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Embracing Non-ICSID Investment Arbitration? The Chinese Perspective

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Embracing Non-ICSID Investment Arbitration? The Chinese Perspective

*Meng Chen**

Abstract: This article introduces and examines Chinese arbitration institutions' recent movements to expand non-ICSID investment arbitration services, which could potentially contravene existing relevant Chinese laws and judicial practice, and it explores the prospects for non-ICSID investment arbitration in China. The article first compares ICSID and non-ICSID investment arbitration to determine the differences between them and their respective selling points for stakeholders in investment disputes. Next, the article examines the diverse mechanisms involved and highlights the different rules that govern non-ICSID arbitration, including the rules established by Chinese arbitration institutions in recent years. The article then further analyzes the obstacles in existing Chinese legislation and judicial practice that have impeded the use of non-ICSID investment arbitration in China. Finally, after briefly introducing proposals to remove these obstacles, the article examines the future prospects for Chinese non-ICSID investment arbitration.

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1. INTRODUCTION

With the increasing number of investment arbitration treaties, international arbitration has gradually conquered the investment dispute resolution market by taking the place of various prior inefficient dispute resolution methods.¹ As a more popular tool for resolving investment disputes between private investors and host states, international arbitration is constantly evolving and developing versatile regimes and mechanisms to fulfill the different demands and respond to feedback and questions from clients.² There are generally three types of investment arbitration: 1) the most frequently used International Centre for Settlement of Investment Disputes (ICSID) Convention, which includes arbitration regimes registered under the ICSID Convention and Additional Facility Rules; 2) other frequently used regimes organized under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; and 3) arbitration regimes administered by various international arbitration institutions under institutional arbitration rules, such as the Arbitration Rules of the Stockholm Chamber of Commerce. Practitioners have further classified these three regimes into two categories ICSID and non-ICSID investment arbitration due to the different rules governing their arbitration procedures and enforcement of outcomes. With China increasingly becoming an important player in the world of international economics, the country has intensively reformed and internationalized its arbitration regime to capture more of the investment dispute resolution market. This article introduces and examines Chinese arbitration institutions' recent movements toward expanding their non-ICSID investment arbitration services, which could potentially contravene existing relevant Chinese law and judicial practice.

The article first compares ICSID and non-ICSID investment arbitration to examine their differences and respective selling points for

¹ CAMPBELL MCLACHLAN, *Investment Treaty Arbitration: The Legal Framework*, in ALBERT JAN VAN DEN BERG (ED), 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES, VOLUME 14, 96 (Kluwer Law International, 2009).

² Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 745 (2008); Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L & COMP. L. 21, 21 (2001).

stakeholders in investment disputes. Then, this article examines the diverse mechanisms involved and highlights the different rules that govern non-ICSID arbitration, including the arbitration rules established by Chinese arbitration institutions in recent years. This article then further analyzes the obstacles in existing Chinese legislation and judicial practice that have impeded non-ICSID investment arbitration in China. Finally, after briefly introducing proposals to remove these obstacles, this article examines the future prospects for Chinese non-ICSID investment arbitration.

2. ICSID OR NON-ICSID INVESTMENT ARBITRATION

Arbitration is a dispute resolution mechanism based on the disputants' mutual consent. In the sphere of investment arbitration, such consent is not just limited to private investors and host states but can also involve agreements between home states and host states. Therefore, investor-state investment arbitration is more complicated than pure commercial arbitration due to the involvement of multiple parties of interest and arbitration regimes. There are several situations when stakeholders are entitled to choose between ICSID and non-ICSID arbitration. The first is when investment treaties between home states and host states explicitly provide for dispute resolution mechanisms, including ICSID and non-ICSID arbitration. For example, Article 26(4) of the Energy Charter Treaty (ECT) provides for investment arbitration under the ICSID and Additional Facility Rules, ad hoc arbitration under UNCITRAL Arbitration Rules, or an arbitration proceeding under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce.³ The second is when the home state and host state are both signatories to the ICSID Convention, and the investment dispute arises from a contractual relationship that includes an arbitration agreement for a proceeding under the UNCITRAL Arbitration Rules or administered by an arbitration institution. The third is when disputants are free to select ICSID or non-ICSID arbitration based on mutual consent. Although parallel arbitration proceedings are rare, both ICSID and non-ICSID arbitration are frequently used to resolve investment disputes. Furthermore, with the increasing criticism of the ICSID system, stakeholders are considering non-ICSID arbitration to resolve their investment disputes more often, and accordingly, more arbitration institutions are expanding their relevant services.⁴ Nevertheless, it is impossible to propose a panacea for stakeholders to choose between ICSID and non-ICSID arbitration. The two regimes vary widely in many respects due to their divergent governing rules.

³ The Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 100. The treaty was entered into force April, 16, 1988.

⁴ MCLACHLAN, SHORE & WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* § 3.09 (Oxford University Press, 2007); Kaj Hobér, *Investment Treaty Arbitration and Its Future -- If Any*, 7 Y.B. ON ARB. & MEDIATION 58, 60 (2015).

2.1. Jurisdiction

The jurisdiction of arbitration tribunals is the cornerstone of such proceedings. Jurisdiction under the ICSID is described as follows:

[A]ny legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.⁵

This jurisdictional requirement is referred to as double-tier consent, as it includes consent between the home state and host state by signing the ICSID Convention in addition to the consent of the private investors who submit their disputes to the ICSID. Article 25 of the ICSID Convention provides several definitions of terms in this rule, including “national of another Contracting State” and the form of “consent.” The Convention explicitly excludes the formal diplomatic protection provided by home states. In addition, even if the home state and host state are not parties to the ICSID Convention, disputants can still submit their disputes to the ICSID under the ICSID Additional Facility Rules.

Jurisdiction under non-ICSID arbitration is also not difficult to explain. The most widely quoted requirement is provided in Article 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, NYC), which only requires a written arbitration agreement for evidence of the parties’ consent to submit their disputes to arbitration.⁶ Many states have established more flexible requirements for the forms of arbitration agreements.⁷ In addition, it is widely established that arbitral tribunals are generally entitled to rule on their own jurisdiction, which is referred to as the “competence-competence” doctrine. The worldwide atmosphere of favoring international arbitration has fueled a clear tendency for arbitrators and national courts to confirm and support arbitral jurisdiction based on evidence of the parties’ explicit or implicit consent. In the specific area of investment arbitration, the only “obstacle” to jurisdiction is probably sovereign immunity, which provides that states that are immune to the jurisdiction of another sovereign. However, sovereign immunity is easy to overcome in both ICSID and non-ICSID arbitration because it can be waived by the states involved through

⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 UNTS 159, article 25 (hereinafter ICSID Convention). It entered into force on October 14, 1966.

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 UNTS 38 (hereinafter New York Convention). It entered into force on June 7, 1959).

⁷ Anghélos C. Foustoucos, *Conditions Required for the Validity of an Arbitration Agreement*, 5 J. OF INT’L ARBITRATION 126, 128 (1988).

implicit and explicit consent to submit disputes to arbitration.⁸ In summary, jurisdiction under both ICSID and non-ICSID arbitration is clear and easy to identify with evidence of the disputants' consent or investment treaties that designate the relevant dispute mechanisms. The biggest difference in initiating ICSID and non-ICSID arbitration is that ICSID arbitration is provided for in investment treaties and the ICSID Convention, and it is ready for use in all qualified disputes that may arise afterward. Non-ICSID arbitration must be explicitly selected in an arbitration agreement, and it is generally difficult for private investors to persuade host states to adhere to such agreements, especially when there is no direct contractual relationship between them.

2.2. Procedure

Investment disputes involve state parties, public law issues, and complicated controversies. Both ICSID and non-ICSID arbitral proceedings rely on mature and well-organized procedural rules to provide smooth processes. ICSID arbitration complies with the ICSID Rules of Procedure for Arbitration Proceedings or the ICSID Additional Facility Rules (hereinafter referred to as the ICSID Rules), while most non-ICSID arbitration is organized under the UNCITRAL Arbitration Rules or various institutional arbitration rules. Due to limitations on the scope of this research, this article does not attempt to differentiate between every aspect of the ICSID Rules and the rules applied in non-ICSID arbitration. These two sets of arbitration rules generally follow similar dispute resolution patterns and due process standards, although they have different specific provisions. Some empirical research has indicated that there is a slight difference in the average length of ICSID and non-ICSID arbitration proceedings, which may indicate that one proceeding is more efficient than another.⁹ However, such superiority is not clearly evidenced in the text of the relevant procedural provisions. With slight differences in the number of days, both sets of arbitration rules provide timely guidelines for different procedural processes and delegate tribunals ample discretion to coordinate arbitral proceedings. For example, in non-ICSID arbitration, Article 4 of the UNCITRAL Arbitration Rules provides that the respondent shall submit a response to the notice of arbitration within 30 days of its receipt,¹⁰ while the ICSID Rules impose no time limitation on this process but provide that the

⁸ Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 128 (2006); 28 U.S.C. § 1605(a)(6)(B) (2006).

⁹ Gaëtan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES VOLUME 14, 285, 317 (Albert Jan van den Berg ed., 2009).

¹⁰ United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, (2003).

requesting party shall propose the appointment of arbitrators within 10 days after registration of the request.¹¹

Another notable difference is that Article 46 of the ICSID Arbitration Rules provides that “[t]he award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding,” with an optional 60 day extension, while the UNCITRAL Arbitration Rules do not impose any limitation on the period for the tribunal’s decision after closure of the hearings. Even with these differences, it is not possible to conclude that one procedure is faster or more efficient than the other, especially considering that the alleged difference in the average duration of proceedings in one empirical study was marginal compared to the duration of the entire process.¹²

In addition, the availability and efficiency of interim measures are critical factors that are considered increasingly important in evaluating the effectiveness of a dispute resolution regime. It has been noted that ICSID and non-ICSID arbitration utilize different interim measure mechanisms.¹³ However, the differences do not lie in the procedural rules. Both the ICSID and non-ICSID rules prescribe arbitral tribunals’ authority to issue interim decisions.¹⁴ In non-ICSID arbitration, the parties can also submit a request for interim measures to the national courts following national laws, while ICSID arbitration is generally considered to have exempted the jurisdiction of the national courts, even though Rule 39(6) of the ICSID Rules specifically states that the parties are allowed to request any judicial or other authority to order provisional measures based on mutual consent.¹⁵ Notably, in enforcing and executing tribunals’ interim decisions, sovereign immunity problems are often inevitable, as in the final award enforcement stage, which will be described in a later section.

As two separate arbitration regimes dedicated to resolving investment disputes, the differences between the ICSID and non-ICSID arbitration procedural rules are a matter of course. However, there is no persuasive evidence to prove that the relevant differences have resulted in different levels of effectiveness in resolving disputes. Furthermore, the two regimes are continuously developing and cross-fertilizing each other. UNCITRAL established the UNCITRAL Rules on Transparency in Treaty-based

¹¹ International Centre for Settlement of International Disputes, *ICSID Convention, Regulations and Rules* (Apr. 10, 2006).

¹² GAETAN VERHOESSEL, *supra* note 9, at 306.

¹³ CAMPBELL MCLACHLAN, *Investment Treaty Arbitration: The Legal Framework*, in ALBERT JAN VAN DEN BERG (ED), *50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, ICCA CONGRESS SERIES, VOLUME 14* 95,145 (Kluwer Law International, 2009).

¹⁴ ICSID Convention, *supra* note 5, Article 47; UNCITRAL Arbitration Rules, *supra* note 10, Article 26.

¹⁵ ICSID Convention, *supra* note 5, Article 39; *ETI Euro Telecom International BV v. Republic of Bolivia*, EWCA Civ 880 (2008).

Investor-State Arbitration (“the UNCITRAL Transparency Rules”), which have been widely praised in practice.¹⁶ The ICSID recently published Proposals for Amendment of the ICSID Rules, which specifically increased the transparency requirements in the Arbitration Rules (including the Additional Facility Rules), in response to relevant criticism.¹⁷

2.3. Annulment or Set Aside

Proponents frequently describe the ICSID arbitration regime as self-contained and autonomous because the ICSID Rules delegate the authority for initiating ICSID arbitral proceedings and supervising the awards in the ICSID system.¹⁸ The only supervision mechanism is an annulment review by an ad hoc Committee of three people constituted based on Article 52 of the ICSID Convention. This annulment process does not work as an appeals system in which the appellant authority can revise a previous award based on its own discretion. The ad hoc committee can only annul previous awards on the exclusive grounds provided for in Article 52 of the ICSID Convention.¹⁹ After awards have been fully or partially annulled, the parties can submit the dispute to a new tribunal and restart the arbitral proceedings.²⁰ Academics have noted that the drafters of the ICSID Convention believed that finality and the procedural integrity of the system was more valuable than substantive correctness; thus, the relevant provision only provides for a limited and extraordinary remedy for arbitral awards.²¹

The supervision mechanism in non-ICSID arbitration is a different story. As with commercial arbitration, two types of jurisdictions hold vital positions in the execution of effective judicial supervision in the post award stage. The first is ‘primary jurisdiction’, where the arbitration is held, while the second is ‘secondary jurisdiction’, where the arbitral award is enforced.²² In traditional ‘seat’ theory,²³ national courts have primary jurisdiction and are entitled to set aside arbitral awards, which invalidates

¹⁶ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (last visited September 22, 2018).

¹⁷ Proposals for Amendment of the ICSID Rules, available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf (last visited September 22, 2018).

¹⁸ JOHN CHRISTOPHER THOMAS, *The Evolution of the ICSID System as an Indication of What the Future Might Hold*, in ALBERT JAN VAN DEN BERG (ED), *INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE? ICCA CONGRESS SERIES, VOLUME 17*, 565 (Kluwer Law International, 2013).

¹⁹ ICSID Convention, *supra* note 5, article 52.

²⁰ *Id.*

²¹ Kateryna Bondar, *Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review*, 32 J INT’L ARB. 621, 676 (2015); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 279 (Oxford, 2008).

²² *Id.*

²³ F.A. MANN & LEX FACIT ARBITRUM, *INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE* 157, 159 (Pieter Sanders ed., 1967).

the awards per se and makes them unenforceable everywhere, while under secondary jurisdiction, national courts can only refuse to recognize or enforce arbitral awards. Thus, many academics contend that the authority granted under primary jurisdiction to set aside an arbitral award is the most effective mechanism for the supervision of an international arbitration process.²⁴ Based on this consideration, many international and national laws prescribe the authority of national courts with primary jurisdiction and the grounds for setting aside arbitral awards. Some international rules have attempted to unify the grounds for setting aside arbitral awards. For example, Article 34 of the UNCITRAL Model Law²⁵ and Article IX of the 1961 European Convention on International Commercial Arbitration (hereinafter the European Convention of 1961)²⁶ stipulate detailed grounds for setting aside arbitral awards. In practice, national courts are more inclined to review awards based on their own national provisions.²⁷

Lacking uniform international grounds for setting aside arbitral awards not only greatly increases the uncertainty in non-ICSID arbitration but also makes it difficult to evaluate and compare the review standards under ICSID and non-ICSID arbitration. Thus, forum shopping is inevitable. States that provide more internationalized and arbitration-friendly set-aside grounds are more popular as arbitration forums than those states that exert rigorous scrutiny on arbitral awards. Empirical data may add another perspective to this comparison. One study found that the annulment ratio in the case of ICSID awards was significantly higher than the set-aside ratio for non-ICSID treaty awards.²⁸ While admitting that the population was too small to serve as a basis for any broad conclusions, the research identified some underlying reasons for this measurable difference, such as divergent review standards, inconsistencies inherent in the ICSID system, and the widely used forum shopping in non-ICSID arbitration.²⁹ In practice, the ICSID annulment process received substantial criticism, particularly with respect to its consistency and transparency, which ultimately led to a

²⁴ W. Michael Reisman, SYSTEM OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION BREAKDOWN AND REPAIR 140,127-8 (1992).

²⁵ United Nations Commission on International Trade Law, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985) [hereinafter UNCITRAL Model Law], WITH AMENDMENTS AS ADOPTED IN 2006, U. N. Sales No. E.08.V.4 (2008), Article 34 & Article 36 (1)(a)(v).

²⁶ EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION OF 1961 [hereinafter European Convention of 1961] (April 21, 1961), UNTS vol. 484, p. 364 No. 7041 (1963-1964).

²⁷ Meng Chen & Chengzhi Wang, *Vanishing Set-Aside Authority in International Commercial Arbitration*, 18 INT'L AND COMP. L. REV. 131, 158 (2018).

²⁸ Of the fifteen ad hoc committee decisions, forty percent led to annulment: twenty percent annulled the entire award and twenty percent were partial annulments. Of the sixteen court decisions, only one (six percent of the total) led to a set-aside of an award, and even that was only partial. Gaetan Verhoosel, *supra* note 5.

²⁹ Gaetan Verhoosel, *supra* note 5.

backlash against investment dispute resolution under the ICSID regime.³⁰

2.4. Enforcement of Arbitral Awards

The enforcement of awards rendered under the ICSID is governed by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention),³¹ while most enforcement of non-ICSID awards is governed by the New York Convention.³² The most significant selling point for ICSID arbitration is its delocalization and self-contained enforcement mechanism.³³ According to the ICSID Convention, the contracting States are obliged to recognize and enforce awards as if they were a final judgment of a court in their territory, without any prior review on the basis of their national laws.³⁴ Failure to comply with this provision constitutes breach of bilateral and multilateral treaty obligations, e.g., those contained in BITs and in the ICSID Convention. Therefore, the enforcement of ICSID awards is generally not a serious problem, and voluntary payment is the ordinary practice.³⁵

Notably, to avoid repetitive remedies, Article 27 prevents the contracting states from providing formal “diplomatic protection” or bringing an “international claim” based on an investment dispute.³⁶ In addition, noncompliance with a rendered award can be remedied through the use of Article 64, which enables the contracting state of an investor to refer the dispute to the International Court of Justice (“ICJ”).³⁷ In addition to the enforcement mechanisms provided for in the ICSID Convention, scholars and practitioners have explored many other instruments to enhance the enforcement of ICSID awards, including utilizing World Bank facilities

³⁰ THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds., 2010); Brigitte Stern, *The Future of ICSID, Ad Hoc Committees, Appellate Tribunals, International Investment Courts and Investment Arbitration: Introduction*, in INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE?, ICCA CONGRESS SERIES, VOLUME 17, 559-562 (Albert Jan van den Berg ed., 2013); Guillermo A. Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 366 (2003).

³¹ CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES [hereinafter Washington Convention] March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, Article 25(1).

³² New York Convention, *supra* note 6.

³³ Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?* 15 AM. REV. INT’L ARB. 439, 455 (2004).

³⁴ Katharina Diel-Gligor, *Competing Regimes in International Arbitration: Choice Between the ICSID and Alternative Arbitral Systems*, 22 AM. REV. INT’L ARB. 677 (2011).

³⁵ Antonio Parra, *The Enforcement of ICSID Arbitral Awards*, 24th Joint Colloquium on International Arbitration (Paris, Nov. 16, 2007), 1&3, *retrieved from* http://www.arbitration-icca.org/media/0/12144885278400/enforcement_of_icsid_awards.pdf (last visited September 19, 2018); Lucy Reed, Jan Paulsson & Nigel Blackaby, *GUIDE TO ICSID ARBITRATION* 107 (2004).

³⁶ ICSID Convention, *supra* note 5, Article 27.

³⁷ Katharina Diel-Gligor, *supra* note 34.

and relevant political influence.³⁸ For example, one commentator suggested that the World Bank could punish noncompliance with investment arbitration awards through indirect means by suspending financing to the noncompliant member, similar to the penalties incurred by members for nonpayment of World Bank loans.³⁹ Political approaches are not new instruments for resolving investment disputes, as they have proven to be inefficient and sometimes can increase the illegitimacy in investment disputes. The birth of the ICSID and other alternative resolution methods was aimed at taking the place of traditional investment dispute resolution mechanisms by establishing a uniform and fair international regime. Politicalizing the enforcement of ICSID awards seems to contradict the general purpose of the ICSID Convention.

After entering into force, the New York Convention successfully established a uniform worldwide enforcement regime for international arbitral awards. Enforcement courts can only refuse recognition and enforcement of qualified arbitral awards based on the grounds exclusively provided for in Article 5 of the New York Convention.⁴⁰ Although the enforcement regime under the New York Convention is generally considered to be efficient, national courts inevitably and unsurprisingly accept jurisdiction and decide controversial issues in accordance with their own national laws and procedures, which results in uncertainty and inconsistency in outcomes.⁴¹ More controversially, court decisions may also be influenced by local legal, cultural, economic, and political systems. Therefore, the enforcement regime for non-ICSID awards under the New York Convention is generally considered less favorable than the Washington Convention.

In addition, there is one common obstacle in the enforcement of both ICSID and non-ICSID awards, which is the sovereign immunity defense in the enforcement stage. Sovereign immunity is a jurisdictional doctrine that prohibits the national courts of one state from exercising jurisdiction over other states.⁴² This doctrine further extends to the execution process, which indicates that states' assets are immune to the execution of any other state's authority. By signing a BIT or contract designating arbitration as the

³⁸ LUCY REED, JAN PAULSSON & NIGEL BLACKABY, *supra* note 35, at 5.

³⁹ Joseph M. Cardosi, *Precluding the Treasure Hunt: How the World Bank Group Can Help Investor Circumnavigate Sovereign Immunity Obstacles to ICISID Award Execution*, 41 PEPP. L. REV. 125, 162-63 (2013).

⁴⁰ ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 327 (Kluwer Law and Taxation Publishers, 1981); RICHARD B. LILICH & CAHRLES N. BROWER, *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY* 38 (Transnational Publishers, 1992).

⁴¹ Julian D M Lew, *Does National Court Involvement Undermine The International Arbitration Process?* 24 AM. U. INT'L L. REV. 489, 498 (2009).

⁴² DHISADEE CHAMLONGRASDR, *FOREIGN STATE IMMUNITY AND ARBITRATION* 69-70 (Cameron May Ltd., 2007) (asserting that when states conduct commercial acts, the rationales for sovereign immunity no longer apply).

dispute resolution mechanism, a state is considered to have waived its immunity from the jurisdiction of national courts for proceedings concerning the arbitral process.⁴³ However, jurisdictional immunity and execution immunity are generally considered separate; most countries currently do not extend such jurisdictional immunity to execution proceedings.⁴⁴ Therefore, stakeholders frequently find themselves having to revisit the sovereign immunity defense in the enforcement stage. Neither the New York Convention nor the Washington Convention addresses the issue of sovereign immunity defenses to the enforcement or execution of awards rendered pursuant to the treaty. This omission is explicit in the Washington Convention, which provides that the domestic law of immunity is not affected by the provisions of the Convention.⁴⁵ The New York Convention does not explicitly address the issue of sovereign immunity, but enforcement courts have refused enforcement based on its rationale according to either the “commercial character reservation” or “public policy doctrine” provided in Article 1(3) and Article 5 of the New York

Convention, respectively.⁴⁶ Some enforcement courts have even refused to find that its national provisions specifically abrogate sovereign immunity in execution proceedings.⁴⁷ Many commentators have declared sovereign immunity to be the most significant deficiency in the enforcement of arbitral investment awards. Considering the fragmented national laws regarding the issue of sovereign immunity in execution, some states have persisted with an absolute immunity doctrine; thus, establishing a uniform international approach to settle the sovereign immunity defense in the enforcement of arbitral investment awards is impractical in the near future.⁴⁸ One approach is that some states have shifted from traditional doctrines of the absolute immunity of states to a restrictive theory of sovereign immunity,⁴⁹ which holds that sovereign immunity can be

⁴³ Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT’L L. 121, 128 (2006); 28 U.S.C. § 1605(a)(6)(B) (2006).

⁴⁴ Alexis Blane, *Sovereign Immunity As Bar to the Execution of International Arbitral Awards*, 41 N.Y.U. J. INT’L L. & POL. 453, 505, n. 23 (2009).

⁴⁵ Alexis Blane, *supra* note 44, at 461.

⁴⁶ Hazel Fox, *State Immunity and the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 829, 829-32 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008).

⁴⁷ Alexis Blane, *supra* note 44, at 462.

⁴⁸ August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUROPEAN J. INT’L L. 803 (2006); CHAMLONGRASDR, *supra* note 42.

⁴⁹ Alexis Blane, *supra* note 44, at note 20 (“[I]n adopting a restrictive theory, the International Law Commission traces this evolution of the doctrine of sovereign immunity in various countries. The restrictive theory began in Italy, Belgium, and Egypt and spread throughout the developed world. Countries in the developing world have also been adopting the restrictive approach, though not all have done so, and the codifications of sovereign

overcome when a state engages in commercial activities.⁵⁰ Many decisions made by courts located in the United States and Europe have upheld this tendency, although with divergent standards for identifying “commercial activities”.⁵¹

2.5. Summary

Unlike ICSID arbitration, in which decisions are published and updated by the ICSID in a timely manner, non-ICSID arbitration cases are more confidential and difficult to statistically analyze because they are administered by different authorities, and most non-ICSID arbitration regimes that hear investor-state disputes do not maintain a public registry.⁵² Several empirical studies have attempted to compare the popularity of ICSID and non-ICSID arbitration for investment dispute resolution. Although the numbers may vary slightly, it is generally understood that ICSID arbitration has a longer history and has a much larger share of the investment dispute resolution market. For example, prior to 2007, empirical data indicated that nearly 74.4% of such decisions were rendered under the ICSID (59.8% under the ICSID Convention and 14.6% under the ICSID Additional Facility), and the remaining 25.6% were resolved under either the SCC or other ad hoc rules.⁵³ The ratio has fluctuated slightly in recent years, but the ICSID still administers a major proportion of all investment arbitration proceedings.⁵⁴ Some studies have attempted to explore the reasons why one arbitration system might be prioritized over another. Examinations and comparisons of factors such as subject matter, amounts claimed, amounts rewarded, and identities of winners did not provide clear evidence proving that there are major differences between the two regimes.⁵⁵ There is certainly no clear evidence proving that ICSID arbitration is faster or more favorable to certain disputants than other arbitration forums. Comparisons between the procedural rules that are applied in ICSID and non-ICSID arbitration have found several differences with regard to jurisdiction, interim measures, and supervision mechanisms. However, empirical data indicate that the different governing rules do not result in major differences in their effectiveness in resolving investment

immunity have not been uniform.”).

⁵⁰ CHAMLONGRASDR, *supra* note 42, at 69-70.

⁵¹ Int’l Law Comm’n, Rep. on the Work of Its Forty-Third Session, U.N. Doc. A/CN.4/SER.A/1991/Add.1, at 36 (1991), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf.

⁵² Katharina Diel-Gligor, *supra* note 34.

⁵³ UNCTAD, *Database of Treaty-Based Investor-State Dispute Settlement Cases*, <http://investmentpolicyhub.unctad.org/isds> (last visited September 19, 2011).

⁵⁴ UNCTAD, *Latest Development in Investor-State-Dispute-Settlement*, IIA Monitor No. 1, *1 et seq.*, https://unctad.org/en/Docs/webdiaeia20113_en.pdf (2011).

⁵⁵ Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT’L L. 825, 914 (2011).

disputes. Non-ICSID arbitration is thus a workable option for resolving investment disputes.

3. VARIABLE NON-ICSID INVESTMENT ARBITRATION

Many entities provide investment dispute resolution services based on their respective rules. Even the ICSID frequently provides administrative assistance to investor-state arbitration proceedings under the UNCITRAL Rules, free trade agreements, and other ad hoc dispute settlement provisions.⁵⁶ In addition to administering UNCITRAL arbitrations, the ICSID has also assisted with the organization of hearings in arbitration proceedings conducted under the auspices of the ICC, LCIA, PCA, and other institutions.⁵⁷ Among the various institutions that administer investment arbitration proceedings, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules are the third most commonly used set of arbitration rules in investment disputes, making the SCC the second largest arbitration institute in the world, after the ICSID, for the administration of investment disputes.⁵⁸ Given the backlash against the ICSID system and the continued development of international investment, more and more international institutions have endeavored to obtain a share of the investment dispute resolution market. Three Chinese arbitration institutions have published their own investment arbitration rules to test the market in the last two years. Although neither has administered a real case yet, nor have the obstacles that exist in Chinese legislation and judicial practice been overcome to support the national “Belt and Road” policy, the entire Chinese arbitration community has begun to discuss whether the country has reached the moment for it to embrace non-ICSID arbitration.

⁵⁶ ICSID, *The ICSID Caseload-Statistics*, <https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx>, (last visited September 20, 2018). The Centre’s services in these proceedings range from support with the organization of hearings to administrative services comparable to those provided in ICSID cases. The Secretariat also acts as appointing authority, and decides proposals for disqualification of arbitrators, upon request.

⁵⁷ *Id.*

⁵⁸ Nils Eliasson, *Chapter 2 Stockholm as a Forum for Investment Arbitration*, in *INTERNATIONAL ARBITRATION IN SWEDEN: A PRACTITIONER’S GUIDE* 25-52 (Ulf Franke & Annette Magnusson et al. eds., 2013); “By 31 December 2012, 369 arbitration cases had been registered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (the ICSID Convention) (also known as the Washington Convention) and 41 ICSID Additional Facility arbitration cases. In comparison, 135 known cases had been filed under the UNCITRAL Rules and 57 cases had been filed under the Rules of Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules). To date, only eight investment arbitrations have been filed under the Rules of Arbitration of the International Chamber of Commerce (ICC Rules).” UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA No 1 Mar. 2013.

3.1. Institutional or UNCITRAL Rules

After the ICSID Rules, the UNCITRAL Arbitration Rules are the second most frequently used investment arbitration mechanisms. Due to the complexity of investment disputes, some investment arbitration proceedings administered under the UNCITRAL Arbitration Rules still rely on the assistance of certain institutions. Such assistance ranges from support in organizing hearings to acting as the appointing authorities and deciding on proposals for the disqualification of arbitrators. In 2017, the SCC administered eight investment treaty arbitration cases, six of which were organized according to the SCC Arbitration Rules, one was under the UNCITRAL Arbitration Rules, and one was an Emergency Arbitration.⁵⁹ In total, the SCC has administered 100 investment treaty disputes, with 74% administered under the SCC Rules, 21% under the UNCITRAL Arbitration Rules, and 5% under ad hoc rules.⁶⁰ Similar to the UNCITRAL, the SCC has not established arbitration rules specifically tailored to investment arbitration, which means that an arbitration proceeding in which the dispute concerns a claim based on an investment protection agreement is initiated in the same way as an ordinary commercial arbitration proceeding. This section compares the UNCITRAL Arbitration Rules with the SCC Arbitration Rules to explore the fitness of applying traditional commercial arbitration regimes to resolve investment disputes.

Both the SCC and UNCITRAL Arbitration Rules provide detailed provisions regulating each process of an arbitral proceeding, from commencement of the arbitration, to rendering arbitral awards. Both rules set timely guidelines for the duration of each process and delegate broad discretion to arbitral tribunals to coordinate the arbitral proceedings. In addition to differences in technical rules regarding cost calculations and time periods, other significant differences between the SCC and UNCITRAL Arbitration Rules include the following:

1) *Consolidation of arbitration*: Article 12-14 of the SCC Arbitration Rules govern the involvement of additional parties, multiple contracts and other arbitration proceedings into a single proceeding, while the UNCITRAL Arbitration Rules do not include a similar provision. Although consolidating arbitration proceedings entails several practical difficulties, it can significantly decrease the costs and promote the settlement of multiple related disputes.⁶¹ The effectiveness of its application in investment

⁵⁹ SCC, *Home Statistics Investment Disputes 2017*, <https://sccinstitute.com/statistics/investment-disputes-2017/> (last visited September 19, 2018).

⁶⁰ *Id.*

⁶¹ Michael F. Hoellering, *Consolidated Arbitration: Will it Result in Increased Efficiency or an Affront to Party Autonomy?*, 52 DISP. RESOL. J. 41 (1997); Julie C. Chiu, *Consolidation of Arbitral Proceeding and International Arbitration*, 7 JOURNAL OF INTERNATIONAL ARBITRATION 53-76 (1990); D. T. Hascher, *Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration?*, 1 J. Int. Arb. 127, 133-38 (1984); T. J. Stipanowich, *Arbitration and the Multiparty Dispute: The*

arbitration proceedings is uncertain, but many institutions have added similar provisions to their arbitration rules in recent years, which implies that there is a potential market for this service.⁶²

2) *Appointing authority*: As arbitration rules designed for ad hoc proceedings, UNCITRAL does not have a permanent body to provide case administration services; instead, it delegates appointing authorities to facilitate arbitral proceedings. The parties can select the appointing authorities for their case, and the Rules also designate the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the “PCA”) as the default appointing authority in cases where the parties cannot reach an agreement. The functions of appointing authorities include appointing arbitrators pursuant to Articles 8, 9, 10 or 14 of the UNCITRAL Arbitration Rules and deciding on challenges to arbitrators.⁶³ The SCC Arbitration Rules designate the board of directors (the “Board”) of the SCC for similar functions.

3) *Place of arbitration*: The significance of the forum for international arbitration proceedings cannot be understated. It determines the national procedural laws that govern the arbitral proceedings and the competent national courts that have the authority to set aside awards. The parties are free to agree on the forum. If they cannot reach an agreement, the SCC and UNCITRAL Arbitration Rules delegate the Board and the arbitral tribunal, respectively, to decide the place of arbitration.⁶⁴

4) *Time limit for final award*: Article 43 of the SCC Arbitration Rules requires that the arbitral tribunal render the final award no later than six months from the date the case was referred to it, with optional extensions granted by the Board, while the UNCITRAL Arbitration Rules do not have similar requirements. The ICSID Convention also sets a 120-day limit for final awards.⁶⁵

5) *Exclusion of liability*: Both sets of rules exempt arbitrators, appointing authorities and any expert appointed by the arbitral tribunal from liability for any act or omission in connection with the arbitration, with the exception of intentional wrongdoing.⁶⁶ The SCC Arbitration Rules extend this exemption to the SCC and its administrative secretary but with the exceptions of international misconduct and gross negligence.⁶⁷

6) *Emergency arbitrators*: The SCC established a set of rules for the

Search for Workable Solutions, 72 IOWA L. REV. 473, 495–508 (1987).

⁶² Chen Meng, *Emerging Internal Control in Institutional Arbitration*, 18 CARDOZO JOURNAL OF CONFLICT RESOLUTION 295 (2016).

⁶³ UNCITRAL Arbitration Rules, art. 6.

⁶⁴ SCC Arbitration Rules, available at https://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf (last visited September 19, 2018), Article 25; UNCITRAL Arbitration Rules, Article 18.

⁶⁵ ICSID Convention, *supra* note 5.

⁶⁶ UNCITRAL Arbitration Rules, art. 16; SCC Arbitration Rules, Article 52.

⁶⁷ ICSID Arbitration Rules, rule 46.

appointment of arbitrators for emergency decisions.⁶⁸ Data indicate that emergency arbitrators are occasionally used in investment arbitration proceedings; for example, the SCC administered one emergency investment arbitration proceeding in 2017.⁶⁹

7) *Specific rules for investment arbitration*: Although the SCC does not have a specific set of rules for investment arbitration, it has added several provisions that are specifically applied in such proceedings. These provisions mainly govern submissions by non-disputing treaty parties or a third person.⁷⁰ Notably, the UNCITRAL Transparency Rules include similar provisions.

8) *UNCITRAL Transparency Rules*: The UNCITRAL Transparency Rules, which came into effect on April 1, 2014, are a set of procedural rules that provide for transparency and public accessibility in treaty-based investor-state arbitration. The Transparency Rules are not limited to arbitration proceedings conducted under the UNCITRAL Arbitration Rules and are also available for use in investor-state proceedings initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings. After the Rules were published, they received many positive comments from practitioners.⁷¹ Later, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) was opened for signatures on March 17, 2015. In contrast, the SCC Arbitration Rules provide that the proceedings are generally confidential, if the parties do not agree otherwise.⁷²

3.2. *Emerging Investment Arbitration Market in China*

Non-ICSID investment arbitration remains a closed market in China. Three Chinese arbitration institutions have attempted to explore the provision of investment arbitration services. The first was the Shenzhen Court of International Arbitration (SCIA), located in Shenzhen, Guangdong Province. The SCIA was the southern subunit of the largest Chinese arbitration institution, the China International Economic and Trade Arbitration Commission (CIEATC), declaring itself independent of the CIEATC in 2012 and changing its name to the SCIA.⁷³ In late 2017, the

⁶⁸ SCC Arbitration Rules, Appendix II.

⁶⁹ SCC, *Home Statistics Investment Disputes 2017*, available at <https://sccinstitute.com/statistics/investment-disputes-2017/> (last visited September 19, 2018).

⁷⁰ SCC Arbitration Rules, Appendix III.

⁷¹ William Kenny, *Transparency in Investor State Arbitration*, 33 J. OF INT'L ARBITRATION 499-500 (2016); Loretta Malintoppi & Natalie Limbasan, *Living in Glass Houses? The Debate on Transparency in International Investment Arbitration*, 2 BCDR INT'L ARBITRATION REV. 36, 57 (2015); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2816 (Kluwer Law International, 2014).

⁷² ARBITRATION INSTITUTE OF THE SCC, ARBITRATION RULES 2017, Article 3 (2017) https://sccinstitute.com/media/293614/arbitration_rules_eng_17_web.pdf.

⁷³ Chen Meng, *Is CIETAC Breaking Apart? An Analysis of the Split in the CIETAC*

SCIA merged with another local arbitration institution, the Shenzhen Arbitration Commission.⁷⁴ The newly organized institution is still in a transitional period. The SCIA revised its arbitration rules in 2016 and added “arbitration cases related to investment disputes between states and nationals of other states” to its jurisdiction.⁷⁵ The other SCIA Arbitration Rules are similar to other institutional arbitration rules and are applied indistinguishably in both traditional commercial arbitration and investment arbitration proceedings administered by the SCIA. In addition, the SCIA has also administered arbitration cases subject to the UNCITRAL Arbitration Rules. Theoretically, the SCIA can administer investment arbitration cases under both the SCIA and UNCITRAL Arbitration Rules. However, two years after the promulgation of the new SCIA Arbitration Rules, the SCIA still has not received a single investment arbitration request. The underlying reasons for this will be discussed in the next chapter.

Another arbitration institution that tested the investment arbitration market in China had a similar experience. The CIETAC was established by the China Council for the Promotion of International Trade (CCPIT) in Beijing in 1956.⁷⁶ With its headquarters in Beijing, the CIETAC established the South Sub-Commission in Shenzhen, the Shanghai Sub-Commission, the Tianjin International Economic and Financial Arbitration Center (Tianjin Sub-Commission), and the Southwest Sub-Commission in Chongqing.⁷⁷ The CIETAC rapidly developed into the busiest arbitration institution in the world. Notably, in 2012, the South Sub-Commission and the Shanghai Sub-Commission announced their independence from the CIETAC headquarters in Beijing.⁷⁸ After this split, the CIETAC reestablished offices in Shanghai and Shenzhen and opened a new branch in Hong Kong. In 2017, the CIETAC published the China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation) (CIETAC Investment Arbitration Rules), which were effective on October 1, 2017. In contrast to the SCIA, the CIETAC decided to establish a specific set of rules for investment arbitration cases. In its guidelines, the CIETAC explained that, although Chinese arbitration law limits the application of arbitration to disputes between private parties, the entire Chinese arbitration community

System, 6(1) CONTEMP. ASIA ARB. J. 107 (2013).

⁷⁴ Press Release, SCIA Shenzhen Court of International Arbitration (Shenzhen Arbitration Commission) Announcement (Jan. 8, 2018) <http://www.sccietac.org/web/news/detail/1723.html>.

⁷⁵ SCIA, ARBITRATION RULES, Article 2 (Dec. 1, 2016) http://www.sccietac.org/web/doc/view_rules/861.html.

⁷⁶ About Us Page, CIETAC, <http://www.cietac.org/index.cms> (last visited September 19, 2018).

⁷⁷ *Id.*

⁷⁸ Meng, *supra* note 73.

has realized the significant potential of the Chinese investment arbitration market due to rapidly increasing foreign direct investment involving Chinese parties. Several international institutions are able to provide investment arbitration services, including the ICSID, SCC, and ICC. However, the relevant practice still takes place in a vacuum in China. Therefore, as the leader of the Chinese arbitration community, the CIETAC has attempted to become a pioneer in the development of non-ICSID investment arbitration in China and has clearly demonstrated its preparation by drafting its investment arbitration rules. In 2019, Beijing Arbitration Commission (BAC) followed the CIETAC's model of expanding investment arbitration service by publishing its own draft of investment arbitration rules. Most of the provisions are modeled on the UNCITRAL and other institutional arbitration rules, although the following are noteworthy:

1) *Combination of arbitration and mediation*: Almost all Chinese arbitration institutions have abundant experience combining mediation and arbitration cases due to the wide application and acceptance of mediation to resolve disputes.⁷⁹ This preference is manifested in both the CIETAC Investment Arbitration Rules and the SCIA Arbitration Rules.⁸⁰

2) *Transparency*: In response to "legitimacy" questions regarding investment arbitration proceedings, the CIETAC Investment Arbitration Rules incorporate transparency requirements modeled on the UNCITRAL Transparency Rules. For example, Article 55 of the CIETAC Rules provides that the CIETAC can publish information about arbitral proceedings unless otherwise agreed by the parties. The Rules also include provisions governing submissions made by non-disputing parties and a third person.

3) *Third-party funding (TPF)*: Research has shown that arbitration cases regularly involve third-party funding.⁸¹ The involvement of TPF presents various challenges to many aspects of an investment arbitral proceeding, including: conflicts of interest, disclosure rules, and arbitration costs.⁸² There are currently few investment arbitration rules that include specific provisions related to TPF. Article twenty-seven of the CIETAC Rules defines the allowable scope of TPF in investment arbitration proceedings. It requires compulsory disclosure of the existence and nature

⁷⁹ Gabrielle Kaufmann-Kohler & Fan Kun, *Integrating Mediation into Arbitration: Why it Works in China*, 25(4) J. INT'L ARB. 479, 480-86 (2008).

⁸⁰ CIETAC, ARBITRATION RULES, Article 43 (Nov. 4, 2014) <http://www.cietac.org/Uploads/201902/5c6148b100105.pdf>.

⁸¹ INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, ICCA REPORTS NO. 4: REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, ICCA REPORTS SERIES, 203 (2018) https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

⁸² Nadia Darwazeh & Adrien Leleu, *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*, 33 J. INT'L ARB. 125, 125 (2016).

of TPF as soon as a TPF agreement is concluded and instructs tribunals to take TPF into consideration when awarding the costs of arbitration.⁸³

4) *Place of arbitration*: In contrast to other investment arbitration rules that delegate tribunals or other authorities to decide the forum for proceedings when the parties cannot reach an agreement, the CIETAC Rules stipulate, “where the parties have not agreed on the place of arbitration, the place of arbitration shall be the domicile of the IDSC or the CIETAC Hong Kong Arbitration Center that administers the case.”⁸⁴ In fact, officials with the CIETAC recommend that stakeholders select Hong Kong as the place for investment arbitration to avoid application of the ambiguous and unfavorable Chinese Arbitration Law, the details of which will be described in the next chapter.

4. PRACTICAL OBSTACLES TO NON-ICSID ARBITRATION IN CHINA

The underlying reasons why only three arbitration institutions out of approximately 250 such institutions in China have explored providing investment arbitration services and neither of them have actually received any investment arbitration requests after publishing relevant rules are deeply rooted in Chinese legislation and judicial practice regarding non-ICSID arbitration. The arbitration market in China is currently flourishing compared to the country’s outdated arbitration legislation and judicial system.⁸⁵ Although the Chinese judicial system, which is led by the Supreme People’s Court (SPC), has published a series of judicial interpretations to reform the country’s arbitration regime on issues such as ad hoc arbitration and judicial supervision and enforcement of arbitral awards, it has not yet properly addressed the subject of non-ICSID investment arbitration. In addition, no Chinese parties have been reported to have participated in any non-ICSID arbitration proceedings. Thus, to develop non-ICSID investment arbitration services, the obstacles in China’s legislation and judicial systems must be overcome.

4.1. *Jurisdiction*

Article 2 of the Arbitration Law of the People’s Republic of China (Chinese Arbitration Law, CAL) stipulates “[c]ontractual disputes between citizens of equal status, legal persons and other economic organizations and

⁸³ CIETAC, INVESTMENT ARBITRATION RULES, Article 27 (Sept. 12, 2017) <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en>.

⁸⁴ CIETAC Investment Arbitration Rules, Article 28.

⁸⁵ In 2015, for example, arbitration institutions located in mainland China administered 136,924 arbitration cases in total, 2,085 of which were foreign-related arbitrations. The total disputed monetary amount reached 411.2 billion RMB. CHINA ACADEMY OF ARBITRATION LAW, CHINESE ARBITRATION ANNUAL REPORT 2015, 26-30 (China Academy of Arbitration Law, 2016).

disputes arising from property rights may be put to arbitration,”⁸⁶ which is generally interpreted as excluding investment disputes between private investors and host states. In addition, China declared a commercial reservation when the country joined the New York Convention, which means that China applies the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under its national law. Whether investment disputes between investors and host states are considered commercial at the international level is subject to debate.⁸⁷ Article 2 of the Notice of the Supreme People’s Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China explicitly stipulates:

In accordance with the commercial reservation declaration made by China upon its accession to this Convention, China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the national law of the People’s Republic of China... except disputes between foreign investors and the host government.⁸⁸

Therefore, even though there may be arbitration agreements between investors and host states, as long as Chinese law is the governing law of the arbitration agreement, non-ICSID investment arbitration is impracticable, and enforcement courts may refuse to enforce arbitral awards.

4.2. Procedure

In addition to obstacles to arbitrability, due to the complexity of investment disputes, the parties normally select existing arbitration rules to govern their arbitral proceedings. As a highly autonomous dispute resolution mechanism, arbitration proceedings do not necessarily rely on intervention by national courts.⁸⁹ As stated above, three Chinese institutions have established their own investment arbitration rules and have offered to administer arbitration cases based on UNCITRAL arbitration rules. However, there are a plethora of other international institutions that can

⁸⁶ Zhong Hua Ren Ming Gong He Guo Zhong Cai Fa (中华人民共和国仲裁法) [Arbitration Law of the People’s Republic of China](promulgated by 8th Standing Meeting National People’s Congress, August 31, 1994, effective September 1, 1995), English version available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm, Article 2.

⁸⁷ *United Mexican States v. Metaclad*, 5 ICSID Report 236, 246-7 (Supreme Court of British Columbia, Canada 2 May 2001); *Czech Republic v. CME Czech Republic*, 9 ICSID Report 439, Case No. T 8735-01 (Svea Court of Appeal, Sweden 15 May 2003); *BG Group plc v. Republic of Argentina*, 1 572 US 9, 15 (US Supreme Court 2014).

⁸⁸ Notice of the Supreme People’s Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China (No. 5 [1987] of the Supreme People’s Court, April 10, 1987)

⁸⁹ Julian D M Lew, *supra* note 41.

provide investment arbitration services, and parties with business in China have many choices of both arbitration rules and entities to manage the cases.

The most significant difference when commencing investment arbitration in Mainland China is the involvement of the local national courts in supporting the arbitral proceedings, including facilitating the enforcement of interim measures. The relevant provisions are Article 101 of The Civil Procedure Law of the People's Republic of China (2017 Revision) (Chinese Civil Procedure Law), Articles 28 and 68 of the Chinese Arbitration Law, and Article 2 of the Notice of the Supreme People's Court on several issues concerning the implementation of the Arbitration Law of the PRC, which generally provide that disputants who are parties to an arbitration proceeding administered by a Chinese arbitration institution can apply to the Chinese courts at the location of the assets or dependents to issue evidence and property security orders.⁹⁰ First, the relevant Chinese laws only confirm that Chinese courts can issue interim orders and are silent on whether arbitral tribunals have the same authority. Therefore, Chinese courts will not facilitate the enforcement of interim orders made by arbitral tribunals that are in forms other than arbitral awards. In practice, if the parties submit a request for interim measures to an arbitral tribunal or institution, the parties are often directed to transfer their requests to the competent Chinese courts instead of providing interim orders on their own. Second, it is subject to debate whether the parties to an arbitration proceeding administered by a foreign arbitration institution or an ad hoc arbitration proceeding can submit requests for interim measures to the Chinese courts. Without a clear delegation of such authority in Chinese legislation, it is unlikely that Chinese courts will grant such requests. In addition, if arbitral tribunals make interim orders in the forms of arbitral awards, then the awards can be enforced according to the New York Convention and relevant Chinese laws. However, as manifested in Article 26 of the UNCITRAL Arbitration Rules and in other institutional arbitration rules, arbitral tribunals can provide interim orders in the form of temporary measures at any time prior to the issuance of the award that finally decides the dispute.⁹¹ Thus, the support for enforcing interim measures in investment arbitration cases provided for in Chinese law is quite limited.

4.3. Enforcement

If the issue of arbitrability is not considered the most significant obstacle to commencing non-ICSID investment arbitration in China, the missing enforcement mechanism is likely the most problematic.

⁹⁰ Notice of the Supreme People's Court on Several Issues Concerning the Implementation of the Arbitration Law of the PRC (Fa Fa [1997]No.4)

⁹¹ UNCITRAL Arbitration Rules, Article 26.

Enforcement of non-ICSID investment arbitral awards in Mainland China can encounter at least three problems: 1) the lack of a legal basis, 2) public policy defenses, and 3) sovereign immunity.

1) *Lack of a legal basis*: As described above, China declared a commercial reservation when signing the New York Convention, and the SPC explicitly excluded investment disputes between investors and host states from commercial arbitration, which leads to the simple outcome that non-ICSID investment arbitral awards cannot be enforced in China based on the New York Convention. Article 283 of the Chinese Civil Procedure Law provides that requests for enforcement of foreign arbitral awards to Chinese courts shall be decided in accordance with international treaties concluded or acceded to by the People's Republic of China or based on the principle of reciprocity.⁹² If the New York Convention is deemed not applicable, without any other governing international treaty, the enforcement of non-ICSID investment arbitral awards in China must rely on the national courts' ambiguous interpretation of the principle of reciprocity. Considering that there are no non-ICSID investment arbitral awards involving Chinese parties that have been reported or enforced by a foreign court, it is not likely that Chinese courts will grant enforcement requests based on the principle of reciprocity.

2) *Public policy defense and sovereign immunity*: These two obstacles are grounded on the same rationale that sovereign assets are immune from enforcement and execution by any foreign authorities. The former defense originated with Article 5 of the New York Convention, while the latter is grounded in customary international law. Article 55 of the ICSID Convention makes clear that the collection procedure in Article 54 shall not "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."⁹³ Efforts have been made to reach an international consensus on the rules of state immunity.⁹⁴ To date, there are two conventions that provide rules on state immunity: the European Convention on State Immunity ("ECSI") and the United Nations Convention on Jurisdictional Immunities of States and Their Property ("UNCIS").⁹⁵ Due to widely varying national legislations regarding sovereign immunity, there are a limited number of states that have signed these two conventions. In fact, the UNCIS has not even been implemented due to an insufficient number of signatories. Without a prevailing international interpretation of sovereign immunity, the national laws of enforcement govern the enforcement of investment arbitral awards

⁹² Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China (2017 Revision)](promulgated by 7th Standing Meeting National People's Congress, April 9, 1991), Article 283.

⁹³ ICSID Convention, Article 55.

⁹⁴ EUROPEAN CONVENTION ON STATE IMMUNITY, May 16, 1972, 1495 UNTS 181.

⁹⁵ G.A. Res. 59/38, United Nations Convention on Jurisdiction Immunities of States and Their Property (Dec. 02, 2004).

rendered under both the ICSID and non-ICSID regimes. For example, the United States promulgated the Foreign Sovereign Immunities Act (FSIA) to codify state immunity,⁹⁶ which was followed by the United Kingdom⁹⁷, Australia⁹⁸, and others. It is also common for national courts to identify national rules regarding sovereign immunity as a public policy that shall not be violated in the enforcement process.⁹⁹ Due to the limitations of this research and the complexity of the immunity issue, this article does not undertake a detailed examination of the various state immunity practices.¹⁰⁰ In contrast to the ongoing transition from the absolute immunity doctrine to the restrictive immunity doctrine in other states, under Chinese legislation and in Chinese courts, states are absolutely immune from adjudication by foreign authorities (jurisdictional immunity), and state assets are immune from execution in any enforcement proceedings unless the involved states waive such presumptive immunity.¹⁰¹ China has not codified a national law to govern the issue of state immunity. The relevant provisions are incorporated in various laws, such as the Chinese Civil Procedural Law, the People's Republic of China Regulations Concerning Diplomatic Privileges and Immunities, and the People's Republic of China Law on Enforcement Immunity of Foreign Central Banks' Property. In practice, national courts located in Mainland China, Hong Kong and Macau have consistently denied jurisdiction in cases with sovereign states as defendants, and the country has also resisted foreign jurisdiction or refused to waive immunity when it is designated as a defendant.¹⁰² The most recent instance was in 2011 in *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, in which the Hong Kong Supreme Court ultimately denied jurisdiction in a case between an American company and the Democratic Republic of the Congo based on the Chinese National People's Congress Standing Committee's consistent interpretation of Chinese policy on absolute state immunity.¹⁰³ Therefore, although the relevant national provisions regarding sovereign immunity are not conclusive and explicit, Chinese judicial practice continues to follow the absolute sovereign immunity doctrine. Without an explicit waiver of enforcement immunity by

⁹⁶ Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq (1976).

⁹⁷ State Immunity Act, 1978 (UK).

⁹⁸ Foreign States Immunities Act, 1985 (Act No. 196/1985) (Austl.).

⁹⁹ Stephan J. Toope, *Mixed International Arbitration* 141 (1990)

¹⁰⁰ August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 *EUROPEAN J. INT'L L.* 803 (2006).

¹⁰¹ HUANG YAYING (ED), *CHINESE INTERNATIONAL PRIVATE LAW COURSE 320* (Xiamen University Press, 2017).

¹⁰² *Id.*

¹⁰³ *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, CACV 373/2008 & CACV 43/2009 (Feb. 10, 2010), https://arbitrationlaw.com/sites/default/files/free_pdfs/fg_hemisphere_associates_llc_v_congo_et_al_cacv_373-2008_and_cacv_43-2009.pdf.

states, Chinese courts will refuse to enforce non-ICSID arbitral awards against any states.

4.4. *Prospects and Resolution*

China is experiencing a significant revolution in the arbitration area. The SPC has published a series of judicial interpretations to alleviate and resolve the limitations of the outdated Chinese arbitration legislation in its rapidly growing arbitration market. Under the national “Belt and Road” and Free Trade Zones policies, arbitration has been delegated the ambiguous mission of resolving both commercial and investment disputes. The revolution is reflected in the opening of Free Trade Zone ad hoc arbitration, the expanding validity of arbitration agreements, the lifting of limitations on services provided by foreign arbitration institutions, and the reforms to judicial review and the enforcement of arbitral awards.¹⁰⁴ Several legal interpretations published by the SPC have exceeded what is allowed under existing Chinese legislation and have caused intense discussion in the arbitration community.¹⁰⁵ In June 2018, the SPC established the International Commercial Tribunal to hear qualified cases involving international commercial issues to facilitate the “Belt and Road” policy and the needs of Chinese citizens who are deeply involved in international trade.¹⁰⁶ The Chinese arbitration community is relying on the SPC to continue its innovation and to lead the revolution toward investment arbitration. Suggested measures include judicial interpretations regarding jurisdiction under non-ICSID investment arbitration, explanations of allowable interim measures, and interpretations of the scope of sovereign immunity and enforcement of non-ICSID arbitral awards under the New York Convention regime. Through the law revision process, the SPC’s judicial interpretations can have immediate and significant effects on initiating non-ICSID investment arbitration in China.

In addition, the concurrent expansion of investment arbitration services provided by three Chinese arbitration institutions is not groundless. First, both have attempted to designate Hong Kong as the default forum for arbitration to avoid the application of unfavorable Chinese arbitration

¹⁰⁴ Notice of the Supreme People’s Court on Issues Concerning the Centralized Arbitration Judicial Review Cases (Fa [2017] No.152) (China); Relevant Provisions of the Supreme People’s Court on the Report of Arbitration Judicial Review Cases (Fa Shi [2017] No. 21) (China); Relevant Provisions of the Supreme People’s Court on the Handling Arbitration Judicial Review Cases (Fa Shi [2017] No. 22) (China); Relevant Provisions of the Supreme People’s Court on the Enforcement of Arbitral Awards (Feb. 23, 2018) (China), <http://www.court.gov.cn/zixun-xiangqing-81932.html> (last visited September 19, 2018).

¹⁰⁵ Id; Gao Xiaoli, *Positive Practice of Chinese Courts in Recognition and Enforcement of Foreign Arbitral Awards*, 5 LEGAL APPLICATION (2018), translated in <http://cicc.court.gov.cn/html/1/219/199/203/805.html>.

¹⁰⁶ Provisions of The SPC on Several Issues Concerning the Establishment of the International Commercial Tribunal (Fa Shi [2018] No.11) (China), translated in <http://cicc.court.gov.cn/html/1/219/199/201/817.html>.

laws.¹⁰⁷ Second, if the ultimate arbitral awards do not have to be enforced in the territory of China but in a state that recognizes the restrictive sovereign immunity doctrine, enforcement is feasible as long as the applicants can locate qualified states' assets that are used for commercial purposes.¹⁰⁸ Therefore, currently, the potential clients of the investment arbitration services provided by Chinese arbitration institutions are more likely to be Chinese investors who wish to sue foreign host states rather than investors who have disputes with China.

5. CONCLUSION

Both the ICSID and the international arbitration system are dynamic investment dispute resolution regimes that are evolving based on the rapidly changing international trade and economic structure. Recently, the ICSID proposed an amendment to its rules in response to a backlash and questions about its arbitration system. Many arbitration institutions and international entities are also devoted to expanding the investment arbitration market. With their divergent procedural rules and enforcement regimes, the ICSID and non-ICSID arbitration mechanisms meet different market demands in resolving investment disputes. The varied non-ICSID arbitration services provided by various institutions also enrich the investment dispute resolution market. By actively reforming and internationalizing its arbitration system, China can fulfill its ambition to play a more important role in the new international economic world. However, existing Chinese legislation and judicial practices still present formidable obstacles and cause significant uncertainty in commencing non-ICSID investment arbitration in China. The Chinese arbitration community expects the SPC to provide further judicial interpretations to support non-ICSID arbitration practice in China before unpredictable revisions of Chinese laws. Based on the SPC's innovations in Chinese arbitration in recent years, such expectations are not groundless, but the fate of non-ICSID investment arbitration in China has still yet to be revealed.

¹⁰⁷ CIETAC Investment Arbitration Rules, Article 28.

¹⁰⁸ Andrea K. Bjorklund, *Sovereign Immunity as Barrier to the Enforcement of Investor-State Arbitral Awards: the Repoliticization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 225-230 (2010); Olga Gerlich, *State Immunity from Execution in Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of Investor-State Arbitration System?* 26 AM. REV. INT'L ARB. 47, 70-8 (2015); Alexis Blane, *supra* note 44.

