter these dynamics. But for now, local law in global China is poised to remain highly uneven.

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360 See Opening Up Guiding Opinions, *supra* note 209.

361 See Stern et al., *supra* note 285.

362 Cf. KEVIN J. O’BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006).

363 See Jia, *supra* note 1, at 1706 (summarizing doctrines).

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