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Enforcement of ICSID Awards in the People's Republic of China

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THE ENFORCEMENT OF ICSID AWARDS IN THE PEOPLE'S REPUBLIC OF CHINA

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ABSTRACT

The People's Republic of China is one of the most enthusiastic signatories of bilateral investment treaties that grant mandatory jurisdiction to the ICSID investment arbitration system. This essay considers the PRC's domestic laws affecting the fulfillment of its ICSID Convention obligations to recognize and enforce ICSID awards. It notes that the PRC has failed to enact any specific legislation to comply with the ICSID Convention's recognition and enforcement obligations, making its compliance with these obligations uncertain. It concludes that the only way that the PRC could claim to have fulfilled its treaty obligations is to declare that the ICSID Convention and related agreements have direct effect in its domestic law. The status of treaties within PRC law, however, remains uncertain and unsettled. For this reason, it is likely that a judicial interpretation from the Supreme People's Court is necessary to guarantee enforcement of such an award within the PRC system. Without such an interpretation, it is highly doubtful that a PRC court would enforce an ICSID award, despite the ICSID Convention's plain requirement that it do so.

KEYWORDS: *ICSID, enforcement of arbitral awards, bilateral investment agreements, China*

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I. INTRODUCTION

The People's Republic of China (PRC) has had a long history of jealously guarding its sovereignty against foreign countries and international tribunals.[1] In a classic statement of this point of view, PRC scholar Ying Tao described decisions of international courts or arbitral organs as made "under [the] manipulation" of "big capitalist powers."[2]

While the contemporary PRC has recently begun to accept participation in a few binding international dispute mechanisms, it has generally been careful to limit the scope of its obligations and the jurisdiction of such international courts or arbitrations. For example, the PRC has signed nearly 53 multilateral conventions with binding international dispute mechanisms and it has chosen to opt out of nearly all of those mechanisms.[3] To the extent the PRC has agreed to such mechanisms, it has generally done so only when the treaty itself makes agreement to binding dispute settlement mandatory.[4] Indeed, in a recent dispute, the PRC has even gone so far as to walk away from its obligation to arbitrate under the United Nations Convention on the Law of the Sea.[5]

There is, however, one remarkable exception to this general skepticism toward binding international dispute settlement. The PRC is not only a party to the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter ICSID Convention],[6] but it has also been one of the world's most enthusiastic signatories of bilateral investment treaties that grant binding mandatory jurisdiction to ICSID arbitration tribunals.

One explanation for this paradox may be that the PRC has assumed that it would rarely if ever be a respondent in an ICSID proceeding. In the nearly two decades since joining the ICSID Convention, the PRC has faced only one arbitration brought by an investor, and that arbitration was suspended before any filings were made.[7] Nor, until recently, have any

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[1] *See* Julian G. Ku, *China and the Future of International Adjudication*, 27 MD. J. INT'L L. 154 (2012).

[2] Ying Tao, *Recognize the True Face of Bourgeois International Law from a Few Basic Concepts*, *in* PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY, 70-71 (J. Cohen & H. Chiu eds., 1974).

[3] *Id.* at 162.

[4] *Id.* at 165-69. (Discussing China's participation in the United Nations Convention on the Law of the Sea and the World Trade Organization Agreement.)

[5] The Associated Press, *China Rejects U.N. Arbitration of Maritime Dispute*, N. Y. TIMES, Feb. 20, 2013, at A13, *available at* http://www.nytimes.com/2013/02/20/world/asia/china-rejects-un-arbitration-of-maritime-dispute.html?_r=0.

[6] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[7] *See generally* Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15 (Date registered May 24, 2011) [hereinafter Ekran Derhad v. China]. The proceeding was suspended pursuant to the parties' agreement.

PRC investors invoked BITs against foreign states.[8] Indeed, the PRC has not enacted any legislation to fulfill its obligations under the ICSID Convention to create domestic law mechanisms to recognize and enforce ICSID awards.[9]

There is another possibility. PRC authorities may believe that PRC law does not need any further changes to implement its ICSID Convention obligations. Under existing PRC domestic law, treaties like the ICSID Convention may be interpreted to take priority over conflicting domestic law. If so, than the ICSID Convention's terms may be considered to have "direct effect" within the PRC domestic legal system and ICSID awards would be enforced directly by PRC courts.

This essay considers the PRC's domestic laws affecting the fulfillment of its ICSID Convention obligations to recognize and enforce ICSID awards. It begins by discussing the PRC's decision to join ICSID and to create a large network of bilateral investment treaties. It then notes that the PRC has failed to enact any specific legislation to comply with the ICSID Convention's recognition and enforcement obligations. It finally concludes that the only way that the PRC could claim to have fulfilled its treaty obligations is to declare that the ICSID Convention and related agreements have direct effect in its domestic law. The status of treaties within PRC law, however, remains uncertain and unsettled. For this reason, it is likely that, at the very least, a judicial interpretation from the Supreme People's Court is necessary to clarify a series of domestic law objections that would likely be raised against any attempt to enforce an ICSID award in the PRC. Without such an interpretation, it is highly doubtful that a PRC court would enforce an ICSID award, despite the ICSID Convention's plain requirement that it do so.

II. CHINA AND THE ICSID CONVENTION

The PRC acceded to the ICSID Convention in 1993. The PRC's accession to ICSID marked one of the first times it had accepted the possibility of submitting disputes over its sovereign actions to the jurisdiction of a third-party arbitration system. Historically, the PRC had treated such international dispute resolution mechanisms with caution or even hostility. Part of this hostility was due to a perceived pro-Western bias in such institutions, but another part of the hostility arose from the PRC's

[8] *See generally* Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6 (Date registered Feb. 12, 2007); Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29 (Date registered Sept. 19, 2012).

[9] Xiao Fang, *Guo Ji Tou Zi Zhong Cai Cai Jue Zai Zhong Guo De Chen Ren Yu Zhi Xing [Recognition and Enforcement of International Investment Arbitration Award in China]*, 6 JURISTS REVIEW 94, 95 (2011).

emphasis on protecting its sovereign independence.[10]

In addition to joining the ICSID system in 1993 (and entering into numerous bilateral investment agreements granting jurisdiction to ICSID tribunals), the PRC also acceded to the jurisdiction of the compulsory dispute settlement system created by the United Nations Convention on the Law of the Sea in 1996. Finally, in 2001, the PRC accepted the jurisdiction of the Dispute Settlement Body of the World Trade Organization.[11] Joining ICSID, therefore, represented an important milestone in the PRC's engagement with mechanisms of international adjudication.

The PRC's decision to depart from its past practice to join the ICSID Convention was long urged by PRC scholars. Such academics argued that joining the ISCID Convention posed a relatively small threat to China's sovereignty since joining the convention itself does not constitute an agreement to grant ICSID jurisdiction. Any consent must be given in a separate written agreement.[12] Other scholars noted that China could play a constructive role as a member of ICSID by representing the interests of developing countries as well as protecting its own interests.[13] Finally, scholars believed that the PRC's accession would foster confidence among foreign investors that their investments would be protected[14] as well as provide protection for the increased levels of PRC investment overseas.[15]

In joining ICSID, however, the PRC limited the scope of its consent to ICSID's jurisdiction. Upon acceding to the convention, the PRC notified the Centre that "[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of [ICSID] disputes over compensation resulting from expropriation and nationalization."[16] The legal effect of this notification, however, does not mean that the PRC can never broaden the scope of jurisdiction in an ICSID arbitration. It still permits the PRC to separately consent to a broader set of disputes in a bilateral investment agreement.[17] Nonetheless, the existence

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[10] *See* Julian G. Ku, *supra* note 1.

[11] *Id.* at 160.

[12] *See generally* Zhou Chengxin, *Dui Wo Guo Ying Fou Jia Ru Jie Jue Tou Zi Zheng Duan Gong Yue De Yi Dian Yi Jian* [*Some Opinions on Whether China Should Participate in "Convention on Settlement of Investment Disputes"*], 5(1) L. REV. 42 (1987).

[13] *Id.*

[14] *Id.* Zhang Qinglin, *Yong Jin Dang Di Jiu Ji Yu "Zhong Xin" (ICSID) Guan Xia Quan* [*The Exhaustion of Local Remedies and the ISCID "Center" Jurisdiction*], 5 SCIENCE OF L. 74, 78 (1991).

[15] Zhang Zhiyong, *Wo Guo Dui Hai Wai Zhi Jie Tou Zi De Fa Lu* [*On Legal Protection of Chinese Foreign Direct Investment*], 2 L. SCI. MAG. 14, 14 (1997).

[16] ICSID, *Contracting States and Measure Taken by Them for the Purpose of the Convention* (Sept., 2012), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&action Val=ShowDocument&Measures=True&language=English.

[17] Shen Hong, *Lun ICSID Dui Shi Zhong Guo Tou Zi Tiao Yue Zhong Cai De Guan Xia Quan* [*On The Jurisdiction of ICSID Relating to China's Investment-treaty-based Arbitration*], 32(7) L. SCI.

of this notification reflects the PRC's initially wary approach to the ICSID system.

A. China and Bilateral Investment Treaties

Under the ICSID system, an investor-state arbitration cannot be initiated unless the host state has separately consented to such jurisdiction. Such consent usually takes the form of a bilateral investment treaty with another nation. As of September 2012, the PRC has signed BITs with 100 States.[18] The sheer number of PRC BITs is impressive, especially when compared to other countries like India (61), the United States (48), and Japan (11).[19]

Although the first PRC BIT was signed in 1982 with Sweden,[20] most PRC BITs were signed after the 1993 accession to the ICSID Convention. Early PRC BITs avoided investor-state arbitration.[21] For instance, the first BIT to include an ICSID arbitration provision was signed with Spain in 1992. Setting a precedent for future PRC BITs, the PRC-Spain BIT limited investor-state arbitration disputes over the amount of compensation resulting from expropriation and nationalization.[22] Subsequent BITs contain a similar limitation on the subject-matter of arbitrations to questions of the "amount of compensation resulting from expropriation and nationalization."

B. China and New Generation BITs

Later PRC BITs, however, departed from this practice.[23] Since the conclusion of the 1998 BIT between the PRC and Barbados, most PRC

MAG. 128, 129 (2011); Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 90 (2007).

[18] Ministry of Commerce of the People's Republic of China (Department of Treaty and Law), *Wo Guo Dui Wai Qian Ding Shuang Bian Tou Zi Xie Ding Yi Lan Biao* [*The List of Bilateral Investment Treaty in People's Republic of China*] (Nov. 8, 2011), http://tfs.mofcom.gov.cn/aarticle/Nocategory/201111/20111107819474.html.

[19] ICSID, *ICSID Database of Bilateral Investment Treaties*, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewBilateral&reqFrom=Main (last visited May 15, 2013).

[20] *Id.*

[21] Schill, *supra* note 17, at 89. Guiguo Wang, *Trade, Investment and Dispute Settlement: China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575, 584 (2009).

[22] Agreement Between the People's Republic of China and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investment, art. 9, P.R.C.-Spain, Feb. 6, 1992.

[23] *See* Yu Jingsong & Zhan Xiaoning, *Lun Tou Zi Zhe Yu Dong Dao Guo Jian Zheng Duan Jie Jue Ji Zhi Ji Qi Ying Xiang* [*On the Dispute Settlement Mechanics Between Investors and Relative States and Its Influences*], 5 CHINA LEGAL SCIENCE 175, 176-177 (2005).

BITs have granted ICSID jurisdiction without the limitation on the nature of the investment dispute.[24] For example, Article 9 of the 2005 PRC-Finland bilateral investment treaty states that "any investment disputes arising from the investment between contracting parties," may be submitted to the ICSID for arbitration.[25] As a result of the less restrictive BIT terms, arbitrable investment disputes against the PRC have expanded to the disputes involving investment treatment, transfer and other issues.[26] Such broad clauses thus allow investors not only to resolve disputes concerning the amount of compensation in expropriation cases, but also to invoke all substantive rights granted in the applicable BIT.[27]

Because the PRC usually includes a standard Most-Favored-Nation Treatment clause in its BITs, it is possible that investors from states operating under the earlier generation PRC BITs could invoke the more generous terms of the newer BITs. This issue is complicated by the fact that PRC BITs contain at least three types of MFN clauses. The first kind of MFN provision has a broad application, but does not specify whether the scope of application of the provisions including dispute settlement matters.[28] The second type of MFN clause terms limits its scope but does not specify whether dispute settlement is outside the scope of the MFN treatment.[29] For example, the PRC Malta BIT provides

> [t]hat the investment and investment-related activities treatment a party gives the other party investors, in its investment management, terms of use, enjoyment or punishment, should not be less than its treatment of investment and investment-related activities given to any third-country investors.[30]

Only the third type of MFN clause clearly excludes its application to dispute settlement. For instance, the BIT between the PRC and Colombia states that "provisions of this agreement on the granting of Most-Favored-Nation status in similar circumstances in the various treaties or international investment agreements do not apply to investment dispute settlement mechanisms, such as set forth in article eighth and article ninth

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Schill, *supra* note 17, at 91.

[28] Nan Wang, *Zui Hui Guo Dai Yu Tiao Kuan Zai Guo Ji Tou Zi Zheng Duan Jie Jue Shi Xiang Shang Shi Yong Wen Ti [On the Application of Most-Favored-Nation Treatment Clause to International Investment Dispute Settlement]*, 1 HEBEI L. 120, 121-122 (2010).

[29] *Id.*

[30] Agreement Between the People's Republic of China and the Government of Malta on the Promotion and Protection of Investment, art. 3(3)(1), Feb. 22, 2009.

of the present Agreement."[31]

Scholars and arbitrators remain divided on whether the first and second types of MFN clauses could trigger the dispute settlement clause of the third-party treaty.[32] Some arbitration tribunals have held that they do.[33] Some scholars have also endorsed this view,[34] but this view is not universal.[35] It is thus conceivable, in light of this authority, that investors from states with earlier generation China BITs could avail themselves of the investor-state provisions of the new generation BITs.[36]

No matter how the MFN issue is resolved, it is plain that the PRC is now deeply engaged and intertwined with the ICSID system of investment protection and investor-state arbitration. But despite the PRC's deep engagement with ICSID, it has only been subject to one investor-state proceeding, and that proceeding was suspended shortly after it was filed.[37] Indeed, until a recent award involving a Hong Kong resident's claim against Peru, no PRC BIT has ever been invoked as the basis for jurisdiction in an ICSID investor-state arbitration. The success of the action against Peru, however, combined with the sheer volume of PRC BITs, is likely to trigger more ICSID actions involving the PRC or PRC nationals in the near future. Indeed, PRC arbitrators have recently begun participating in ICSID proceedings.[38] The U.S. and the PRC have recently re-opened negotiations on the creation of a US-PRC BIT.[39] It is thus worth considering how and whether the PRC would recognize and enforce an ICSID award within its domestic legal system.

III. THE PRC'S DOMESTIC LAW REGARDING ENFORCEMENT of ICSID AWARDS

Article 69 of ICSID Convention instructs member states to "take such

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[31] Agreement Between the People's Republic of China and Colombia on the Promotion and Reciprocal Protection of Investment, art. 3(3), Nov. 22, 2008.

[32] Wang, *supra* note 28, at 120.

[33] *Id.*

[34] Schill, *supra* note 17, at 101. Ko-Yung Tung & Rafael Cox-Alomar, *Arbitral & Judicial Decision: the New Generation of China Bits in Light of TZA YAP SHUM v. Republic of Peru*, 17 AM. REV. INT'L ARB. 461, 462 (2006).

[35] Jie Wang, *Investor-State Arbitration: Where Does China Stand*, 32 SUFFOLK TRANSNAT'L L. REV. 493, 500 (2009). In Professor Wang's view, a likely answer would have to be made on a case-by-case basis by analyzing the specific MFN clause of the particular BIT.

[36] *Id.*

[37] Ekran Derhad v. China.

[38] *See* Zhuang-Hui Wu, *International Arbitration for Chinese-Foreign Disputes*, 41(2) INTERNATIONAL LAW NEWS 1, 8 (2012).

[39] Ambassador Charlene Barshefsky et al., *United States to Resume Bilateral Investment Treaty Negotiations on the Basis of a Revised Model Treaty*, WILMERHALE (May 15, 2012), http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=89748 ("On May 4, 2012 the U.S. and China announced their intention to schedule a 7th round of talks on a BIT.")

legislative or other measures as may be necessary for making the provisions of the Convention effective . . ." Such legislative measures include an obligation to ensure that an ICSID award "shall be binding on the parties and shall not be subject to any appeal or to any other remedy."[40] Additionally, the Convention further requires member states to give broad recognition to awards within their domestic law. As Article 54 states:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

This provision thus specifies that a member state must provide a domestic law enforcement mechanism for ICSID awards and that such mechanism must give awards the status of a "final judgment of a court of that state." The United States, for instance, has implemented this provision by a federal statute that gives ICSID awards a status equivalent to that of a domestic state court judgment.

> An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] convention shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.[41]

While not every country is required to fulfill its Article 54 obligations in the same way, Article 54 plainly requires the PRC to ensure that ICSID awards may be enforced in the same manner as domestic court judgments.

A. PRC Domestic Law Governing the Recognition and Enforcement of Arbitral Awards

There is no domestic PRC legislation that specifically implements these obligations under the ICSID Convention. However, if a party brought an ICSID award to the PRC, it would likely invoke Article 269 of the Civil Procedural Law.

> If an award made by a foreign arbitration agency requires the recognition and enforcement by a people's court of the People's

[40] ICSID Convention, art. 53.
[41] Foreign Relations and Intercourse, 22 U.S.C. § 1650a(a) (2000).

> Republic of China, the party concerned shall directly apply to the intermediate people's court in the place where the party subject to execution has its domicile or where its property is located. The people's court shall deal with the matter in accordance with the relevant provisions of the international treaties concluded or acceded to by the People's Republic of China or on the principle of reciprocity.

A party seeking enforcement would also invoke Article 238 the CPL, which provides that "if an international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall apply, unless the provisions are the ones on which China has announced reservations."

On its face, Articles 269 and 238 of the CPL allow parties seeking to enforce an ICSID award to invoke the ICSID Convention itself. Read in this light, Article 269 of the CPL makes clear that intermediate people's courts should treat ICSID awards consistent with the Article 54 of the ICSID Convention, *e.g.* as final judgments of domestic courts. Article 238 would then make clear that no other domestic law could override Article 54 of the ICSID Convention's requirements.

This interpretation of the CPL, however, requires the assumption that PRC law can incorporate treaties to operate directly and even to override inconsistent domestic law. Some notable PRC scholars, like Tieya Wang, have argued that the PRC has adopted a system of "adoption" for international treaties into PRC law.[42] Adoption is the direct incorporation of treaties into PRC domestic law without any separate act of "transformation" by the governmental authorities. Writing in 1995, Wang suggested that numerous treaties, involving both civil and criminal matters, have been directly "adopted" into the Chinese legal system.[43]

By the end of the 1990s, however, enthusiasm for the Wang's view on treaty incorporation began to wane. A likely factor in the shift in viewpoint was China's accession to the WTO. Commentators noticed that the WTO and its numerous annexes were not directly incorporated by most WTO states, and Chinese courts (supported by Chinese scholars) eventually concluded that the WTO agreements should not be "adopted" in China. Although at least one scholar has argued in favor of rejecting direct incorporation completely,[44] the consensus view seems to maintain the

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[42] Tieya Wang, *The Status of Treaties in the Chinese Legal System*, 1 J. CHINESE & COMP. L. 1, 4 (1995).

[43] *Id.*

[44] Yong-Wei Liu, *Guo Ji Tiao Yue Zai Zhong Guo Shi Yong Xin Lun* [*Some New Thoughts on Application of International Treaties in China*], 2 JURISTS REV. 143, 144 (2007).

adoption approach for some treaties. Recent scholarship has repeatedly called for either constitutional amendments or more legislation to clarify the status of treaties and confirm that adoption permits direct application of many international treaties.[45] Hence, while adoption is no longer necessarily the dominant method of treaty incorporation in the PRC, it remains a key component of China's existing, and future, mechanisms for treaty interpretation. This continuing academic discussion reflects the fluid status of Chinese legal doctrine on the incorporation of treaties.

It is also true, however, that treaties have rarely been directly applied by Chinese courts unless the relevant PRC legislation specifically mentions treaties.[46] The unsettled state of doctrine on treaty implementation means that even provisions such as Articles 269 and 238 do not guarantee that PRC courts will enforce ICSID awards.

B. The New York Convention on the Recognition and Enforcement of Arbitral Awards

This conclusion is supported by the PRC's implementation of the New York Convention on the Recognition and Enforcement of Arbitral Awards.[47] Like the ICSID Convention, the recognition and enforcement provisions of the New York Convention could have been interpreted to have direct effect in PRC law pursuant to Articles 269 and 238 of the CPL. Despite those provisions, the New York Convention was not implemented within the PRC system until the Supreme People's Court issued a judicial notice to guide lower courts in the enforcement of private arbitral awards under the Convention.

Article 32 of the Law of the People's Republic of China on the Organization of the People's Courts provides "Supreme People's Court shall issue judicial interpretations on specific application of laws and decrees of the problems for trial."[48] The Supreme People's Court has the authority to issue judicial interpretations on almost any laws applied by lower PRC courts.

Thus, in 1987, one year after the PRC acceded to the New York Convention, the Supreme People's Court issued "Circular on the Implementation on Convention on the Recognition and Enforcement of

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[45] *See* YONG WANG, TIAO YUE ZAI ZHONG GUO SHI YONG ZHI JI BEN LI LUN WEN TI YAN JIU [BASIC PRINCIPLES AND THEORIES IN THE APPLICATION OF TREATIES IN CHINA] 171-181 (2007).

[46] *Id.*

[47] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

[48] Quan Guo Ren Min Dai Biao Da Hui Chang Wu Wei Yuan Hui Guan Yu Jia Qiang Fa Lu Jie Shi Gong Zuo De Jue Yi [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law], CLI.1.1006(EN), art. 32 (1981).

Foreign Arbitral Awards".[49] This judicial interpretation guided lower courts on a variety of questions related to judicial treatment of foreign arbitration awards.[50] For instance, the circular made clear that domestic courts should treat the New York Convention as superior to provisions of the Civil Procedure Law.[51] It also instructed lower courts on which questions of jurisdiction over arbitral award enforcement actions.[52] This and other judicial interpretations were important mechanisms for guiding lower court actions with private arbitral awards under the New York Convention, especially since the Civil Procedure Law had no specific provisions governing the enforcement of arbitral awards at that time. The CPL was later revised in 1991 to include provisions specifically directed toward foreign arbitral awards.

In any event, the Supreme People's Court's guidance also extended to obligations not contained in the letter of the New York Convention. For example, the "Circular on Questions Concerning the Handling of Foreign Arbitrations"[53] requires people's courts to report to the jurisdiction of the subordinate higher people's court concerned for examination before issuing a decision to refuse to recognize and enforce arbitration under the New York Convention. If the higher people's court agrees with the lower court's decision to refuse enforcement, the Supreme People's Court must also be consulted. The original people's court must await a reply from the Supreme People's court before refusing to enforce an award.

This pro-enforcement approach might seem to bode well for attempts to enforce an ICSID award. But it also reflects the importance of guidance from the Supreme People's Court in managing the enforcement of private

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[49] Zui Gao Ren Min Fa Yuan Guan Yu Zhi Xing Wo Guo Jia Ru De Cheng Ren Ji Zhi Xing Wai Guo Zhong Cai Cai Jue Gong Yue De Tong Zhi [Circular on the Implementation on Convention on the Recognition and Enforcement of Foreign Arbitral Awards] (Apr. 10, 1987), *available at* http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-1-7-1.html [hereinafter Circular on the Implementation on Convention].

[50] The request for recognition and enforcement of the arbitration award made on the territory of another contracting state, shall be made by one party against the award is revoked. The request made by one party shall be governed by the following Intermediate People's Court of People's Republic of China: if the enforced party is a nature person, the jurisdiction shall be the court of the place with his/her place of domicile or residence; if the enforced party is a legal entity, the jurisdiction shall be the court of the place of its main office; if the enforced party has no place of domicile, residence, or main office but still has property in China, the jurisdiction shall be the court of the place of property.

[51] Circular on the Implementation on Convention, ¶ 1 ("Where there is any conflict between the provisions of this convention and the provisions of China's Civil Procedure Law (Trial Implementation), this Convention shall prevail.")

[52] Circular on the Implementation on Convention, ¶ 5; Bruce R. Schulberg, *China's Accession to the New York Convention: An Analysis of a New Regime for the Recognition and Enforcement of Arbitral Awards*, 3 J. CHINESE L. 117, 135 (1989).

[53] Zui Gao Ren Min Fa Yuan Guan Yu Ren Min Fa Yuan Chu Li Yu She Wai Zhong Cai Ji Wai Guo Zhong Cai Shi Qiang You Guan Wen Ti De Tong Zhi [Circular on Questions Concerning the Handling of Foreign Arbitrations].

arbitral awards. This practice suggests that lower courts in the PRC would neither enforce, nor refuse to enforce, an ICSID award until the Supreme People's Court issued a definitive interpretation. No such interpretation has been issued in the nearly two decades since the PRC's accession to ICSID, although one PRC scholar has recently called for the SPC to issue such an interpretation.[54]

Such an interpretation could resolve ambiguities about enforcement of ICSID award in PRC courts. Scholars have noted that an ICSID award enforcement action would face a number of possible legal defenses that may or may not comply with Article 54 of ICSID.

For instance, a defending sovereign state might raise the "social and public policy interest" exception to enforcement contained in Article 217 of the CPL.[55] Under the New York Convention's Article V, arbitration awards face a "public policy" exception to enforcement that might correspond with Article 217 of the CPL. However, the ICSID Convention contains no analogous public policy exception to enforcement. A PRC court that used Article 217 of the CPL to reject enforcement would likely violate Article 53's prohibition of appeals and Article 54's requirement of "final judgment" status for ICSID Awards. As the ad hoc Committee in MINE v. Guinea expressed noted:

> 4.02 Article 53 of the Convention provides that the award shall be binding on the parties "and shall not be subject to any appeal or to any other remedy except those provided for in this Convention". The post-award procedures (remedies) provided for in the Convention, namely, addition to, and correction of, the award (Art. 49), and interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52) of the award are to be exercised within the framework of the Convention and in accordance with its provisions. It appears from these provisions that the Convention excludes any attack on the award in national courts.[56]

Indeed, the course on the ICSID Convention provided by the United Nations Conference on Trade and Development specifically rules out any invocation of "ordre public" or "public policy" in a challenge to ICSID awards. Instead, courts are limited to "verifying the authenticity of ICSID

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[54] Xiao, *supra* note 9, at 96. The system under ICSID Convention takes the cooperation of the domestic laws of Contracting State. However, China has no relevant rules or arrangement in its domestic laws, including that all the relating departments in Supreme People's Court have no idea about how to recognize and enforce the ICSID arbitration awards.

[55] "If the people's court determines that the execution of the arbitral award is against the public interest, it shall make an order not to allow the execution."

[56] Maritime International Nominees Establishment (MINE) v. Government of Guinea (Guinea), ICSID Case No. ARB/84/4, Decision, ¶ 4.02 (Date registered Jan. 6, 1988).

Awards."[57]

In a similar vein, Professor Xiao Fang has argued that PRC provisions for the supervision of trials might allow the appeal of an ICSID award. Article 177 of CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA provides

> If the president of a people's court at any level finds some definite error in a legally effective judgment or order of his court and deems it necessary to have the case retried, he shall refer it to the judicial committee for discussion and decision. If the Supreme People's Court finds some definite error in a legally effective judgment or order of a local people's court at any level, or if a people's court at a higher level finds some definite error in a legally effective judgment or order of a people's court at a lower level, it shall have the power to bring the case up for trial itself or direct the people's court at a lower level to conduct a retrial.

Article 178 of Civil Procedure Law of the People's Republic of China provides "If a party considers that a legally effective judgment or order has some error, he may apply to the people's court which originally tried the case or to a people's court at the next higher level for retrial; however, execution of the judgment or order shall not be suspended". These two articles set forth the procedural framework for trial supervision in PRC courts.

The trial supervision procedure might be interpreted to apply to ICSID awards since they might qualify as a "legally effective" judgment. Even the enforcement proceeding might be deemed a legally effective judgment. But if the trial supervision procedure was applied to the enforcement of an ICSID award, this would likely breach Article 53's prohibition on appeals of ICSID awards.

Finally, although Article 55 of the ICSID Convention specifically exempts a country's sovereign immunity laws from the Convention's reach, the PRC does not have any formal legal provision that sets forth the effect of sovereign immunity in its domestic courts. Indeed, the most authoritative and recent statement of this view was released by the Standing Committee of the National's People's Congress in response to a request for guidance from Hong Kong. In the *Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the*

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[57] UNCTAD, *Dispute Settlement – International Centre for Settlement of Investment Dispute 2.9 Binding Force and Enforcement*, at 16 (2003), http://unctad.org/en/docs/edmmisc232add8_en.pdf.

National People's Congress,[58] the Standing Committee clarified that the central government, and not Hong Kong, would determine the question of sovereign immunity. In this case, the Standing Committee found that immunity should be granted but it did not clarify when and in what future circumstances state immunity could be invoked in domestic courts. The absence of a definitive legal provision on sovereign immunity would create substantial uncertainty in an ICSID enforcement proceeding given that such a state is almost always the respondent in such a proceeding.

These questions, the public policy exception, trial supervision procedure, and sovereign immunity, represent some but not all of the key issues that would be raised in any ICSID award enforcement effort in the PRC.

IV. CONCLUSION

The PRC's enthusiasm and interest in the ICSID-BIT system of investment protection and investor state arbitration has not been matched by the creation of a clear domestic mechanism for living up to its obligations under these international agreements. While a reasonable interpretation of the PRC's civil procedure law seems to allow parties to directly enforce ICSID awards, past practice suggests that a judicial interpretation from the Supreme People's Court is necessary to clarify lower courts' authority to enforce awards.

Understood in this light, the PRC's departure from its past hostility to international arbitration is more understandable. The PRC has not yet begun to consider itself a likely target for such investor-state arbitration, and it has not bothered to adopt legislation or judicial interpretations that would subject it to domestic award enforcements. The full strength of the PRC's commitment to investor-state arbitration under ICSID has yet to be tested. Its paucity of domestic legal mechanisms suggests this commitment is not particularly deep.

[58] Quan Guo Ren Da Chan Wei Hui Guan Yu Zhong Hua Ren Min Gong He Guo Qiang Gang Te Bie Xing Zheng Qu Ji Ben Fa Di Shi San Tiao Di Yi Kuan He Di Shi Jiu Tiao De Jie Shi [The explanation of Article 13.1 and 19 of "The Basic Law Of The Hong Kong Special Administrative Region Of The People's Republic Of China" by The National People Congress of the People's Republic of China].

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