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The ISDS adventure of Chinese arbitration institutions: towards a dead end or a bright future?

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ABSTRACT

In recent years, a few leading Chinese arbitration institutions have embarked on an unprecedented investor–state dispute settlement (ISDS) adventure. Despite their efforts and achievements, these institutions still face a number of legal impediments to ISDS in Chinese national laws and investment treaties, concerning the admission of investment arbitration cases, the arbitrability of investment disputes, the legal capacity of sovereign states in arbitration, the state immunity defence, and the enforcement of arbitral awards in China. All these impediments, compounded by potential competition from established arbitration institutions, will make it extremely difficult, if not impossible, for the ISDS adventure to succeed in the near future. To be truly supportive of the ISDS adventure, China must make the necessary law-making efforts to become an ISDS-friendly jurisdiction. As the ISDS adventure is still developing, it remains to be seen whether and how China will effect such measures, and whether the ISDS adventure will eventually be successful.

KEYWORDS

ISDS; arbitration institutions; arbitration law; bilateral investment treaties; China

I. Introduction

Thanks to China's economic growth over recent decades, the country's arbitration institutions have experienced rapid development.[1] Notably, several leading Chinese arbitration institutions have become major players in international arbitration,[2] including the Beijing Arbitration Commission (BAC), China International Economic and Trade Arbitration Commission (CIETAC), and the Shenzhen Court of International Arbitration (SCIA), to list a few. Meanwhile, as the number of investor–state arbitration (ISA) cases relying on China's investment treaties continues to increase, China and Chinese investors have also emerged as major players and stakeholders in the realm of investor–state dispute settlement (ISDS).[3] Against this backdrop,

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In this article, the term 'China' refers only to mainland China, and 'Chinese arbitration institutions' refers only to those in mainland China.

[1] Jie Zheng, 'Competition Between Arbitral Institutions in China — Fighting for a Better System?' (*Kluwer Arbitration Blog*, 16 October 2015) <http://arbitrationblog.kluwerarbitration.com/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system> accessed 19 October 2020.

[2] Rick Stockmann, 'International Commercial Arbitration in China: Issues Surrounding the Resolution of International Commercial Disputes Through Chinese Arbitration' (2011) 19(2) Willamette Journal of International Law and Dispute Resolution 327.

[3] ISA cases involving China or Chinese investors have been on the rise since around a decade ago. See a list of these cases at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china> accessed 19 October 2020.

Chinese arbitration institutions have shown a growing interest and ambition to participate in ISDS, and have embarked on an unprecedented ISDS adventure.

This adventure represents not only a precious opportunity for Chinese arbitration institutions to emerge on the world stage for ISDS, but is also one of the latest developments in the field of international dispute settlement and investment law in China. The nation is a contracting state of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),[4] and many of China's international investment agreements (IIAs) allow investment disputes to be submitted to ICSID arbitration. At the outset, it is helpful to differentiate between ICSID arbitration and potential ISA cases submitted to Chinese arbitration institutions. The latter involve non-ICSID arbitration, as they are not subject to the ICSID Convention. Enforcement of the resulting arbitral awards is subject to the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or the national law of the place of enforcement. In light of this, the ISDS adventure of Chinese arbitration institutions, if successful, would supply new ISDS options in addition to ICSID arbitration, which could be a welcome option for investment disputes involving Chinese elements.

Unlike topics involving Chinese IIAs and ICSID arbitration cases based thereon, the ISDS adventure of Chinese arbitration institutions remains largely unexplored. This article presents a unique and critical study of this subject, with the aim of exploring the potential for Chinese arbitration institutions participating in the competitive global ISDS market. Following this introduction, Part II briefly reviews the efforts and achievements of leading Chinese arbitration institutions in the ISDS adventure; Parts III, IV and V comprehensively and critically study the various legal impediments to ISDS in China that could hinder the ISDS adventure. Specifically, Part III discusses the difficulty for Chinese arbitration institutions in admitting both IIA-based and contract-based ISA cases; Part IV highlights the major legal impediments to ISDS in Chinese national law, relating to the arbitrability of investment disputes and the legal capacity of (foreign) states as an ISA party; while Part V analyses the possibility of enforcement of ISA awards made by Chinese arbitration institutions, focusing on state immunity and judicial review standards over the ISA awards. Part VI concludes that the ISDS adventure faces an uncertain future, and lays out proposals to facilitate Chinese arbitration institutions in the ISDS adventure.

II. Major efforts and achievements of the ISDS adventure

While the ISDS adventure of Chinese arbitration institutions may seem novel to many, it was actually initiated around ten years ago. At the outset, it is helpful to review briefly what Chinese arbitration institutions have tried and achieved in the ISDS adventure over the past decade.

First, leading Chinese arbitration institutions have been involved in China's IIA making and ISDS-related negotiations. A typical example is CIETAC's participation in the negotiations of the China-United States (US) bilateral investment treaty (BIT) and the China-European Union (EU) investment treaty, as a member of the Chinese delegation.[5] While the specific role of the Commission in the negotiations is unknown, CIETAC states that it 'has provided useful advice

[4] See a list of member states at <https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed 19 October 2020.

[5] China Council for the Promotion of International Trade (CCPIT), 'Summary of the Work of CIETAC in 2015 and Plan for the Work of CIETAC in 2016 (中國國際貿易促進委員會, '貿仲委2015業務工作總結和2016年業務工作計劃') <http://www.ccpit.org/Contents/Channel_3528/2016/0214/579810/content_579810.htm> accessed 19 October 2020.

to the government that is beneficial to the healthy development of the Chinese arbitration market'.[6] CIETAC's participation in China's IIA making helps it generate needed knowledge of IIAs and ISDS policymaking. More recently, CIETAC and BAC have also participated as observers in ISDS reform discussions chaired by the United Nations Commission for International Trade Law Working Group III (UNCITRAL WG III).[7] Though observers are not involved in formal negotiations, they can through such experiences get up to date with ongoing ISDS reforms, potentially helping them make sensible decisions on their ISDS adventure.

Second, several Chinese arbitration institutions have been designated as authorized mediation institutions for the settlement of investment disputes under certain regional trade agreements (RTAs). One publicly reported case is the designation of CIETAC by the Central Government under the investment agreement of the Closer Economic Partnership Arrangement Between Mainland China and the Hong Kong and Macau Special Administrative Regions (CEPA), and the investment agreement of the Cross-Straits Economic Cooperation Framework Agreement Between Mainland China and Taiwan (ECFA).[8] While neither agreement allows ISA for political reasons, both allow a party's investors to solve investment disputes with another party's government through mediation,[9] which should only be conducted by institutions authorized by the respective governments.[10] Accordingly, China authorized CIETAC as a mediation institution under the two agreements in 2018 and 2012, respectively.[11] Shortly after the 2018 authorization, CIETAC also adopted a set of mediation rules to be applied exclusively to CEPA investment disputes,[12] and published a list of mediators from mainland China, Hong Kong and Macau.[13]

Third, and probably more importantly, a recent milestone achievement of leading Chinese arbitration institutions in the ISDS adventure is the adoption of specialized ISA rules. As no Chinese arbitration institutions have been involved in any ISA cases up to the present, the adoption of ISA rules could be deemed as their debut in the global ISDS landscape.

In 2016, SCIA took the first step in rule making. SCIA does not have standalone ISA rules, but the amended SCIA Arbitration Rules include a novel provision, which allows SCIA to admit 'arbitration cases related to investment disputes between states and nationals of other states',[14] which should be governed by the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[15] Reading these provisions together, one may find that SCIA has impliedly expanded its jurisdiction to *ad hoc* ISA cases. This amendment is deemed as a key innovation of SCIA Arbitration Rules.[16] SCIA also signed a memorandum of cooperation with ICSID in June 2018,

[6] Ibid.
[7] Liu Yang, 'Investor–State Dispute Settlement Reform: BAC/BIAC Delegation Attended the 34th Session UNCITRAL of Working Group III' <http://www.bjac.org.cn/english/news/view?id=3132> accessed 19 October 2020; CIETAC, 'China International Economic and Trade Arbitration Commission: Delegates Attended UNCITRAL Working Group III' <https://www.marketscreener.com/news/CIETAC-China-International-Economic-and-Trade-Ar-Delegates-Attended-UNCITRAL-Working-Group-I—26525721> accessed 19 October 2020.
[8] CIETAC, 'Investment Dispute Mediation' <http://www.cietac.org/index.php?m=Article&a=show&id=13864&l=en> accessed 19 October 2020.
[9] CEPA Investment Agreement, Art 19.1; ECFA Investment Agreement, Art 13.1.
[10] CEPA Investment Agreement, ibid, Art 19.2; ECFA Investment Agreement, ibid, Art 13.4.
[11] CIETAC (n 8).
[12] CIETAC, 'CIETAC Mediation Rules for Investment Disputes Under the CEPA Investment Agreements' <http://www.cietac.org/index.php?m=Article&a=show&id=16065&l=en> accessed 19 October 2020.
[13] CIETAC, 'CIETAC Panel of Mediators for CEPA Investment Disputes Mainland Mediators' <http://www.cietac.org/index.php?m=Article&a=show&id=16066&l=en> accessed 19 October 2020.
[14] SCIA Rules, Art 2(2).
[15] Ibid, Art 3(5).
[16] See Weixia Gu, 'Piercing the Veil of Arbitration Reform in China: Promises, Pitfalls, Patterns, Prognoses, and Prospects' (2017) 65(4) American Journal of Comparative Law 799, 820.

according to which the two institutions will assist each other in arbitration services such as hearing arrangements, translation and other secretariat services, the promotion of dispute resolution alternatives, and information exchange.[17] Further information on the memorandum is not available publicly, but the signing thereof clearly shows SCIA's efforts and ambition in the ISDS adventure.

In 2017, CIETAC adopted a standalone set of rules for ISA.[18] Notably, while SCIA Arbitration Rules only apply to *ad hoc* ISA cases, CIETAC ISA Rules are designed for institutional ISA cases administered by CIETAC.[19] Though, normatively, CIETAC ISA Rules are not materially different from some other ISA rules, such as the Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC),[20] they are innovative as China's first set of ISA rules. Shortly after the adoption of its ISA Rules, CIETAC published an indicative list of arbitrators for ISA, composed of dozens of arbitrators from around the world, 'particularly countries along the Belt and Road'.[21] As the first set of ISA rules in China, the CIETAC ISA Rules are welcomed by China and its scholars. It has been held by some Chinese media and academics that the adoption of CIETAC ISA Rules 'fills in the gaps in China's autonomous rule making in investment arbitration',[22] and 'breaks the monopoly of existing Western-initiated institutions'.[23]

In 2019, BAC adopted a set of ISA rules.[24] Compared with the CIETAC ISA Rules and SCIA Arbitration Rules, the BAC ISA Rules appear to be more comprehensive, innovative and ambitious. First, in terms of application scope, the BAC ISA Rules cover not only institutional arbitration administered by BAC, but also *ad hoc* arbitration managed by BAC under the UNCITRAL Arbitration Rules.[25] Second, the BAC ISA Rules attempt to address some highly contentious issues relating to the ongoing ISDS reform. For instance, to respond to the call for 'an award review mechanism' to improve the consistency of ISA awards and correctness of treaty interpretation,[26] the BAC ISA Rules incorporate a set of appeal rules for ISA.[27] To respond to the lack of transparency in ISA,[28] the BAC ISA Rules allow for the application of the UNCITRAL Rules on Transparency in Treaty-Based Investor–State Arbitration (UNCITRAL Transparency Rules) upon the agreement of the disputing

[17] SCIA, 'SCIA and ICSID Signed Memorandum of Cooperation in Washington' (深圳國際仲裁院, '深圳國際仲裁院與新加坡國際調解中心在華盛頓簽署合作備忘錄') <http://www.sccietac.org/web/news/detail/1744.html> accessed 19 October 2020.

[18] CIETAC, 'China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (for Trial Implementation)' <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en> accessed 19 October 2020 (hereinafter 'CIETAC ISA Rules').

[19] CIETAC ISA Rules, ibid, Art 3.

[20] SIAC, 'Investment Arbitration Rules 2017' <http://www.siac.org.sg/our-rules/rules/siac-investment-arbitration-rules> accessed 19 October 2020.

[21] CIETAC, 'Panel of International Investment Arbitration' <http://www.cietac.org/index.php?m=Article&a=show&id=15573&l=en> accessed 19 October 2020.

[22] See, e.g., Yicai, 'Why Both China and the US Actively Acceded to the Singapore Convention' (第一財經, '中美為何都積極參與新加坡公約') <https://www.yicai.com/news/100287934.html> accessed 19 October 2020.

[23] Huiping Chen, 'Reforming ISDS: A Chinese Perspective' in Yuwen Li and others (eds), *China, the EU and International Investment Law: Reforming Investor–State Dispute Settlement* (Routledge 2020) 103.

[24] BAC, 'Beijing Arbitration Commission Rules for International Investment Arbitration' <https://www.bjac.org.cn/page/data_dl/2019%E6%8A%95%E8%B5%84%E4%BB%B2%E8%A3%81%E8%A7%84%E5%88%990905%20%E8%8B%B1%E6%96%87.pdf> accessed 27 October 2020 (hereinafter 'BAC ISA Rules').

[25] BAC ISA Rules, ibid, Art 2.

[26] See, e.g., Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32(3) ICSID Review 528, 529.

[27] BAC ISA Rules (n 24), Annexe 5 (BAC Appeal Rules).

[28] William Kenny, 'Transparency in Investor–State Arbitration' (2016) 33(5) Journal of International Arbitration 471, 472.

parties,[29] though China is not a contracting state of the United Nations Convention on Transparency in Treaty-Based Investor–State Arbitration (Mauritius Convention).[30] Such innovative provisions clearly 'send out a Chinese voice on ISDS reform', and could help BAC attract attention globally.[31]

Two observations can be drawn from the above discussions. First, the decade-long ISDS adventure of leading Chinese arbitration institutions is a manifestation of their determination and ambition to step into the ISDS business. Second, the ISDS adventure is not only self-motivated by the institutions, but also demonstrates strong support from the Chinese government. In light of this, it is suggested that the ISDS adventure should not be understood merely from a commercial perspective; rather, the involvement of the Chinese government as well as the impacts of such involvement should also be taken into account. This point will be further elaborated in Part IV of this article.

III. Challenges of admissibility of investment disputes

Despite the efforts and achievements of leading Chinese arbitration institutions, the success of the ISDS adventure cannot be guaranteed. In this part, we discuss whether Chinese arbitration institutions will be able to admit sufficient BIT-based and contract-based ISA cases.

A. Limited access to BIT-based ISA cases

The first challenge to Chinese arbitration institutions in the ISDS adventure concerns whether they have sufficiently broad access to potential ISA cases. Essentially, ISA is based on the consent of states, which can typically be found in the ISDS provisions of IIAs (in particular, BITs), investment contracts, or the states' national laws.[32] In reality, BIT-based ISA cases form over 60 per cent of existing ISA cases,[33] while contract-based ISA cases stand at around 30 per cent.[34]

It is argued that despite the large number of BITs China has concluded, it is unlikely that the country's arbitration institutions will admit investment disputes based on its BITs, for practical reasons. Up to the present, China has concluded over 130 BITs, with 107 currently in force.[35] Except for some early treaties, the majority of these BITs allow ISA, though the

[29] BAC ISA Rules (n 24), Art 50.
[30] UNCITRAL, 'Status of the United Nations Convention on Transparency in Treaty-Based Investor–State Arbitration' <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 19 October 2020.
[31] See BAC, 'Public Notice for Soliciting Comments on BAC Investment Arbitration Rules' (北京仲裁委員會, '關於《北京仲裁委員會國際投資仲裁規則（徵求意見稿）》公開徵求意見的公告') <http://www.bjac.org.cn/news/view?id=3369> accessed 19 October 2020.
[32] See, e.g., Christopher Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 832.
[33] Roberto Echandi, 'The Debate on Treaty-Based Investor–State Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications' (2019) 34(1) ICSID Review 1, 4.
[34] Isabella Bellera Landa, 'State Parties in Contract-Based Arbitration: A Report from the 16th Annual ITA-ASIL Conference' (*Kluwer Arbitration Blog*, 17 June 2019) <http://arbitrationblog.kluwerarbitration.com/2019/06/17/state-parties-in-contract-based-arbitration-a-report-from-the-16th-annual-ita-asil-conference/?print=pdf> accessed 19 October 2020.
[35] See a list of Chinese IIAs at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> accessed 19 October 2020.

exact scope of the consent varies.[36] A brief review of the ISDS clauses in Chinese BITs shows that: (i) the vast majority of Chinese BITs refer investment disputes to ICSID arbitration or *ad hoc* arbitration under the UNCITRAL Arbitration Rules; (ii) no BIT mentions CIETAC, BAC, SCIA or any other Chinese arbitration institution as a possible ISDS forum; and (iii) only a few BITs allow investment disputes to be submitted to 'other arbitration institutions or *ad hoc* arbitration tribunals', such as the China–Uzbekistan BIT.[37]

Clearly, unlike ICSID, Chinese arbitration institutions are neglected in Chinese BITs. Such omission is understandable, since almost all these BITs were concluded before the ISDS adventure took place. This actually implies that Chinese arbitration institutions can only admit two types of BIT-based ISA cases, namely: (i) ISA cases administered as 'other institutions' (institutional arbitration), and (ii) ISA cases managed under the UNCITRAL Arbitration Rules (*ad hoc* arbitration). Neither scenario seems realistic, as it is unlikely for investors to select a Chinese arbitration institution under 'other arbitration institutions', pursuant to the ISDS clause of Chinese BITs, for the following reasons.

First, admitting either type of ISA case implies competition between Chinese arbitration institutions and the well-established arbitration institutions, especially ICSID. Since the 1990s, the number of ISA cases has been on the rise at the global level.[38] The majority of ISA cases are submitted to a few institutions, including ICSID, the court of arbitration of the International Chamber of Commerce (ICC), and the court of arbitration of the Stockholm Chamber of Commerce (SCC).[39] Such monopolization of ISA cases by a few institutions could exert strong competition pressures on latecomers to the ISDS business. Though leading Chinese arbitration institutions have adopted ISA rules and are successful in commercial arbitration, they lack experience and reputation in the field of ISDS. It would be unsurprising for foreign investors and states to prefer the more familiar and well-established arbitration institutions over Chinese ones.[40] This viewpoint can also be supported by empirical evidence. Up to the present, of the dozen or so ISA cases relying on Chinese BITs that have arisen, all are either ICSID cases or *ad hoc* arbitration cases under the UNCITRAL Arbitration Rules managed by the Permanent Court of Arbitration (PCA).[41] None of these existing ISA cases has been submitted to other institution for administration or management.

That being said, now that Chinese arbitration institutions are equipped with ISA rules, the likelihood of them being selected as other institutions seems to have increased. Despite this, success remains elusive. It is difficult for Chinese arbitration institutions to prove themselves

[36] Manjiao Chi and Xi Wang, 'The Evolution of ISA Clauses in Chinese IIAs and Its Implications: The Admissibility of Disputes for Investor–State Arbitration' (2015) 16(5–6) Journal of World Investment and Trade 869, 873; Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (Oxford University Press 2009) 299; Axel Berger, 'The Politics of China's Investment Treaty-Making Programme' in Tomer Broude, Marc L Busch and Amelia Porges (eds), *The Politics of International Economic Law* (Cambridge University Press 2008) 163.

[37] See, e.g., China–Uzbekistan BIT, Art 12.2.d.

[38] See, e.g., UNCTAD, 'Fact Sheet on Investor–State Dispute Settlement Cases in 2018 (IIA Issues Note No. 2, May 2019) <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf> accessed 19 October 2020.

[39] See a list of reported ISA cases as well as their status at <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 19 October 2020.

[40] Martin Rogers and others, 'Davis Polk Discusses China's New Rules on International Investment Arbitration' <https://clsbluesky.law.columbia.edu/2017/11/13/davis-polk-discusses-China's-new-rules-on-international-investment-arbitration> accessed 19 October 2020.

[41] Up to the present, there are 10 reported ISA cases relying on Chinese BITs, including four cases initiated by foreign investors against China and six cases initiated by Chinese investors against foreign states. For a list of these ISA cases, see footnote 3 above.

attractive and suitable for ISA, since they lack ISA experience and face competition from well-established institutions. More importantly, as will be discussed below, there remain a number of impediments to ISDS in Chinese law, further hurting Chinese institutions' chances.

Here, one might suggest that China consider revising its IIAs to clearly list Chinese arbitration institutions as ISDS fora, in addition to ICSID and *ad hoc* arbitration under the UNCITRAL Arbitration Rules. While such a revision would serve to broaden Chinese arbitration institutions' access to ISA cases, this strategy is unrealistic in practice. First, as mentioned, while an IIA revision would increase Chinese arbitration institutions' exposure to ISA cases, it is doubtful that they would be able to compete effectively against well-established institutions. Second, while Chinese investors are likely to select Chinese arbitration institutions for ISA against foreign states, as will be discussed below, the neutrality of these institutions in handling ISA cases involving China or Chinese investors is likely to be challenged. Third, though China has authorized CIETAC to mediate investment disputes based on ECFA and CEPA investment agreements, this approach should not be deemed as a reasonable model for China to boost the ISA business of its arbitration institutions. Concluded mainly for political purposes, both ECFA and CEPA intentionally exclude ISA as an ISDS option, and their application scope is strictly limited to mainland China, Taiwan, Hong Kong and Macau, or these jurisdictions' investors. This model is unlikely to be followed in other Chinese IIAs.

B. *Unsuitability in admitting contract-based ISA cases*

As Chinese arbitration institutions are unlikely to admit BIT-based ISA cases, contract-based ISA cases seem to be their main source of such arbitration cases. China has grown into the world's second-largest economy, a major host state for foreign investment, and a leading investment-exporting nation.[42] A large part of Chinese investment has been made in the natural resource and infrastructure sectors, in developing and least developed countries, through contractual arrangements.[43] This situation implies the possibility for Chinese investors to select Chinese arbitration institutions to solve their potential investment disputes with host states.[44] This is particularly the case since some Chinese investors possess strong bargaining power and have become increasingly assertive in enforcing their rights internationally.[45] It has also been argued that ISA by Chinese arbitration institutions provides 'an alternative for Chinese investors who may be concerned about the potential bias against them in offshore fora due to their lack of

[42] The World Bank, 'China Overview' <https://www.worldbank.org/en/country/china/overview> accessed 19 October 2020.

[43] See, e.g., The Development Research Centre of the State Council of the PRC and Chatham House, 'Navigating the New Normal: China and Global Resource Governance' <https://www.chathamhouse.org/sites/default/files/publications/research/2016-01-27-china-global-resource-governance-preston-bailey-bradley-wei-zhao-final.pdf> accessed 19 October 2020; Luka Durovic, 'Resource Curse and China's Infrastructure for Resources Model: Case Study of Angola' (2016) 4(1) Journal of China and International Relations 67; Jeremy Kelley, 'China in Africa: Curing the Resource Curse with Infrastructure and Modernization' (2012) 12(3) Sustainable Development Law and Policy 35.

[44] Squire Patton Boggs, 'CIETAC Investment Arbitration Rules — View from Australian Lawyers' <https://www.squirepattonboggs.com/-/media/files/insights/publications/2018/08/cietac-investment-arbitration-rules-view-from-australian-lawyers/cietac-investment-arbitration-rules-view-from-australian-lawyers.pdf> accessed 19 October 2020.

[45] See Guo Shining, Edwina Kwan and Josephine Lao, 'The Rise of Chinese Investors as Claimants: What Are the Likely Impacts on International Arbitration?' <https://www.chinalawinsight.com/2018/06/articles/dispute-resolution/the-rise-of-chinese-investors-as-claimants-what-are-the-likely-impacts-on-international-arbitration> accessed 19 October 2020.

understanding of Chinese law and practice'.[46] Indeed, such expectations partly explain why ISDS is seen as a potentially profitable business and why the ISDS adventure is worth the effort.[47]

This article argues that it is difficult for Chinese arbitration institutions to attract and admit contract-based ISA cases. First, in attracting such cases, Chinese arbitration institutions inevitably face strong competition from their international rivals, such as ICSID and PCA, and are unlikely to outperform their rivals. Second, even if Chinese arbitration institutions admit contract-based ISA cases involving Chinese investors or China, their neutrality in handling such cases could be challenged. Neutrality is often deemed a requirement of arbitrators, in the sense that arbitrators should be intermediate and equidistant in thought and action throughout the arbitral process.[48] In international arbitration, neutrality also means that disputants choose arbitration because it offers a neutral forum, with neither party having the advantage of their domestic court.[49] In light of this, if an ISA case involves Chinese investors or China, or if the seat of the arbitration is in China, it is doubtful that a Chinese arbitration institution can be considered neutral. For instance, apart from the apparent fact that CIETAC is an institution located in China and that its ISDS adventure is supported by the Chinese government, CIETAC was also established within the China Council for the Promotion of International Trade (CCPIT),[50] and maintains a traditional and institutional relationship with the Chinese government. Thus, despite the growing reputation of CIETAC, it remains doubtful whether the Commission could truly be independent in administering or managing ISA cases involving China.[51]

This unsuitability of Chinese arbitration institutions can be illustrated by the case of a Chinese railway project in Kenya. For this project, a Chinese investor and the Kenyan Government agreed in their contract to submit potential investment disputes to CIETAC for arbitration, and selected Chinese law as the applicable law.[52] The initiation of the project incurred strong criticism,[53] with the assertion made, among others, that CIETAC is an improper forum for ISA case between a Chinese investor and Kenya.[54]

[46] See Tong Qi, 'China's Policy on ISDS Reform: Institutional Choice in a Diversified Era' in Li and others (eds) (n 23) 103.
[47] CCPIT, 'Explanations and Texts of the CIETAC ISA Rules for Investment Arbitration' (中國國際貿易促進委員會, '貿仲委《投資仲裁規則》說明及規則文本') <http://www.ccpit.org/Contents/Channel_4132/2017/0926/883777/content_883777.htm> accessed 19 October 2020.
[48] See, e.g., Gary Born, *International Arbitration: Law and Practice* (2nd edn, Kluwer 2016) 8; Giorgio Bernini, 'Cultural Neutrality: A Prerequisite to Arbitral Justice' (1989) 10 Michigan Journal of International Law 39.
[49] Ronán Feehily, 'Neutrality, Independence and Impartiality in International Commercial Arbitration: A Fine Balance in the Quest for Arbitral Justice' (2019) 7(1) Penn State Journal of Law & International Affairs 88, 91; Margaret L Moses, *The Principles and Practices of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017) 1.
[50] CCPIT, 'Arbitration' <http://en.ccpit.org/info/info_8a8080a94fd37680014fd3d050340009.html> accessed 19 October 2020.
[51] See, e.g., Jerome A Cohen, 'Settling International Business Disputes with China: Then and Now' (2014) 47 Cornell International Law Journal 555, 568; Guodong Du and Meng Yu, 'Chinese Arbitration Institutions Encouraged to Be More Independent' <https://www.chinajusticeobserver.com/a/chinese-arbitration-institutions-encouraged-to-be-more-independent> accessed 19 October 2020.
[52] See, e.g., Edwin Okoth, 'Kenya: SGR Pact with China a Risk to Kenyan Sovereignty, Assets' <https://allafrica.com/stories/201901140451.html> accessed 19 October 2020.
[53] Ibid; NPR, 'A New Chinese-Funded Railway in Kenya Sparks Debt-Trap Fears' <https://www.npr.org/2018/10/08/641625157/a-new-chinese-funded-railway-in-kenya-sparks-debt-trap-fears> accessed 19 October 2020; Jevans Nyabiage, 'Kenya's Chinese-Built Railway Is a Hit with Travellers, But Is This Safari Line a Massive White Elephant?' <https://www.scmp.com/news/china/diplomacy/article/3019603/kenyas-chinese-built-railway-hit-travellers-safari-line> accessed 19 October 2020; Kimiko de Freytas-Tamura, 'Kenyans Fear Chinese-Backed Railway Is Another "Lunatic Express"' <https://www.nytimes.com/2017/06/08/world/africa/kenyans-fear-chinese-backed-railway-is-another-lunatic-express.html> accessed 19 October 2020.
[54] See, e.g., Okoth (n 52).

IV. Major legal impediments to ISDS in Chinese national law

Even if investors agree to submit investment disputes to Chinese arbitration institutions, the question that naturally follows is whether the institutions can legally admit and handle these cases. The answer to this question depends on not only the applicable ISA rules, but also the law of the seat of arbitration, i.e. *lex fori arbitri*. Because Chinese arbitration institutions are normally located in mainland China, ISA cases admitted by them should be subject to Chinese law.

China has no specialized national law on ISDS, and the legal rules explicitly dealing with ISDS are extremely rare. Thus, Chinese law applicable to arbitration in general should be consulted. In this regard, the Arbitration Law of China (CAL) has laid down the fundamental principles and rules of arbitration in China.[55] Other relevant laws include, *inter alia*, the Civil Procedural Law of China (CPL) and the Administrative Procedural Law of China (APL). Some judicial interpretations issued by the Supreme People's Court of China (SPC) may also be relevant to ISDS.[56] These laws apply to arbitration in general; it is unclear whether they are applicable to ISA, as ISA involves sovereign states, especially foreign states. Yet, as these laws do not explicitly exclude ISA from their ambit, it could be argued that they can also be applied to ISA. Based on the assumption that these laws are applicable to ISA, two major issues should be discussed: namely, the arbitrability of investment disputes, and the legal capacity of (foreign) states as an ISA party.

A. The arbitrability of investment disputes under Chinese law

A key factor that determines whether Chinese arbitration institutions can admit an ISA case is whether the investment dispute can be arbitrated under Chinese law. With regard to the arbitrability issue, the CAL contains a positive list and a negative list. The non-exhaustive positive list recognizes that 'contractual disputes and other disputes over rights and interests in property … may be arbitrated'[57]; the negative list denies the arbitrability of 'disputes over marriage, adoption, guardianship, family maintenance and inheritance',[58] and 'administrative disputes that shall be handled by administrative organs as prescribed by law'.[59] Reading these lists together, one may find that for an investment dispute to be arbitrable in China, it should be contractual or over property rights, and must not be administrative in nature.

As the CAL provides no definition or description of these crucial terms, other relevant Chinese laws and rules should be consulted. According to the SPC Judicial Interpretation Concerning Certain Issues on Application of the Arbitration Law of China, 'contractual disputes' refers to disputes arising out of formation, effectiveness, modification, assignment, performance, liabilities for breach, interpretation, or termination of a contract.[60] According

[55] Ge Liu and Alexander Lourie, 'International Commercial Arbitration in China: History, New Developments, and Current Practice' (1994–1995) 28(3) John Marshall Law Review 539, 543.
[56] Yun-chien Chang and Ke Xu, 'Decentralized and Anomalous Interpretation of Chinese Private Law: Understanding a Bureaucratic and Political Judicial System' (2018) 102 Minnesota Law Review 1527, 1544.
[57] CAL, Art 2.
[58] Ibid, Art 3(1).
[59] Ibid, Art 3(2).
[60] SPC, Interpretation Concerning Certain Issues on Application of the Arbitration Law of the People's Republic of China, Fa Shi [2006] 7 (最高人民法院關於適用《中華人民共和國仲裁法》若干問題的解釋, 法釋 [2006] 7號) (adopted at the 1,375th meeting of the Judicial Committee of the Supreme People's Court on 26 December 2005), Art 2.

to an explanation issued by the Office of Legal Affairs of the State Council, the term 'other disputes over property rights and interests' refers to disputes over torts, often seen in the fields of maritime, real estate, product liability and intellectual property rights.[61] In light of these explanations, it seems that an investment dispute arising out of an investment contract or relating to a certain type of economic right, such as land-use rights, could be arbitrable under Chinese law.

On the other hand, as the CAL clearly denies the arbitrability of administrative disputes, it is also essential to explore how the term 'administrative disputes' is interpreted in China. According to the APL, 'administrative disputes' means 'disputes between citizens, legal persons or other organizations and state administrative organs or their personnel, arising out of the infringement of the private party's lawful rights or interests by administrative acts'.[62] The APL further provides non-exhaustive lists of actionable and non-actionable administrative disputes.[63] Actionable administrative disputes cover eight types of administrative acts, including, *inter alia*, cancellation of government licence, violation of property rights, and interference with the operation of enterprise.[64] In the broad sense, such administrative acts are typical reasons that may give rise to disputes between investors and their host governments.

The above APL and CAL provisions have profound implications for ISA in China. Essentially, ISA is a legal mechanism through which the legality and appropriateness of the administrative acts of states is scrutinized. Almost all ISA cases in which an expropriation or a fair and equitable treatment clause is invoked involve allegedly illegal or irregular administrative acts of host states.[65] Taking China as an example, all reported ISA cases against the state have been triggered by the administrative acts of local governments, concerning foreign investors' land-use rights.[66] In light of this, China's categorical denial of the arbitrability of administrative disputes could amount to a *de facto* ban of ISA in China. As a result, only contract-based investment disputes that do not involve administrative acts are arbitrable under Chinese law. This greatly limits the scope and availability of contract-based ISA cases for Chinese arbitration institutions.

B. The legal capacity of (foreign) states in ISA under Chinese law

Aside from the arbitrability requirement, Chinese law also requires that disputants have the necessary capacity to be a party in arbitration. Chinese law has no explicit rules on the capacity of states, especially foreign states, in legal proceedings in the

[61] Office of Legal Affairs of the State Council of China, *Explanation and Supplementation to the Arbitration Law of the People's Republic of China* (China Fazhi Press 2008) 3 (國務院法制辦公室,《中華人民共和國仲裁法註解與配套》[中國法制出版社 2008] 第3頁).

[62] APL, Art 2.

[63] Ibid, Arts 12 and 13.

[64] Ibid, Art 12.

[65] Marc Jacob and Stephan W Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Nomos 2015) 700.

[66] See, e.g., *Ekran Berhad v People's Republic of China*, ICSID Case No. ARB/11/15 <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/427/ekran-v-china> accessed 19 October 2020; *Ansung Housing Co Ltd v People's Republic of China*, ICSID Case No. ARB/14/25 <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/602/ansung-housing-v-china> accessed 19 October 2020; *Hela Schwarz GmbH v People's Republic of China*, ICSID Case No. ARB/17/19 <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/805/hela-schwarz-v-china> accessed 19 October 2020.

country. In this respect, the CAL generally stipulates that only disputes 'between citizens, legal persons and other organizations that are equal subjects' may be arbitrated.[67] Since investment disputes involve states, in order to be a party in ISA, the states should constitute a 'legal person' or 'other organization' and should be 'equal subjects' with private investors under Chinese law.

The above requirements are unlikely to be met. First, as the CAL does not define 'legal person' or 'other organization', other relevant national laws should be consulted. The term 'legal person' is defined in the recently adopted Civil Code of China (CCC) as referring to 'an institution established in accordance with law' and 'shall have its name, organizational structure and premise, and property',[68] which 'can independently enjoy civil rights and undertake civil liabilities'.[69] According to leading Chinese civil law scholars, 'legal person' covers both enterprises and non-enterprise entities, with the latter covering 'state organs, social institutions and other organizations'.[70] The term 'other organization' is defined in the SPC's Opinions Concerning Certain Questions on the Application of the Civil Procedural Law as referring to 'an institution established in accordance with law, which has its own property and organizational structure but does not meet the other requirements of legal person, such as foreign enterprises and social organizations'.[71] Having drawn parallels between 'other organization' and 'foreign enterprise' and 'social organization', this provision seems unlikely to be applicable to dealing with the legal status of foreign states.

Second, the CAL requires that states be 'equal subjects of law' with investors, to be an arbitral party in China. Though this term is frequently used in China, it is used in the context of civil and commercial law, where private parties to a contract can be deemed as 'equal subjects of law' in proceedings. As ISA essentially deals with relations between private parties and sovereign states, it can hardly be viewed as a manifestation of civil or commercial law, but rather, is one of global administrative law.[72] Thus, it seems unlikely that states and private investors could be treated as 'equal subjects of law' in ISA in China. This argument could be enhanced by the fact that Chinese law has a strong state-centric tradition, in which private parties are hardly deemed as counterparts of public parties.[73]

Reading together the above legal provisions, it seems difficult, if not impossible, to argue that foreign states have legal capacity as a party in ISA in China. Such uncertainty makes Chinese arbitration institutions unattractive for ISDS, as no reasonable investor would run the risk of initiating an ISA case in China without even knowing if the respondent states could be a proper party in ISA.

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[67] CAL, Art 3.
[68] CCC, Art 58.
[69] Ibid, Art 57.
[70] See, e.g., Jiang Ping, *Civil Law* (2nd edn, CUPL Press 2011) 76 (江平,《民法》第二版 [中國政法大學出版社 2011] 第76頁).
[71] SPC, Opinions Concerning Certain Questions on the Application of the Civil Procedural Law, Fa Fa [1992] 22 (最高人民法院, 關於適用民事訴訟法若干問題的意見, 法發 [2019] 22號) (adopted at the 528th meeting of the Judicial Committee of the Supreme People's Court on 14 July 1992), Art 40.
[72] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) European Journal of International Law 121.
[73] Xingzhong Yu, 'State Legalism and the Public/Private Divide in Chinese Legal Development' (2014) 15(1) Theoretical Inquiries in Law 27, 29.

C. 'Creative provisions' and their potential risks

As discussed earlier, the legal capacity of states in ISA and the arbitrability of investment disputes are extremely uncertain under Chinese law. Such uncertainty could amount to an implied ban of ISA in China. To circumvent such a ban, leading Chinese arbitration institutions have designed 'creative provisions' in their ISA rules, deemed as an important 'innovation' of such rules. Specifically, though CIETAC and SCIA are located in mainland China, their ISA Rules provide that Hong Kong should be the default seat of ISA.[74] This is because, unlike mainland China, Hong Kong has adopted the UNCITRAL Model Law and allows ISA.[75] The BAC ISA Rules take things a step further, allowing arbitral tribunals to decide the seat of arbitration at their discretion.[76] Thus, at least in theory, BAC tribunals may conduct arbitration in any place they deem appropriate. In this way, BAC tribunals may select the seat of arbitration in a location that allows ISA.

Essentially, by shifting the seat of arbitration from mainland China to Hong Kong or a foreign state, Chinese arbitration institutions could impliedly evade the ISA ban in Chinese law that should otherwise be the *lex loci arbitri* of the ISA. Admittedly, changing the seat of arbitration is not prohibited *per se* in international arbitration. In this sense, such 'creative provisions' could provide a practical solution for Chinese arbitration institutions to admit ISA cases without violating Chinese law. However, these provisions potentially carry profound risks, as their application could be seen as an evasion of mandatory rules under national (Chinese) law.

While there is no uniform definition of 'mandatory rules' of law, such rules often reflect the public interest of a state,[77] and some could involve national or international public policy.[78] Because the CAL provisions concerning legal capacity of arbitral parties and arbitrability of disputes essentially define the legality of arbitration in China, they carry fundamental significance in the legal system of China. In this sense, it is reasonable for these provisions to constitute mandatory rules of law in China, and for the application of the 'creative provisions' of ISA rules to go against these mandatory rules of law and public policy in China. A convenient way to explore this issue is to observe how courts, especially Chinese courts, deal with such ISA awards. But this will not happen until Chinese arbitration institutions admit ISA cases and render awards.

V. Challenges of enforcement of ISA awards in China

Even if Chinese arbitration institutions can legally admit ISA cases and successfully make awards, questions remain over whether such awards can be enforced in China. The essence of this issue lies in two major aspects: namely, whether foreign states can raise

[74] CIETAC ISA Rules (n 18), Art 74; SCIA Guidelines for the Administration of Arbitration Under the UNCITRAL Arbitration Rules, Art 3.

[75] David Holloway and others, 'Strengthening Hong Kong's Position as an Arbitration Hub in the Belt and Road Initiative' (June 2018) Research Centre for Sustainable Hong Kong, City University of Hong Kong, Policy Paper 8, 2 <https://www.cityu.edu.hk/cshk/files/PolicyPapers/CSHK%20Policy%20Paper%208.pdf> accessed 19 October 2020.

[76] BAC ISA Rules (n 24), Art 26.

[77] George A Bermann, 'Mandatory Rules of Law in International Arbitration' (2018) 7(1) European International Arbitration Review 101.

[78] Nathalie Voser, 'Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7(3–4) American Review of International Arbitration 319, 322.

an immunity defence in China, and whether ISA awards could survive judicial review in Chinese courts. These two aspects could be intertwined in practice.

A. *The issue of state immunity in China*

While states are frequently involved in litigation and arbitration, no uniform rules on state immunity have been formed at the international level. Roughly speaking, while the restrictive immunity principle has been widely adopted, the absolute immunity principle is still upheld in some states.[79] Common law states often adopt the former and enact national foreign state immunity laws: among them, the US,[80] and the United Kingdom.[81] This article argues that, though Chinese law is unclear on the issue of state immunity, the country's state practices and relevant policies suggest that while foreign nations may be compelled to engage in ISA, they are likely to enjoy immunity from enforcement of ISA awards in China.

On the one hand, it is unlikely for foreign states to claim jurisdictional immunity in ISA in China. Though jurisdictional immunity in the strict sense refers to immunity from the jurisdiction of national courts, arguably, it also covers arbitral jurisdiction. In this respect, the 'implied waiver doctrine' has been widely accepted. Essentially, this doctrine rests on the general principle of good faith, meaning that if a state has agreed to arbitrate with a private party out of its free will, it should not be allowed to disregard its promise.[82] This principle has been codified in many national laws and international legal instruments, such as the 2005 United Nations Convention on Jurisdictional Immunity of States and Their Properties (UN Immunity Convention),[83] and the 1976 European Convention on State Immunity.[84]

China has not codified the 'implied waiver doctrine' in its national laws, but upholds it in its policies and practices with regard to ISA. For instance, China has signed the UN Immunity Convention,[85] acceded to the ICSID Convention and has also concluded a large number of IIAs, with all these treaties clearly recording the contracting states' consent to ISA. In fact, no state has claimed jurisdictional immunity in reported BIT-based ISA cases. It thus follows that foreign state are unlikely to be granted jurisdictional immunity in ISA in China.

On the other hand, as the impacts of enforcement measures against a state are much graver than when a state is subjected to arbitral jurisdiction,[86] the 'implied waiver doctrine' cannot be extended to the execution stage.[87] As stated in the ICSID Convention,[88] enforcement of ISA awards against foreign states is often deemed as a matter for national courts.[89] In this regard, China has a national law: namely, the Law of Immunity of Assets of Foreign Central Banks of the

[79] See generally Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013).
[80] Foreign Sovereign Immunity Act 1976 <https://www.law.cornell.edu/uscode/text/28/1605> accessed 19 October 2020.
[81] Sovereign Immunity Act 1978 <http://www.legislation.gov.uk/ukpga/1978/33> accessed 19 October 2020.
[82] Manjiao Chi, 'The Impeding Effects of the Immunity Plea on International Arbitration: China's Position Revisited' (2016) 12(1) Asian International Arbitration Journal 21, 24.
[83] UN Immunity Convention, Art 17.
[84] European Convention on State Immunity, Art 12.
[85] See the status of the Convention at <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en> accessed 19 October 2020.
[86] I Sinclair, 'The European Convention on State Immunity' (1973) 22 International & Comparative Law Quarterly 254, 267; Jan Paulsson, 'Sovereign Immunity from Execution in France' (1977) 11 International Lawyer 673, 674.
[87] Hazel Fox, *The Law of State Immunity* (Oxford University Press 2003) 374.
[88] ICSID Convention, Art 55.
[89] Hazel Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property?' (1996) 12(1) Arbitration International 89, 90.

People's Republic of China.[90] According to this law, assets of foreign central banks located in China shall be immune from judicial execution and property preservation, unless these banks or their governments waive such immunity in writing, or designate the assets for execution or preservation purposes.[91] While this law is helpful, its application scope is strictly limited to the assets of foreign central banks. Thus, if ISA awards are to be enforced with other types of properties of foreign states in China, no guidance can be found in Chinese law.

Aside from such legislative lacunae, a more important reason why ISA awards against foreign states are unlikely to be enforced in China involves the country's adherence to absolute immunity, which could be sensed from its state practices and the views of prominent Chinese lawyers. For instance, Judge Xue of the International Court of Justice (ICJ) has stated that 'China holds absolute immunity in case of acts of foreign states from national jurisdiction and execution' and that 'Chinese courts have never enforced any decisions involving public property of foreign states'.[92] In addition, in the high-profile case of *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC*,[93] the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region, the representative of China's Central Government in Hong Kong, issued two letters, respectively, to the Hong Kong Court of First Instance and the Court of Appeal, which clarified China's adherence to absolute immunity.[94]

As can be seen, Chinese national law fails to provide sufficient guidance on the immunity issue in relation to ISA. While it seems unlikely that foreign states will claim jurisdictional immunity in ISA in China, it is almost impossible for ISA awards to be enforced in the country in light of China's adherence to absolute immunity. This situation seems unlikely to change unless China shifts to restrictive immunity.

B. Judicial review of ISA awards in China

As mentioned, the ISA rules of Chinese arbitration institutions incorporate 'creative provisions', so that ISA cases submitted to these institutions could be administered or managed outside China. This article argues that, even if the 'creative provisions' enable ISA cases to be legally initiated, the enforcement of awards made by Chinese arbitration institutions outside China may be set aside by Chinese courts.

As discussed at the outset, since ISA cases submitted to Chinese arbitration institutions constitute non-ICSID arbitration, enforcement of the resulting arbitral awards will be subject to Chinese law and the New York Convention, as China is a contracting state of the Convention.[95] The Convention provides a framework for arbitral awards to be enforced almost globally, but it also lays down several grounds on which foreign arbitral awards may be set aside.[96] As the Convention only applies to foreign arbitral awards, it is

[90] Adopted at the 18th Meeting of the Standing Committee of the 10th National People's Congress on 25 October 2005 <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384123.htm> accessed 27 October 2020.
[91] Law of Immunity of Assets of Foreign Central Banks of the People's Republic of China, Art 1.
[92] Xue Hanqin, 'Chinese Contemporary Perspective on International Law: History, Culture and International Law' (2011) 355 Recueil des Cours 42, 100.
[93] See [2009] 1 HKLRD 410 (Court of First Instance); [2010] 2 HKLRD 66 (Court of Appeal); and FACV 5, 6 & 7/2010 (Court of Final Appeal) <http://www.judiciary.gov.hk/en/legal_ref/judgements.htm> accessed 19 October 2020.
[94] Chi (n 82) 36.
[95] For the status of the New York Convention, see <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 19 October 2020.
[96] New York Convention, Art V.

crucial to ascertain the nationality of awards for enforcement purposes. On this issue, China adopts an implied dual-track award-enforcement regime based on an 'institutional test'. This regime is functional and feasible because China only allows institutional arbitration, since *ad hoc* arbitration in China is impliedly banned by the CAL.[97]

In this award enforcement regime, Chinese courts decide the nationality of an award according to the seat of the arbitration institution that makes the award, and apply different legal standards in reviewing foreign and Chinese awards for enforcement. To be specific, if an award is made by a foreign arbitration institution, such as ICC or SCC, then it is a foreign award and is enforced according to the New York Convention; if an award is made by a Chinese arbitration institution, such as CIETAC or BAC, then it is a Chinese award and is enforced according to Chinese national law, mainly with reference to the CPL.[98] Further, depending on whether an arbitration case involves foreign-related factors, Chinese awards can be further divided into domestic and foreign-related awards. According to the CPL, these two types of awards are subject to different review standards for enforcement.[99] The standards for foreign-related awards are similar to those for foreign awards under the New York Convention, though they are not identical.[100] While this regime has been criticized for being outdated and unreasonable,[101] it remains largely unchanged.

As can be seen, a distinct feature of China's award enforcement regime is that the seat of arbitration does not play a decisive role in determining the nationality of arbitral awards or the review standards of the awards. In this sense, though the 'creative provisions' in ISA rules of Chinese arbitration institutions change the seat of ISA to ensure the legality of the ISA, ISA awards made by Chinese arbitration institutions outside China should still be deemed as Chinese awards, as the seat of arbitration institutions cannot be changed by these provisions. Consequently, these ISA awards should still be enforced according to Chinese national law instead of the New York Convention. These ISA awards are most likely to be subject to the CPL provisions on foreign-related arbitral awards. Even if this is the case, these awards could still be set aside by Chinese courts relying on the various legal grounds set forth in the CPL, such as 'the dispute cannot be settled through arbitration' and 'the enforcement of the award goes against the public order of China'.[102] Especially, as mentioned, as these 'creative provisions' could be deemed as an evasion of mandatory rules of law in China, these ISA awards could be set aside on public order grounds.

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[97] CAL, Art 16 (requiring that a valid arbitration agreement must contain an identified or identifiable arbitration institution). However, one should also note that recently China seems to have conditionally allowed *ad hoc* arbitration in a few places in China. On this point, see, e.g., Wei Sun, 'Recent Development of *Ad hoc* Arbitration in China: SPC Guidance and Hengqin Rules' (*Kluwer Arbitration Blog*, 19 December 2017) <http://arbitrationblog.kluwerarbitration.com/2017/12/19/recent-development-ad-hoc-arbitration-china-spc-guidance-hengqin-rules> accessed 19 October 2020.

[98] Manjiao Chi, 'Drinking Poison to Quench Thirst: The Discriminatory Arbitral Award Enforcement Regime Under Chinese Arbitration Law' (2009) 39(2) Hong Kong Law Journal 541, 543.

[99] Ibid, 541.

[100] CPL, Art 274; New York Convention, Art V.

[101] A decade ago, Chinese scholars heatedly debated over the nationality of an ICC award with the seat of arbitration in China. Some held that because the ICC is located in France, such an ICC award was a French award, thus qualifying it as a foreign award under the New York Convention for enforcement in China; others argued that the award should be a Chinese award, since the seat of arbitration is in China and the disputants are both Chinese, and the arbitration has no relevance to France, except that the selected arbitration institution is located in France. While the Chinese court finally ruled to enforce this award in China, the court did not clarify the nationality of the award. For more detailed discussions on this issue, see Song Shufang, 'Non-Domestic Arbitral Award Under the New York Convention' (2016) 132 Arbitration and Law (宋淑芳, '論《紐約公約》項下的"非本國裁決"', 《仲裁與法律》2016年第132輯); Zhao Xiuwen, 'The Recognition and Enforcement of ICC Awards in China' (趙秀文, '論ICC國際仲裁院裁決在我國的承認與執行') <http://ielaw.uibe.edu.cn/wtoflzdyj/7187.htm> accessed 19 October 2020.

[102] CPL, Art 274.

Furthermore, even if ISA awards made by Chinese arbitration institutions outside China could be enforceable in China, the enforcement of such awards could create *de facto* discrimination against foreign ISA awards and ICSID awards. China maintains a 'commercial reservation' to the New York Convention, which implies that no foreign ISA awards can be enforced in China under the Convention.[103] More than this, it has been argued that even ICSID awards cannot be enforced in China, as the country does not have the necessary procedural rules in place, despite the fact that China is a contracting state of the ICSID Convention.[104] In light of this, enforcing Chinese ISA awards could lead to *de facto* discrimination against both foreign ISA awards and ICSID awards, which could put Chinese arbitration institutions in an advantageous position over ICSID and other international arbitration institutions. Though in the strict sense, such discrimination cannot be regarded as illegal, it indicates that China is not only an ISA-unfriendly jurisdiction, but it also exercises 'judicial protectionism'.

Last but not least, regardless of the enforceability of ISA awards, a practical consideration concerns the fact that China has no necessary procedural rules to for enforcing ISA awards. For instance, the country has no legal rules to indicate which court(s) should be applied to for enforcing ISA awards; how such court(s) should deal with the enforcement application; and what kinds of decisions the court(s) could make, to list a few concerns. Thus, even if ISA awards could be enforced in China, such enforcement is practically impossible unless and until the necessary procedural rules are enacted.[105]

To sum up, in light of the lacunae in and uncertainty around Chinese law, it is highly unlikely, if not impossible, for ISA awards made by Chinese arbitration institutions to be enforced in the country, though such ISA awards could be made outside China. Consequently, investors will have to resort to foreign courts to enforce ISA awards made by Chinese arbitration institutions, mostly likely through the New York Convention. While such a result is not entirely unacceptable from a legal perspective, it does not make much practical sense to investors. Possible measures to help address this situation would be for China to: (i) withdraw its 'commercial reservation' of the New York Convention; (ii) lift its *de facto* ban on ISA; and (iii) enact the necessary procedural rules for the enforcement of ISA awards, which should be applied to ICSID awards as well as Chinese and foreign ISA awards. Up to the present, there has been no clear sign as to whether or how China would take any of these measures.

VI. Conclusion

Over the past decade, leading Chinese arbitration institutions have embarked on an unprecedented ISDS adventure. Despite their efforts, the ISDS adventure still faces various profound legal impediments, namely that: (i) it remains quite difficult for Chinese arbitration institutions to admit both IIA-based and contract-based ISA cases; (ii) it is likely that ISA in China is illegal, as it is extremely uncertain with regard to the arbitrability of investment disputes and the legal capacity of (foreign) states as an arbitral party in

[103] See the New York Convention (n 95).
[104] Julian G Ku, 'Enforcement of ICSID Awards in the People's Republic of China' (2013) 6(1) Contemporary Asia Arbitration Journal 31.
[105] Ibid, 38.

China; (iii) ISA awards are unlikely to be enforced in China due to the country's adherence to absolute immunity in international law and relations; and (iv) despite the 'creative provisions' in the ISA rules of Chinese arbitration institutions, enforcement of ISA awards in China remains unlikely on various legal and policy grounds. All these impediments, compounded by potential competition from well-established arbitration institutions, seem to suggest that the ISDS adventure is unlikely to succeed in the near future.

As can be seen, whether and to what extent the ISDS adventure will succeed depends largely on how much support China would provide to its arbitration institutions and to ISDS. In particular, to be supportive to the ISDS adventure, China must make the necessary law-making efforts to enable its arbitration institutions to overcome the various legal impediments to ISDS, which could also help China grow into an ISA-friendly jurisdiction. In fact, there has emerged a growing call to revise China's ISDS-related national laws in recent years.[106] while others have proposed revising the CAL to clearly allow ISA,[107] while others have suggested that China should enact a foreign state immunity law as soon as possible.[108] China seems to have become aware of such a need, having put the revision of the CAL on the agenda of the Standing Committee of the National People's Congress (China's top legislature).[109] However, up to the present, no concrete law-making efforts have been made.

The decade-long efforts of leading Chinese arbitration institutions in the ISDS adventure are a clear manifestation of these bodies' determination to make their way to the global ISDS market. These efforts are unlikely to yield successful results if the legal impediments to ISDS in Chinese law remain. Yet, it is doubtful whether China is fully prepared to take the necessary steps, especially law-making measures, to support the ISDS adventure of its arbitration institutions and to transform itself into an ISA-friendly jurisdiction. Such a situation implies that the ISDS adventure continues to face uncertain prospects. Consequently, Chinese arbitration institutions may well embrace a bright future, but they may also find themselves on the path to a dead end. Given that the ISDS adventure is ongoing and that China has realized the law-making needs involved, it will be interesting to observe whether the unprecedented ISDS adventure of Chinese arbitration institutions ends up being successful.

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[106] See, e.g., Monika Prusinowska, 'China as a Global Arbitration Player?: Recent Developments of Chinese Arbitration System and Directions for Further Changes' (2017) 10 Tsinghua China Law Review 22, 38.

[107] See, e.g., Shengchang Wang, Ning Fei and Fang Zhao, 'China Arbitration — Getting the Deal Through' <https://gettingthedealthrough.com/area/3/jurisdiction/27/arbitration-china> accessed 19 October 2020.

[108] China News, 'More than 30 NPC Representatives Call for Making Foreign State Immunity Law' (中國新聞, '30余名人大代表呼籲制定國家豁免法') <http://www.chinanews.com/gn/2020/05-28/9196720.shtml> accessed 19 October 2020.

[109] National People's Congress, 'The Legislative Plan of the 13th Standing Committee of the National People's Congress of the People's Republic of China' (全國人民代表大會, '中華人民共和國全國人民代表大會第十三屆常務委員會立法計劃') <http://210.82.31.8/npc//xinwen/2018-09/10/content_2061041.htm> accessed 19 October 2020.

Notes on contributor

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