

Is China Ready to Recognize and Enforce Investment Arbitral Awards?

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This article explores whether China is ready to comply with its international obligations to recognize and enforce investment arbitral awards, and if not, what remains to be done. First, for ICSID awards, China has neither enacted any implementing legislation, nor designated courts or authorities are competent at recognizing and enforcing ICSID awards. Second, it is more ambiguous and complicated to seek recognition and enforcement of non-ICSID awards, due to China's commercial reservation to New York Convention. It is uncertain whether the current provisions in national law on the recognition and enforcement of foreign commercial arbitral awards would also apply to the recognition and enforcement of non-ICSID awards. Moreover, statutes on State immunity, the common issue while enforcing both ICSID and non-ICSID awards, are quite insufficient. Finally, beyond satisfying its international obligations, investment arbitral awards issued by Chinese arbitration institutions also face obstacles of recognition and enforcement.

Keywords: Investment Arbitral Awards, China, IIAs, ICSID, ISDS

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1. Introduction

Despite a gradual opposition among various stakeholders in both developing and developed countries, the investor-state dispute settlement (“ISDS”) remains the most effective mechanism in International Investment Agreements (“IIAs”).¹ The ISDS mechanism is effective and meaningful for recognition and enforcement system, while, at the same time, it used to interfere with a State’s sovereignty.²

China has been both a major home country of outward investment and an important recipient of FDI inflows for many years. It remains a favorite host economy to the world³ as well as an increasingly important capital-exporting country.⁴ Upon this background, China has concluded over 130 bilateral investment treaties (“BITs”)⁵ and various free trade agreements (“FTAs”) with investment chapters⁶ over the past few decades. The BITs in the 1980s and early 1990s invariably restricted investor-state arbitration to disputes concerning the amount of compensation for an expropriation. However, it was often interpreted expansively by the arbitral tribunal to cover disputes over the expropriation by either interpretation or application of the MFN clauses.⁷

A turning point was the China-South Africa BIT 1997. This BIT permitted *ad hoc* arbitration of all investor-state disputes. Also, the 1998 China-Barbados BIT provides for the ICSID arbitration of all disputes. Since then, almost all China’s IIAs have provided for a broad reference to arbitration. They usually adopted such terms as “any dispute ... in connection with an investment,” or “concerning an investment,” or “with respect to an investment” or “related to an investment” or even very broad references such as “any investment dispute,” or “any legal dispute” between the investor and the contracting party.⁸

Being inconsistent with its investing status and a large amount of IIAs, there have been only two ISDS cases against China. One was the *Ekran Berhad v People’s Republic of China*.⁹ It was registered on May 24, 2011, suspended on July 22, 2011 via agreement of the parties and discontinued on May 16, 2013 without any decision or award.¹⁰ The other was *Ansung Housing Co. Ltd. v People’s Republic of China*.¹¹ Commenced on November 4, 2014, it was concluded on March 9, 2017 in favor of China.

By contrast, the number of ISDS cases in the world have been rising since the late 1990s. In 2015, it reached a record high, 70 known ISDS cases. As of January

1, 2017, the total number of publicly known ISDS claims have reached 767. So far, 109 countries have respondents to one or more ISDS claims.¹²

Although there may be some effective mechanisms to prevent disputes,¹³ this trend would change over the next two decades.¹⁴ First of all, nearly 20 years have passed since Chinese IIAs shifted to a more liberal paradigm with broad ISDS clauses. Increasing FDI inflows may also contribute to the increasing possibilities of investment disputes. Considering China's ongoing reform on social and economic aspects, furthermore, China would get involved in more ISDS cases in the future, especially when financial or economic crises happen.

So, even if the number of ISDS cases against China is small and neither of the cases has proceeded to the stage of enforcement, it is not too early for China to decide whether to recognize and enforce international investment arbitral awards against it. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention) provides: China "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."¹⁵ It is thus necessary for China to consider if it has prepared well to recognize and enforce international investment arbitral awards against other states or investors¹⁶ provided that assets of the respondent are located in Chinese jurisdiction.

As many international treaties leave the procedures of recognition and enforcement to domestic law, this research is to explore whether China has prepared well to fulfill its international obligations to recognize and enforce international investment arbitral awards and if not, what remains to be done. It will also explore the recognition and enforcement of investor-state arbitral awards issued by Chinese arbitration institutions. This essay is composed of five parts including an Introduction and Conclusion. Part two will discuss the legal grounds of China's international obligation to ISD recognition and enforcement. Part three will examine its legal framework. Part four will examine the remains to be done.

2. Legal Grounds of China's International Obligations to Recognition and Enforcement of Investor-State Arbitral Awards

A. ICSID Convention

China became a Member State of the ICSID Convention on February 6, 1993. The ICSID Convention contains provisions facilitating the recognition and enforcement of international investment arbitral awards. Article 53 of the ICSID Convention provides:

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. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

According to the provision, China is obliged to comply with an ICSID award rendered to it without seeking any external remedy or review including domestic review. Following Article 54, China should recognize an ICSID award and enforce the pecuniary obligations imposed by the award against any state or investor if the award's creditor initiates the enforcement proceedings before Chinese courts. Here, suitable assets are situated when the respondent has failed to satisfy the award voluntarily.¹⁷ Article 54 also provides: "Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation"¹⁸ and "[E]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."¹⁹ In procedural aspects, China should designate courts or other authorities competent for the recognition and enforcement of the ICSID award to the Secretary-General. Moreover, as Article 54 leaves the execution of arbitral awards to domestic law, China should ensure that there is domestic procedure law concerning the execution of judgments. However, China has no obligation to create new execution procedures for the ICSID awards.²⁰

Further, according to Article 69,²¹ China should take necessary measures to ensure that provisions of ICSID Convention are effective in its domestic legal

system, including the provisions on recognition and enforcement of course.

Article 55 of the ICSID Convention provides: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.” The UNCTAD maintains that it would preserve state immunity from execution.²² Therefore, China may refuse to enforce an ICSID award against itself or other States if there would be any violation of the rules on State immunity. However, “[s]uccessful reliance on State immunity from execution of awards may still amount to the violation of the Convention and lead to the usual consequences of State responsibility, including diplomatic protection under Article 27(1).”²³

Upon accession, China filed a notification under Article 25 (4) of the ICSID Convention stating: “Pursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Center for Settlement of Investment Disputes over compensation resulting from expropriation and nationalization.”²⁴ In fact, however, China has concluded a lot of IIAs which go beyond the limits indicated in its notification. What is then the effect of the notification? In case of conflict between a specific consent in IIAs and the notification, which should govern? The last sentence of Article 25 (4) - “such notification shall not constitute the consent required by paragraph (1)” - makes it clear that as notifications under Article 25(4) of the ICSID Convention would serve for the information only, it would not constitute the consent required to give the Center jurisdiction²⁵ and thus do not have any direct legal consequences.²⁶ As a result, China’s obligations to recognize and enforce the ICSID awards are unlikely to be affected by its notification.

B. New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter New York Convention) aims to facilitate the recognition and enforcement of foreign arbitral awards. While it seems that the drafters of the Convention were not contemplating disputes under public (international) law, modern trade and investment practices expect that awards rendered particularly in state-investor arbitrations should be included in the Convention’s scope of application.²⁷ Article 3 of the Additional Facility Rules and Article 19 of Arbitration (Additional Facility) Rules adopted by the Administrative Council

of the ICSID Center implies that the awards passed under the Additional Facility Rules become subject to the enforcement regime of the New York Convention.²⁸

China ratified the New York Convention on January 22, 1987, subject to the above two reservations as follows:²⁹

1. The People's Republic of China will apply the Convention, only on the basis of reciprocity, to the recognition and enforcement of arbitral awards made in the territory of another Contracting State;
2. The People's Republic of China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the People's Republic of China.

On April 10, 1987, the Supreme People's Court ("SPC") noticed on the Implementation of the Convention toward the Recognition and Enforcement of Foreign Arbitral Awards acceded to by China (New York Convention Implementation Notice):

Legal relationships, whether contractual or not, which are considered commercial' means 'the economic rights and obligations arising from contracts, torts or relevant legal provisions, such as ..., except disputes between foreign investors and the host government.'³⁰

According to this Notice, China has no obligations to recognize and enforce investment arbitral awards under the New York Convention due to its declarations and reservations.

C. IIAs

Generally, ISDS forum options in Chinese IIAs include domestic courts of the host State, *ad hoc* arbitral tribunal, and the ICSID center. Before 1993 when China became a Contracting State of the ICSID Convention, the majority of investment treaties provided for *ad hoc* arbitration. Even after 1993, there were still references to *ad hoc* arbitration.³¹ Applicable procedures vary by treaties such as the ICSID Arbitration Rules, the UNCITRAL rules and other rules agreed by the parties. Except for the ICSID Convention, China has signed BITs that provide for arbitration under the ICSID Additional Facility, *e.g.*, with India, which is not yet a

State Party to the ICSID Convention.³²

Most of the IIAs concluded by China contains the following languages: “The award shall be final and binding on both parties”³³; “The decision of the arbitral tribunal shall be final and binding and shall be enforced in accordance with domestic legislation”³⁴; “The award shall be final and binding for the parties to the dispute and shall be executed according to national law”³⁵; or similar words. However, further detailed provisions to the recognition and enforcement of the awards in Chinese IIAs are very rare. The China-Canada BIT 2012, *e.g.*, has a little more specific language regarding enforcement but still leave it mainly to national law of the country where enforcement is sought. Article 32 (Finality and Enforcement of an Award) provides as follows:

1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of that particular case.
2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
3. A disputing party may not seek enforcement of a final award until:
 - (a) in the case of a final award made under the ICSID Convention:
 - (i) 120 days have elapsed from the date the award was rendered, provided that a disputing party has not requested the award be revised or annulled, or
 - (ii) revision or annulment proceedings have been completed; and
 - (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules:
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award and there is no further appeal.
4. Each Contracting Party shall provide for the enforcement of an award in its territory.

Even if most of the IIAs seldom deals with the recognition and enforcement, China is still under implied obligations to honor the adverse ICSID awards or non-ICSID awards against itself with good faith, especially for the latter, as they benefit neither from the enforcement system of the ICSID Convention, nor from the New York Convention due to China’s commercial reservation mentioned above.

3. Current Legal Framework regarding the Recognition and Enforcement of Investor-State Arbitral Awards

A. The Status of Investor-State Arbitration in National Legal System

According to the Chinese Civil Procedure Law 2012, arbitral awards are divided into three types, namely, domestic awards, foreign-related awards, and foreign awards, each of which has distinct rules for recognition and enforcement. A foreign-related award is rendered by a Chinese arbitral institution, involving foreign elements such as one or both of the parties are foreigners, stateless persons, foreign enterprises or organizations.³⁶

For domestic and foreign related arbitration, only disputes over contracts, property rights and interest between citizens, legal persons and other organizations as equal subjects of law may be submitted to arbitration by virtue of Article 2 of the Arbitration Law of the People's Republic of China 1995 (hereinafter Arbitration Law).³⁷ Accordingly, disputes over unequal subjects such as investor-state investment disputes would not be submitted to arbitration institute in China.³⁸ In other words, it is impermissible for a Chinese arbitration institution to administer an investor-state arbitration and issue an award on it.

For foreign arbitration, investor-state disputes are explicitly excluded from commercial legal relationship in the New York Convention Implementation Notice. Consistent with the arbitrability rules stipulated in the PRC Arbitration Law of 1994 and the New York Convention Implementation Notice, there are neither any specific provisions concerning the recognition and enforcement of investor-state arbitral awards in the current Civil Procedure Law 2012, nor any other specific legislation enforcing investor-state arbitral awards. In addition, China has not made its designation of a competent court or other authority required by Article 54(2) of the ICSID Convention yet.³⁹ By contrast, the SPC has issued several judicial interpretations with respect to the recognition and enforcement of awards under the New York Convention, such as “the Supreme People's Court Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which China has acceded.”⁴⁰

Since China's national legal system currently remains silent on the enforcement of investor-state arbitral awards, it is necessary to examine the general provisions

on the recognition and enforcement of foreign arbitration and foreign-related arbitration. First, Article 283 of the Civil Procedure Law regulates the recognition and enforcement of foreign arbitral awards in China. Moreover, Article 545 of the Judicial Interpretation of Civil Procedure Law by the Supreme People's Court 2015 provides the rule to recognize and enforce foreign *ad hoc* arbitral awards made outside China in the same way as foreign institutional awards in China is recognized and enforced.⁴¹ Nonetheless, it is not sure whether *ad hoc* awards made within China on the basis of BITs could be recognized and executed in China.⁴²

The SPC introduced the “prior reporting mechanism” by its Notice on Several Questions concerning the People's Court's handling of the Issues in relation to Foreign-related Arbitration and Foreign Arbitration in 1995.⁴³ It will certainly facilitate the recognition and enforcement of foreign-related arbitral awards and foreign arbitral awards by taking away the power of the intermediate people's court and higher people's court to refuse the enforcement of foreign-related and foreign arbitral awards. Pursuant to this Note, only the SPC is entitled to deny the recognition and enforcement of foreign-related and foreign arbitral awards.

Considering the aforementioned commercial reservation under the New York Convention, it is unclear whether the above-mentioned stipulations can also be applied to foreign investor-state awards, especially the latter.

B. Specific Issues

1. Public Policy

The public policy defense serves as a safety-valve allowing the Contracting States to prevent intrusion into their legal system of awards they consider it irreconcilable.⁴⁴ Following this purpose, public policy standard is commonly defined broadly under a respective national law. In general, public policy opens the gateway for obstructing the recognition and enforcement of foreign arbitral awards. However, the tension between its sensible use and abuse is unlikely to be ever fully resolved.⁴⁵

According to Article V(2)(b) of the New York Convention, public policy is the only ground allowing for a substantive review of the award by a domestic court and one of the bases for non-recognition and non-enforcement of foreign commercial arbitral awards. By contrast, the ICSID Convention lays down that public policy cannot be a bar to the recognition and enforcement of the ICSID

awards because of the self-contained and exhaustive nature of its review process.⁴⁶ As for non-ICSID awards not covered by the New York Convention, such as *ad hoc* investor-state awards, may also be denied on the ground of public policy.⁴⁷

There is no term like ‘public policy’ in Chinese legislation. In the context of commercial arbitrations, “social and public interest” is a ground to refuse enforcement of foreign-related⁴⁸ and domestic awards.⁴⁹ A similar provision exists in connection with the recognition and enforcement of foreign court judgments,⁵⁰ while no similar stipulation exists with regard to the recognition and enforcement of foreign arbitral awards. Therefore, it is unclear whether the recognition and enforcement of non-ICSID awards would be circumvented for violation of “social and public interest.”

As there is no definition of “social and public interest” in law, the public policy ground may be abused. To the contrary, public policy defense is often invoked but rarely granted. Up until now, only two foreign arbitral awards are denied on the ground of public policy. One is *Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd. v. Jinan Yongning Pharmaceutical Co. Ltd.* in 2008,⁵¹ and the other is *Taizhou Haopu Investment Co., Ltd. v Wicor Holding AG* in 2016.⁵² Both conflict with a prior Chinese court ruling on an issue of Chinese law and thus are violating China’s judicial sovereignty. The Chinese courts generally adopt a restrictive approach to interpret public policy which broadly reflects international developments on the issue.⁵³ In addition, the SPC made it clear that mere non-compliance with a mandatory law of China would not necessarily constitute a violation of public policy.⁵⁴

2. State Immunity

The ICSID awards are executed under the national law of State immunity of the forum State. In other words, the forum State may refuse the enforcement of an ICSID award as long as it would violate the rules on State immunity as applied in the enforcing State. For non-ICSID awards, it is assumed that State immunity can also be a bar to their enforcement.⁵⁵

Since the 1970s, countries such as the US, the UK, Canada and Australia have adopted legislation to regulate the law of State immunity domestically.⁵⁶ However, China has not yet enacted a comprehensive legislation of State immunity, but several instruments and judicial interpretations are related to State immunity on

specific aspects.⁵⁷

On September 14, 2005, China signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (hereinafter 2004 UN State Immunity Convention). It distinguishes the proceedings relating to enforcement from those relating to adjudication and deals separately with pre- and post-judgment execution. Article 19 of the 2004 UN State Immunity Convention contains a prohibition against the measures of constraint exercised by the authorities of one state against another and its property. However, it sets out three exceptions: express consent, property allocation, and the state property. In particular, the last one is related or intended to use for other than governmental (non-commercial) purposes if execution may only be taken against property connecting to the entity against which the proceeding was directed. However, neither convention has entered into force, nor China has ratified it.⁵⁸

Today, China has only one statute in force relating to the enforcement of awards.⁵⁹ Subject to the principle of reciprocity, it grants foreign central banks immunity both from pre-judgment attachment and post-judgment execution without making any distinction to the types of the assets, commercial or non-commercial. Exceptions to immunity include express and implied waiver by the allocation of the central bank or its government. It is consistent with Article 21(1)(c) of 2004 UN State Immunity Convention.

Besides, another relevant instrument is Notice of the Supreme People's Court on the Relevant Issues concerning the People's Courts to Accept Civil Cases involving Privilege and Immunity on May 22, 2007.⁶⁰ It establishes a prior reporting system with regard to acceptance of civil cases involving privilege and immunity. If a civil case is filed with the people's court to a foreign country or other subjects, only the SPC is entitled to determine whether to accept it or not. It relates to the immunity from jurisdiction, but does not deal with immunity from enforcement.

People's courts have not engaged in any lawsuit or enforcement proceeding involving State immunity issues so far. A case study shows that when China was involved as a defendant in a foreign forum, it stands on the doctrine of absolute immunity, while Chinese government embraces the idea that state-owned enterprises should not enjoy immunity at least in relation to their commercial activities.⁶¹ In *FG Hemisphere Associates v. Democratic Republic of the Congo*,⁶²

China reflected traditional position of absolute immunity from enforcement.

The doctrine of Precedent is not applied in mainland China. Meanwhile, China signed the 2004 UN State Immunity Convention, which adopts the doctrine of restrictive immunity. As far as China will adhere to traditional absolute State immunity persistently, uncertainty will thus remain in the future.

4. What Remains to Be Done?

A. ICSID Implementing Legislation

According to Article 69 of the ICSID Convention, a number of States has taken legislative measures to make the Convention effective.⁶³ The measures of the domestic legal sphere vary depending on the respective constitutional system. *E.g.*, the UK requires legislation to incorporate treaties into its domestic law, while the US applies duly promulgated treaties internally in principle.⁶⁴

It is generally accepted that international treaties to which China accedes do not require domestic legislation in order to have an effect.⁶⁵ An ICSID implementing legislation, however, is still necessary for the Chinese government to carry out its international obligations under the ICSID Convention. Without any explicit domestic law for enforcing the ICSID awards, uncertainty still remains. As mentioned above, it is unclear whether Article 283 of the Civil Procedure Law can be applied to investor-state awards. Although China can satisfy an adverse ICSID award against itself voluntarily without requiring the award creditor resorting to any enforcement proceedings, the initiation of enforcement is still inevitable for the ICSID awards against other states or investors who sought to be recognized or enforced in China. So, the ICSID implementing legislation such as a judicial interpretation from the SPC is necessary to ensure that lower courts recognize the binding status of the ICSID Convention as well as to clarify a series of domestic law objections that might otherwise be raised. Moreover, China should designate the competent courts or authorities as soon as possible.

B. Non-ICSID Awards Enforcement Mechanism

Lack of an international convention governing the recognition and enforcement of non-ICSID awards, it is not sure how an award creditor would seek legal

remedies in China. In other words, would the award creditor rely on the principle of reciprocity or rely on the IIAs as another kind of legal basis? For the former, recognition and enforcement would be refused unless ‘reciprocity’ is proved by the requesting party. However, this will be contrary to the obligations in the IIAs that any award shall be final and binding. For the latter, as mentioned above, IIAs usually do not deal with procedures of enforcement, but leave it to domestic law, offering little guidance.

Would non-ICSID awards be then enforceable without any ground for refusal listed in the New York Convention? *E.g.*, would public policy become a relevant ground for not enforcing an *ad hoc* investor-state arbitral award? Further, would non-ICSID awards be refused on the ground of State immunity? China needs to adjust and clarify its enforcement mechanism for non-ICSID awards as soon as possible.

A potential option for China is to withdraw its commercial reservation from the New York Convention or redefine ‘commercial’ by national law so that non-ICSID awards could be applied on the basis of the New York Convention. Another alternative approach is to enact legislation or issue judicial interpretations, establish special rules with regard to the recognition and enforcement of non-ICSID awards. It should be noted that, in order to fulfill the obligations in IIAs, awards rendered by *ad hoc* tribunal in the territory of China should be recognized and enforced, as well.⁶⁶

C. State Immunity Act

State immunity is the sole obstacle to the recognition and enforcement of all types of investor-state arbitral awards including non-ICSID awards. The Law of the People’s Republic of China on Judicial Immunity from Compulsory Measures concerning the Property of Foreign Central Banks only covers a specific issue. Thus, a comprehensive legislation is expected.

It is necessary for China to consider whether to give 2004 UN State Immunity Convention effect or to shift from the original absolute immunity to the restrictive immunity of sovereign States and their property. After all, a distinct and separate regime of the rules relating to the immunity from enforcement continue to be universally recognized from those relating to the immunity from adjudication.⁶⁷ Further, there is a general consensus among the major jurisdictions that while

immunity from enforcement remained absolute for property of the foreign state in use for public purposes, some state property might be subjected to enforcement, but varied as to the extent required for its use for a non-governmental purpose and connection with non-immune subject matter or commercial entity.⁶⁸

More importantly, restrictive immunity benefits Chinese overseas investors. Up to now, there have been seven cases filed by Chinese investors.⁶⁹ Although none of them has applied enforcement in Chinese courts due to either adverse awards or unconcluded proceedings, Chinese investors may seek to enforce investment arbitral awards against other State in Chinese courts where assets of that State are situated if it has failed to comply voluntarily with the adverse investment arbitral awards in the future. However, absolute immunity would refrain Chinese investors from adjudicating or enforcing certain claims against foreign states and their assets. By contrast, under restrictive immunity, Chinese investors might be entitled to seek enforcement against foreign assets.

As every coin has two sides, it is not always easy to make distinctions between commercial and non-commercial. Thus, restrictive immunity may allow gradual intrusion into sovereign States. Especially considering the modern Chinese history, suffering from extra-territorial rights,⁷⁰ it might be difficult for China to shift from absolute to restrictive immunity immediately. Conversely, absolute State immunity might be in favor of encouraging foreign States to maintain their reserves in China by maintaining a friendly relationship.⁷¹

Time is ripe for China to change its attitude from absolute to restrictive immunity. However, how to keep the balance of different interests is still a huge challenge while drafting such a comprehensive State immunity act.

5. Conclusion and Prospect

China is evolving as both a significant capital recipient and major investor in the world. Although the number of current ISDS cases involving China or Chinese investors is relatively small, this does not mean that China is not ready to recognize and enforce investment arbitral awards. On the contrary, China should urgently consider examining whether its domestic legislation is compatible with its international obligations.

Over the past decade, there have been some significant developments in relation to the recognition and enforcement of foreign arbitral awards. *E.g.*, foreign *ad hoc* arbitral awards made outside the territory of China are explicitly admitted and can be recognized and enforced in China according to the SPC's Judicial Interpretation of Civil Procedure Law in 2015, while domestic *ad hoc* arbitration is still generally illegal. Notwithstanding, these developments are far from sufficient. Especially, when it comes to the recognition and enforcement of investment arbitral awards, much remains to be done.

China has neither enacted any implementing legislation, nor designated courts or authorities competent to recognize and enforce the ICSID awards. Although it is generally believed that absolute immunity doctrine applies in China, statutes on State immunity which is the core issue of enforcing the ICSID awards are quite insufficient.

For non-ICSID awards, meanwhile, China lacks in enforcing mechanism. On the one hand, the New York Convention cannot be relied upon due to its commercial reservation and the express exclusion of investor-state disputes in the definition of 'commercial relationship' by national law. On the other hand, the legal status of non-ICSID awards, such as foreign *ad hoc* arbitral awards conducted within China, is still ambiguous under current Chinese legal system.

There still remains a legal vacuum on the recognition and enforcement of investor-state arbitral awards in China. It might be partly attributable to the legislative lags behind practices which occur frequently in developing countries. China needs more time to take careful consideration of this issue. Another plausible explanation is that if China will not distinguish the recognition and enforcement of investor-state arbitral awards from those of commercial arbitral awards, it is not necessary to address investor-state arbitral awards specifically. Even so, a lot of work remains to be done to make the procedural framework of recognition and enforcement of investor-state arbitral awards more transparent, definite and efficient.

In addition to the compliance with its international obligations, some fundamental changes within the legal framework of domestic arbitration law are essential and beneficial to the development of Chinese arbitration institution and its oversea investment. Today, international commercial arbitration centers would generally cater for investment arbitration. Against this background, the Shenzhen Court

of International Arbitration (“SCIA”) updated its rules on October 26, 2016, to enable it to accept investor-state disputes. It has become the first arbitration institution in mainland China to administer investor-state arbitrations.⁷² The new Shenzhen Court of International Arbitration Rules has taken effect since December 1, 2016.⁷³ Pursuant to Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules,⁷⁴ arbitration should be conducted in Hong Kong if neither parties agree as such, nor the tribunal decides otherwise under the UNCITRAL rules. However, the legality of the investment awards by SCIA is doubted because of the non-arbitrability of investor-state disputes by domestic arbitration institution according to the Arbitration Law of 1995. Such awards may be thus set aside and could not be recognized and enforced in Chinese as well as foreign courts. This limitation is obviously detrimental to develop domestic arbitration institution and further to protect China’s increasing outbound investors.

To keep in line with its status in the world economy, China should look ahead and take a global perspective while reviewing its domestic legislation. Also, China can be advised to make significant modifications or even fundamental changes to its current legal system in respect of the recognition and enforcement of investment arbitral awards. In this course, consequently, the recognition and enforcement of investor-state arbitral awards including foreign-related investor-state awards issued by Chinese arbitration institutions will be more predictable and efficient.

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18. *Id.* art. 54(2).
19. *Id.* art. 54(3).
20. C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1149 (2d ed. 2009).
21. ICSID Convention art. 69. It stipulates: "Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories."
22. UNCTAD, *Dispute Settlement: International Center for Settlement of Investment Disputes: 2.9 Binding Force and Enforcement* (2003), UNCTAD/EDM/Misc.232/Add 8, at 18, available at http://unctad.org/en/Docs/edmmisc232add8_en.pdf (last visited on Aug. 3, 2017).
23. *Id.*
24. See Notification of China, Jan. 7, 1993, available at <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST30> (last visited on Aug. 3, 2017).
25. ICSID, *Jurisdiction of the Center*, 1 ICSID Rep. ¶ 31, available at <http://icsidfiles.worldbank>.

- org/icsid/ICSID/StaticFiles/basicdoc/partB-section05.htm#05 (last visited on Aug. 3, 2017).
26. *Supra* note 20, at 342-7.
 27. R. Wolff, *Recognition of Arbitration Agreements*, in *NEW YORK CONVENTION COMMENTARY* 76 (R. Wolff ed., 2012).
 28. Additional Facility Rules art. 3. ‘Not Applicable’ of the Additional Facility Rules Convention states: “Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.” Article 19 of Arbitration (Additional Facility) Rules (Limitation on Choice of Forum of the Arbitration) states: “Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.”
 29. *See* New York Arbitration Convention Website, *available at* <http://www.newyorkconvention.org/countries> (last visited on Aug. 3, 2017).
 30. *See* Notice of the Supreme People’s Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China, *available at* <http://www.lawinfochina.com/display.aspx?lib=law&id=11873&CGid=> (last visited on Aug. 3, 2017).
 31. China-Cuba BIT (1995), art. 8.2.
 32. China-India BIT (2006), art.9 (3)(b).
 33. BLEU (Belgium-Luxembourg Economic Union)-China BIT (2005), art. 8.3.
 34. China-Norway BIT (1984), Protocol, art. 2(d).
 35. Finland-China BIT (2004), art.9.6.
 36. The Opinions of the Supreme People’s Court on Some Issues concerning Application of the Civil Procedure Law of the PRC, art. 304, *available at* <http://www.people.com.cn/zixun/flfgk/item/dwjff/falv/9/9-1-1-08.html> (last visited on Aug. 3, 2017).
 37. *See* NPC website, *available at* http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4624.htm (last visited on Aug. 3, 2017).
 38. Some commentator, *e.g.*, Professor Lianbin Song, however, may argue that the investor and the state are equal when concluding commercial contracts. (This position was expressed by himself during an inform discussion, but currently there are no public articles on this specific issue in China).
 39. *See* ICSID website, *available at* <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf> (last visited on Aug. 3, 2017).
 40. *See* Notice of the Supreme People’s Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China, *available at* <http://www.lawinfochina.com/display.aspx?lib=law&id=11873&CGid=> (last visited on Aug. 3, 2017).
 41. The Judicial Interpretation of Civil Procedure Law by the Supreme People’s Court (2015),

- art. 545. It provides: “If an ad hoc arbitration award made outside the territory of the People’s Republic of China requires the recognition and enforcement by a people’s court of the People’s Republic of China, it shall be treated according to article 283 of the Civil Procedure Law.”
42. Domestic *ad hoc* arbitration is illegal. However, *ad hoc* arbitration between enterprises both registered in China (Shanghai) Pilot Free Trade Zone is permitted. See SPC, Providing Judicial Safeguard for the Construction of China (Shanghai) Pilot Free Trade Zone [关于为自由贸易试验区建设提供司法保障的意见], No. 34 (Dec. 30, 2016), available at <http://www.china-shftz.gov.cn/PublicInformation.aspx?GID=898f6b50-375c-4ce8-b622-3b13599b29e7&CID=953a259a-1544-4d72-be6a-264677089690&Type=99&navType=0> (last visited on Aug. 3, 2017).
43. It states: “For all those cases raised by a party to the People’s Court for enforcement of the arbitral award rendered by a foreign-related arbitration institution in China, or for recognition and enforcement of the arbitral award made by a foreign arbitration institution, if the People’s Court believes that the arbitral award of China’s foreign-related arbitration institution complies with one of the circumstances provided by Article 260 of the Civil Procedure Law, or that the foreign arbitral award applied for recognition and enforcement is not in conformity with the provisions in the international conventions to which China has acceded or does not comply with the principle of reciprocity, before ruling to not enforce or refuse the recognition and enforcement, it must report to the High People’s Court in its own area of jurisdiction for review; and if the High People’s Court agrees to the non-enforcement or refusal for recognition and enforcement, it shall report its review opinion to the Supreme People’s Court. Only after receiving reply from the Supreme People’s Court, could a ruling for non-enforcement or refusal for recognition and enforcement be made.”
44. R. Wolff, *Article V(2)(b)*, in NEW YORK CONVENTION COMMENTARY 403 (R. Wolff ed., 2012).
45. *Id.* at 406.
46. ICSID Convention, art. 53.
47. Civil Procedure Law, art. 237.
48. *Id.* art. 274. If the people’s court determines that the enforcement of the award would go against the social and public interest of the country, it shall make a written order not to allow the enforcement of the arbitral award. See PRC Civil Procedure Law [中华人民共和国民事诉讼法], available at http://www.spp.gov.cn/sscx/201502/t20150217_91465.shtml (last visited on Aug. 3, 2017).
49. *Id.* art. 237.
50. *Id.* art. 282.
51. [2008] Min Si Ta Zi No. 11 (June 2, 2008), available at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=836 (last visited on Aug. 3, 2017).
52. See Taizhou Intermediate People’s Court Refuses Recognition and Enforcement of ICC Award on Basis of Public Policy, [2015] Tai Zhong Shang Zhong Shen Zi, No. 00004 (June

- 2, 2016), available at <http://hsfnotes.com/arbitration/2016/09/13/taizhou-intermediate-peoples-court-refuses-recognition-and-enforcement-of-icc-award-on-basis-of-public-policy> (last visited on Aug. 3, 2016).
53. Lanfang Fei, *Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach*, 26 ARB. INT'L 301 (2010).
54. See Letter of Reply of the SPC on Request for Instructions Re Application of ED&F Man (Hong Kong) Co. Ltd. for Recognition and Enforcement of Arbitral Award of London Sugar Association [最高人民法院关于ED&F曼氏(香港)有限公司申请承认和执行伦敦糖业协会仲裁裁决案的复函], available at <http://www.yjenterpriselaw.com/articleread.asp?id=299> (last visited on Aug. 3, 2017).
55. *Supra* note 27.
56. *Supra* note 22.
57. See, e.g., Regulations of the PRC concerning Diplomatic Privileges and Immunities of 1986, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383938.htm (last visited on Aug. 3, 2017).
58. See The United Nations Convention on Jurisdictional Immunities of States and Their Property, available at https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSO_NLINE&tabid=2&mtdsg_no=III-13&chapter=3&lang=en (last visited on Aug. 3, 2017).
59. Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures of 2005 [中华人民共和国外国中央银行财产司法强制措施豁免法], available at <http://www.lawinfochina.com/display.aspx?lib=law&id=4659&CGid=> (last visited on Aug. 3, 2017).
60. Fa [2007] No 69 (Official Citation), 最高人民法院关于人民法院受理涉及特权与豁免的民事案件有关问题的通知 [现行有效], available at <http://en.pkulaw.cn/display.aspx?cgid=100159&lib=law> (last visited on Aug. 3, 2017).
61. Dahai Qi, *State Immunity, China and Its Shifting Position*, 7 CHINESE J. INT'L L. 325-6 (2008).
62. Democratic Republic of the Congo v. FG Hemisphere Associates [2011] 14 H.K.C.F.A.R.395, available at http://www.doj.gov.hk/eng/public/basiclaw/basic14_3.pdf (last visited on Aug. 3, 2017).
63. See Legislative or Other Measures relating to the Convention, ICSID/8-F, available at <https://icsid.worldbank.org/en/Pages/icsiddocs/Legislative-or-Other-Measures-Relating-to-the-Convention.aspx> (last visited on Aug. 3, 2017).
64. *Supra* note 20, at 1273.
65. Hanqin Xue & Qian Jin, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299-322 (2009).
66. Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System*, 46 CORNELL INT'L L. J. 361-99 (2013).
67. *Supra* note 2, at 490.
68. *Id.* at 482.

69. They are as follows: 1. Tza Yap Shum v the Republic of Peru, ICSID Case No. ARB/07/6, Award, July 7, 2011; 2. Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20, Award, Sept.12, 2016; 3. Ping An Life Insurance Company of China, Ltd. and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium, ICSID Case No. ARB/12/29, Award, Apr. 30, 2015; 4. Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, pending; 5. Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/15/41, Award, Nov. 2, 2012; 6. China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd., Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia, UNCITRAL, PCA, Award, June 30, 2017; and 7. Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13, Judgement, Sept. 29, 2016.
70. *Supra* note 61, at 326.
71. *Supra* note 2, at 481.
72. See Shenzhen centre welcomes investor-state disputes [报导深圳国际仲裁院的规则创新], SCIA, available at <http://www.scia.com.cn/web/news/detail/1653.html> (last visited on Aug. 3, 2017).
73. See Shenzhen Court of International Arbitration Rules [深圳国际仲裁院仲裁规则], SCIA, available at http://www.scietac.org/web/doc/rules_list.html (last visited on Aug. 3, 2017).
74. See Guidelines for the Administration of Arbitration under the UNCITRAL Arbitration Rules [深圳国际仲裁院关于适用《联合国国际贸易法委员会仲裁规则》的程序指引] SCIA, available at http://www.scietac.org/web/doc/view_rules/860.html (last visited on Aug. 3, 2017).

