Challenges and Opportunities of Investor-State Dispute Settlement Reform in China

Cong Gao

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Declaration

I hereby declare that this thesis represents my own work. Where information has been used they have been duly acknowledged.

Signature: …Cong Gao……………………….

Date: …31 December 2020…………………………….

Abstract

In the past five years, the overall legal environment of investor-State dispute settlement (ISDS) has changed dramatically in China. At the international law level, the fourth generation of Chinese bilateral investment treaty (BIT) further loosens restrictions on the ISDS system. It allows foreign investors to submit any disputes arising from a BIT to any international arbitration forum other than the International Centre for Settlement of Investment Disputes and ad hoc tribunals, subject to certain prerequisites. Nearly all international investment arbitration involving a Chinese party has occurred in the past decade, and more than half of the cases were initiated after 2015. At the domestic law level, article 26 of the newly enacted Foreign Investment Law specifies the three domestic disputes mechanisms that a foreign investor and/or its invested-enterprise registered in China may approach over investment disputes with administrative agencies: the Complaint Mechanisms for Foreign-Invested Enterprises, administrative review and administrative litigation. These domestic proceedings are not only available to foreign investors under domestic law but also an essential part of the ISDS clause in Chinse international investment agreements.

This thesis examines the current ISDS mechanisms in China from both domestic and international aspects, covering the legal basis, features, advantages and disadvantages of the three domestic proceedings and international treaty arbitration. The three domestic proceedings benefit investors and their invested enterprises in multiple ways, but are prone to external influences, especially from domestic administration agencies. Moreover, the qualifications of staff members in the complaint centres and administrative review agencies are often questionable. In contrast, international arbitration seems to be a more independent and impartial dispute resolution mechanism for foreign investors. However, it is facing growing criticisms, including inconsistency and incoherence of awards, lack of correction system, doubts as to the arbitrator’s professionalism and independence, long duration and high costs, lack of regulation of third-party funding and lack of transparency.

These issues have occurred in Chinese BIT practices and investment arbitration cases involving a Chinese party.

To respond to the trend of reforming the ISDS system and competing for the future market share of investment arbitration, three China-based arbitration centres recently promulgated new arbitration rules expanding their business scope to international investment arbitration. In particular, the China International Economic and Trade Arbitration Commission (CIETAC) and Beijing Arbitration Centre (BAC) engage innovative systems in their investment arbitration rules, including an appeal phase and an expedited procedure. Foreign investors may benefit from submitting investment disputes before these China-based arbitration centres under the new arbitration rules because the rules may mitigate parties' concerns about the current ISDS system. In addition, foreign-invested enterprises that are wholly or partially owned by foreign investors might also take advantage of the new CIETAC and BAC arbitration rules. Nevertheless, all three sets of new arbitration rules face practical difficulties in China and questions about the impartiality of when handling investor-State arbitration.

The thesis concludes that the conditions for implementing these arbitration rules are not met at this stage, unless there will be a thorough modification of China's arbitration system. It would be a more effective solution for the sake of foreign investors and the Chinese government to allow administrative arbitration initiated by foreign investors and/or their invested enterprises registered in China against Chinese administrative agencies or even the state under domestic law.

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Abbreviations

ASEAN	Association of Southeast Asian Nations
BAC	Beijing Arbitration Commission
BIT	Bilateral investment treaty
CEPA	Closer Economic Partnership Arrangements
CIETAC	China International Economic and Trade Arbitration Commission
CIPA	China Investment Promotion Agency
CJV	Contractual Joint Venture
EJV	Equity Joint Venture
FDI	Foreign Direct Investment
FIE	Foreign-Invested Enterprise
FTA	Free Trade Agreement
FTAC	Foreign Trade Arbitration Commission
FTZ	Free Trade Zone
HKIAC	Hong Kong International Arbitration Centre
ICSID	International Centre for Settlement of Investment Dispute
IIA	International Investment Agreement
IP	Intellectual Property
ISDS	Investor-State Dispute Settlement
M&A	Merger and Acquisition
MOC	Ministry of Commerce of the People's Republic of China
MOFA	Ministry of Foreign Affairs of the People's Republic of China
MOJ	Ministry of Justice of the People's Republic of China
NCC	National Centre for Complaints of Foreign-Invested Enterprises
NPC	National People's Congress of the People's Republic of China
NPSC	National People's Standing Congress of the People's Republic of China
PRC	People's Republic of China
RCEP	Regional Comprehensive Economic Partnership

SAR	Special Administrative Region
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
SCIA	Shenzhen Court of International Arbitration
SIAC	Singapore International Arbitration Centre
SPC	Supreme People's Court of the People's Republic of China
UNCITRAL	United National Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WFOE	Wholly Foreign-Owned Enterprise
WTO	World Trade Organization

Introduction

China is the largest developing economy host and the second-largest foreign direct investment (FDI) recipient in the world.[1] According to the *Statistical Bulletin of FDI in China (2019)* published by the Ministry of Commerce of the People's Republic of China (MOC) on 26 December 2019, the realised FDI value in China was USD 138.3 billion, and 60,560 new foreign-invested enterprises (FIEs) were set up in 2018. By the end of 2018, a total of 960,725 FIEs were established with the overall FDI stock of China reaching USD 2,149.3 billion.[2] Although the latest statistics for 2020 have yet to be released to the public, the MOC suggested in a November 2020 press conference that 41,000 FIEs were established nationwide in 2019, and the realised foreign capital was USD 141.23 billion, reaching a new record high and ranking second worldwide in scale.[3] In 2020, even though the global funds invested in developing Asian countries are projected to decrease significantly due to the COVID-19 pandemic,[4] China remains a hot spot for foreign investment. The realised FDI in the first eight months of 2020 has maintained the same level of last year – and it even slightly increased by 2.6% if calculated in China's currency.[5]

One reason for China's success in attracting foreign investment may be attributed to continuous efforts to improve its domestic and international legal framework for foreign investments.[6] Indeed, China is regarded as the 'safest' region from the rule of law by multinational corporations.[7] At the national level, China has established a legal system for foreign investment based on three sets of specific laws regulating three different types

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1 United Nations Conference on Trade and Development, *World Investment Report 2020: International Production Beyond the Pandemic* (United Nations 2020) 12.
2 Ministry of Commerce of the People's Republic of China, *Statistical Bulletin of FDI in China (2019)* (2019) 1.
3 'Statistical Bulletin of FDI in China (2020) Is Released – China Has Become a "Stabliser" for Cross-border Investment' (*Invest in China*, 6 November 2020) <www.fdi.gov.cn/come-zonghe-con.html?id=41647> accessed 28 December 2020.
4 *World Investment Report 2020* (n 1) x and xi.
5 'The Person in Charge of the Foreign Investment Department of the Ministry of Commerce Introduced the National Absorption of Foreign Investment from January to August 2020' (*Ministry of Commerce of the People's Republic of China,* 12 September 2020) <http://www.gov.cn/xinwen/2020-09/12/content_5542920.htm> accessed 27 December 2020.
6 Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 2.
7 Julianne Hughes-Jennett and others, *Risk and Return – Foreign Direct investment and the Rule of Law* (Hogan Lovells 2015) 27.

of foreign investments –Law on Chinese–Foreign Equity Joint Ventures, Law on Wholly Foreign-Owned Enterprises and Law on Chinese–Foreign Contractual Joint Venture – since 1979 and has continually improved the system in the following 40 years. In 2020, this old foreign investment legal system has been replaced by the Foreign Investment Law that is the first to unify inbound foreign investment policies in China. At the international law level, China has entered into 145 bilateral investment treaties (BITs) up to September 2020 and has the second-largest number of BITs in the world next to Germany. In addition, China has actively participated in the conclusion of other investment-related international treaties, including 17 Free Trade Agreements (FTAs) and other multinational trade agreements. The most recent achievement is the conclusion of the Regional Comprehensive Economic Partnership (RCEP), which covers accounting for approximately 30% of the world's foreign investment flow.[8]

When a foreign investor believes that its legal rights or interests have been impaired by any conduct of an administrative agency of the Chinese government, it can seek remedies via multiple routes under Chinese domestic law or applicable international treaties. Generally speaking, the investor faces choices of a range of dispute settlement resolutions, including negotiation, government-led conciliation, administrative review proceedings, administrative litigation and international arbitration. An investor's choice of the dispute resolution mechanism must be made with caution, as each option has advantages and disadvantages that may lead to different legal consequences. Although some routes can be taken in parallel (e.g. negotiations can be processed before or after the commencement of litigation or arbitration), some paths must be followed in order, and sometimes there is no turning back in accordance with relevant laws and treaties, especially when a fork-in-the-road provision is contained in the applicable BIT.

[8] Shouwen Wang, 'The World's Largest Free Trade Zone is Just Around the Corner: 10 Q &A Help You Understand the RCEP' (*State Council of the People's Republic of China,* 7 November 2019) <www.gov.cn/xinwen/2019-11/07/content_5449605.htm> accessed 27 December 2020.

Hela Schwarz GmbH v People's Republic of China,[9] an ongoing investor-State arbitration before the International Centre for Settlement of Investment Dispute (ICSID) between a German investor and China, may illustrate how domestic investor-State dispute settlement (ISDS) mechanisms link to international ISDS from the aspect of a foreign investor that has an investment dispute with a Chinese governmental authority. Although the result of arbitration is still pending, the factual records of the case are largely undisputed,[10] as briefed below based on the three prior judgments rendered by Chinese domestic courts and the procedural orders made by the ICSID tribunal:

- In 1996, Hela Schwarz GmbH ('Hela'), a German spice company, established a wholly owned subsidiary Jinan Hela Schwarz Food Co., Ltd ('JHSF') in Jinan City, Shandong Province of China.[11] In 2001, JHSF was granted a legal right to use a parcel of State-owned industrial land for 50 years and built buildings afterwards.[12]

- On 26 September 2013, JHSF was notified that the Jinan Government would expropriate the land as a part of an urban redevelopment project to improve environmental and living conditions (public facilities and affordable housing) along the river.[13] After one year of unsuccessful negotiation on the compensation plan, the Jinan Government made a Decision on Expropriation of Property on 11 September 2014.[14]

- In November 2014, JSHF launched an administrative review procedure before the Shandong Provincial Government against the Decision on Expropriation.[15] An

[9] *Hela Schwarz GmbH v People's Republic of China*, ICSID Case No ARB/17/19.
[10] *Hela Schwarz GmbH v People's Republic of China*, ICSID Case No ARB/17/19, Procedural Order No 2: Decision on the Claimant's Request for Provisional Measures (10 August 2018) para 97.
[11] ibid para 34.
[12] ibid para 35.
[13] ibid paras 36 and 106.
[14] *Hela Schwarz GmbH v People's Republic of China*, ICSID Case No ARB/17/19, Procedure Order No 5: Decision on the Parties' Requests for the Production of Documents (29 July 2019) Annex 1, 17.
[15] *Hela*, Procedural Order No 2 (n 10) para 37; *Jinan Hela Schwarz Food Co., Ltd v Jinan City People's Government*, (2016) LuXingZhong No 1491, Shandong Province High People's Court.

agreement was not reached during the mediation in the administrative review proceedings.[16] JSHF's application was rejected in the Administrative Review Decision dated 15 April 2016.[17]

- On 3 May 2016, JSHF filed an administrative litigation before the Jinan Intermediate People's Court against the legality of the Decision on Expropriation.[18] The claims were dismissed based on a document review by the court of the first instance on 19 July 2016.[19] JSHF appealed to the Shandong Province High People's Court against the decision of the first instance, but the appeal was dismissed by the court on 6 December 2016.[20]

- During the litigation, the Jinan Government issued the Decision on the Reimbursement of Expropriation of Property (the 'Decision on Reimbursement') on 29 August 2016, ordering JHSF to evacuate from the property within 20 days and claim the compensation of RMB 32,954,380 (about USD 5 million) within 10 days from the evacuation.[21] On 1 March 2017, an Exigent Notice was sent to JSHF for its non-performance of the Decision on Reimbursement,[22] requiring JSHF to collect its compensation and vacate the building.[23]

- JHSF did not launch administrative review proceedings or administrative litigation against the Decision on Reimbursement.[24] Instead, on 2 May 2017, Hela filed a Request for Arbitration with ICSID under the China–Germany BIT (2005), and the case was registered on 21 June 2017.

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[16] *Jinan Hela Schwarz Food Co., Ltd* (n 15).
[17] *Hela*, Procedural Order No 2 (n 10) para 37.
[18] *Jinan Hela Schwarz Food Co., Ltd v Jinan City People's Government*, (2016) Lu01XingChu No 296, Shandong Province Jinan City Intermediate People's Court.
[19] ibid; see also *Hela*, Procedural Order No 2 (n 10) para 38.
[20] *Jinan Hela Schwarz Food Co., Ltd* (n 15).
[21] *Jinan City People's Government v Jinan Hela Schwarz Food C*o., Ltd, (2017) Lu0112XingShen No 74, Shandong Province Jinan City Licheng District People's Court.
[22] ibid.
[23] *Hela*, Procedural Order No 2 (n 10) para 40.
[24] ibid.

- On 22 May 2017, the Jinan Government applied to the Licheng District People's Court for the compulsory administrative measure to enforce the Decision on Reimbursement. The hearing on the compulsory administrative measure was held on 5 June 2017 before the registration of the ICSID arbitration.[25] The Licheng District People's Court allowed the enforcement of the Decision on Compensation by compelling JHSF to evacuate from and hand over the property within 10 days on 12 June 2017.[26] However, the Jinan Government had not taken any enforcement actions in the following five months despite putting the compensation under the Decision of Reimbursement in escrow in November 2017.[27]

- On 4 December 2017, Hela submitted a Request for Provisional Measures to the ICSID five days after JHSF received a public announcement ordering it to evacuate its building within five days and indicating the building would be demolished otherwise.[28] The Jinan City People's Government began demolishing the building on 6 December 2017.[29]

- On 8 January 2018, the ICSID tribunal was constituted. However, as of the first arbitration session held on 1 February 2018, JHSF's premises had been fully evacuated, and the building had already been demolished.[30]

- The arbitration is still pending, and the formal hearing has been recently scheduled under Procedure Order No 6 issued by the tribunal on 5 September 2020.

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[25] *Hela* (n 9) 32.
[26] *Jinan City People's Government* (n 21).
[27] *Hela*, Procedure Order No 5 (n 14) para 44.
[28] *Hela* (n 9) para 13.
[29] ibid para 20.
[30] ibid para 50.

This case serves as a good example of what an investor and its local subsidiary can do under the current domestic and international ISDS systems over an investment dispute with the Chinese government. JHSF, a local company wholly owned by Hela, is regarded as an FIE under Chinese law capable of raising administrative review procedures and administrative litigation against an administrative act that is believed has infringed its legal rights under Administrative Review Law and Administrative Procedure Law of China. Hela is a company seated in Germany, which makes it a protected investor under article 1.2. (a) of the China–Germany BIT (2003). Neither JHSF nor Hela is permitted to submit the dispute to arbitration under Chinese domestic law. However, as a German investor, Hela is allowed to launch an ICISD arbitration when there is a dispute concerning its investment with China under the BIT that cannot be settled after a 6-month amicable negotiation and a 3-month administrative review procedure.[31]

Both Hela and JSHF have followed the ISDS procedures according to relevant domestic and international law by going through negotiation, administrative review proceedings, mediation, the first instance and second instance administrative litigation, and finally international arbitration. However, the dispute has remained unsettled for seven years. From the government's perspective, it arguably acted in line with legal procedures when expropriating foreign investments but has been dragged into years of different proceedings and is suffering accumulating losses on costs regardless of the tribunal's decision in the final award. In contrast, Hela, as the investor, and JSHF, as the invested company, have suffered even more significant losses, in particular as the ongoing arbitration proceedings could not prevent the premises from being demolished. Because the demolition took place before the constitution of the tribunal, and it is the only body with the power to order a provisional measure according to rule 39 of the ICSID Arbitration Rules. Of course, even if the demolition did not occur before the tribunal had

[31] Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments (signed 1 December 2003, entered into force 11 November 2005) (China–Germany BIT) art 9; Protocol, art 6.

the chance to grant the provisional measure, whether and how this decision could be enforced in China is another a question.

At the end of September 2020, when the thesis was finalising, there were only six international arbitration cases on record against China, three of which were registered within the last two years. The small number of cases is disproportionate to the scale of foreign investment in China. Why do foreign investors seem reluctant to choose international arbitration? Is it because most disputes have been settled in the prior proceedings under domestic law or international law? If yes, why do these proceedings perform better than treaty arbitration? If not, why cannot the current system effectively solve investor-State disputes? Is there anything wrong with each dispute mechanism under domestic law or international law? Can these mechanisms provide enough protection of foreign investors' legitimate rights? If not, in the context of China, what is a more reliable solution for the benefit of foreign investors when facing investment disputes?

Some China-based permanent arbitration centres, particularly the China International Economic and Trade Arbitration Commission (CIETAC) and Beijing Arbitration Commission (BAC), have provided their answers to the final question by formulating new investment arbitration rules. The new arbitration rules are designed to tackle the concerns of investors and state parties in the current ISDS system by incorporating some innovative provisions, such as an appeal phase, expedited arbitration and a combination of mediation into arbitration. Will these new arbitration rules function as expected? If not, how should parties take advantage of these new rules in settling investor-State disputes in the future? More importantly, what is the suggestion for the reform of the ISDS system in China?

This thesis aims to answer the above questions by virtue of a comprehensive examination of current national and international laws and practices of ISDS mechanisms available to foreign investors when encountering disputes with the Chinese government. Reviews on

Chinese domestic administrative dispute settlement mechanisms from the aspect of investment disputes are rarely seen in either Chinese or English literature, primarily due to that major governing laws and policies are newly promulgated or substantively revised. After a further review on the innovation and feasibility of new investment arbitration rules proposed by Chinese arbitration centres under the current arbitration legal framework of China, and taking into consideration of Chinese legislative and treaty practices, the thesis presents original solutions for the reform of the ISDS system of China from both aspects of national and international law. The author puts forward several opinions on the coming revision of Chinese Arbitration Law, in particular, that the restriction on administrative arbitration should be lifted so as to enable foreign investors as well as their domestic entities to seek reliefs before domestic arbitration tribunals. Furthermore, the author suggests that China may nominate one China-based arbitration centre as one of the fora for the settlement of investment disputes, particularly in the treaties where China has more bargaining power over other treaty parties.

Methodology

This thesis takes a combination of research methodologies. The main methodology employed is a black-letter methodology analysing legal rules found in primary sources. Major primary sources used in this thesis include international treaties, national and regional statutes and statutory instruments of China, arbitration rules of different arbitration centres, and a wide range of official documents, such as reports, working papers, white papers, preparatory documents and drafts of legislation released by international organisations, governments and arbitration centres. Typical domestic and international cases, though they do not serve as precedents under Chinese law or international law, are referenced for a better understanding of the application of the law. Secondary resources, including books, journals and commentaries, serve minor roles in the thesis mostly for clues and background information. Research on those primary and secondary sources has been undertaken either in the library or online using reputable

legal databases and official websites of government agencies and international organisations.

In addition to the doctrinal methodology conducted throughout the thesis, other research methods are used in some chapters depending on the topic. When analysing the performance of domestic and international dispute resolution mechanisms in Chapters 2 and 4, qualitative and quantitative research methods are used to look at the impact of the law in action and legal proceedings. Based on the official data, this approach facilitates an understanding of the performance of different dispute resolution mechanisms for foreign investment disputes and how the laws impact the parties involved.

In Chapter 5, a comparative analysis approach is adopted to show the features of the new investment arbitration rules and mediation rules promulgated by China-based permanent arbitration centres by comparing them with rules from other international arbitration centres or organisations. This comparative analysis approach is also used in other chapters to show the reform and developments of the Chinese domestic and international foreign investment legal framework and dispute resolution mechanisms by comparing the old and new laws.

Outline

This thesis consists of six chapters. Chapter 1 introduces the evolution of the Chinese foreign investment legal framework. In 2019, the new Foreign Investment Law was promulgated, replacing the old foreign investment legal system enacted over the past 40 years. After an overview of the domestic legal regime on foreign investment from the Constitution down to the regulatory documents, this chapter then provides definitions of foreign investors and foreign investments under domestic law. Protective treatments of foreign investment under the current legal system are also covered.

Chapter 2 discusses three major dispute resolution mechanisms of investment disputes for foreign investors and their domestic invested enterprises under article 25 of the Foreign Investment Law: the complaint mechanism for FIEs, administrative review and administrative litigation. These domestic mechanisms also serve as integral parts of investor-state dispute resolution under Chinese international investment agreements (IIAs). All three mechanisms existed prior to the Foreign Investment Law, but their laws and regulations have been modified in recent years. Issues covered in this chapter include the competence of disputing parties, subject of disputes, procedures, consequences, and advantages and disadvantages of each mechanism as they relate to foreign investment disputes. It is concluded that although domestic proceedings benefit investors and their invested enterprises in multiple ways, all of them may be prone to external influences from the administration.

Chapter 3 first provides an overview of Chinese IIAs, focusing on those concluded around or after the formulation of the latest Chinese Model BIT in 2010. Restrictions on the ISDS system have gradually loosened since the first Chinese BIT concluded with Sweden in 1982. Recent IIAs further allow foreign investors to submit any disputes arising from the treaty to any international arbitration forum other than the ICSID and ad hoc tribunals, subject to certain prerequisites. Developments and features of the ISDS clauses under the Chinese investment treaties are illustrated with specific treaty provisions.

Chapter 4 begins with a summary and criticism of recorded cases where China acts as either a host state or a home state. The chapter's main content lies in the concerns of investors and host states on the current ISDS system, particularly international investment arbitration. Issues including the inconsistency and incoherence of awards, lack of correction system, doubts as to the arbitrator's professionalism and independence, long duration and high costs are discussed in combination with cases and statistics specific to China.

Chapter 5 first gives an overview of the Chinese arbitration system with respect to foreign disputes. The chapter then discusses the new investment arbitration rules promulgated by the three China-based arbitration centres, including the CIETAC and BAC. It also addresses how these rules tackle significant concerns of the current ISDS system compared with other investment arbitration rules. Not only foreign investors but also FIEs may take advantage of the new arbitration rules. The last section examines the challenges of implementing investment arbitration rules, including contradictory rules to current law system and doubts about the impartiality of the permanent arbitration centres. It suggests that conditions for implementing these arbitration rules are not met at this stage.

Finally, Chapter 6 summarises and concludes the thesis. It also provides recommendations for the future reform of the ISDS under both Chinese domestic law and international law. Among others, this chapter recommends modifying the Arbitration Law, reform of the China-based permanent arbitration centres that are eager to enter the market of investment arbitration and approaches taken by the Chinese government in promoting these arbitration centres in future treaty negotiations.

The jurisdiction of Mainland China is distinct from those of the Hong Kong Special Administrative Region, Macau Special Administrative Region and Taiwan Province of China. For this thesis and unless otherwise specified, China is only referred to as the People's Republic of China (PRC). The Chinese legal system and Chinese law mentioned are only referred to as those of Mainland China.

Chapter 1: Chinese Domestic Legal Regime on Foreign Investment

A. Introduction

1.1 It is a principle that international law supersedes any domestic law, and a state cannot invoke provisions of its domestic law as justification for its failure to perform an investment treaty.[1] Foreign investors may rely on international investment agreements (IIAs) concluded between their home countries and China for a stable and secure investment environment when they invest in China. However, as pointed out by Professor Vaughan Lowe, bilateral investment treaties (BITs) and other international treaties are not the only reinsurances for foreign investors.[2] According to a survey of senior executives of multinational corporations in 2014, national laws protecting investors' rights, security and property are arguably a more important impact factor than international investment treaties for foreign investors when making investment decisions.[3] Indeed, although many investors believe that BITs between their home states and the host state are essential for them to consider investing in a particular region, they still invest even when no BITs are present.[4] This is particularly true in the case of China and the US. Despite not reaching a BIT after decades of negotiation, the US is one of the top investors to China.[5]

1.2 National law plays a significant role in the business behaviour of foreign investors. Even for a foreign investor from a home country that has an IIA with China, if a particular issue is not regulated under the IIA or in the investment contract between the investor and the Chinese government, then the foreign investor may have to look

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[1] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 27; see also General Principles of the Civil Law of the People's Republic of China (2009 Amendment) (General Principles of the Civil Law (2009)) art 142 (2).
[2] Vaughan Lowe, 'Changing Dimensions of International Investment Law' Oxford Legal Studies Research Paper 4/2007 <https://ssrn.com/abstract=970727> accessed 24 December 2020.
[3] Julianne Hughes-Jennett and others, *Risk and Return – Foreign Direct Investment and the Rule of Law* (Hogan Lovells 2015) 41. This survey was conducted by The Economist Intelligence Unit on behalf of Hogan Lovells, the Bingham Centre for the Rule of Law, and the Investment Treaty Forum of the British Institute of International and Comparative Law in 2014.
[4] ibid 47.
[5] Ministry of Commerce of the People's Republic of China, *Statistical Bulletin of FDI in China (2020)* (2020) 6.

into Chinese domestic laws and regulations to determine whether the investor is entitled to do so. In other words, foreign investors shall conduct business in accordance with Chinese law, if domestic laws and regulations of China do not breach Chinese treaty commitments under international law or duties under contracts.

1.3 Furthermore, Chinese domestic law is the applicable law for a significant portion of investment contracts in China. For example, in terms of contracts for Chinese–foreign equity joint ventures (EJV),[6] Chinese–foreign contractual joint ventures (CJVs),[7] or Chinese–foreign joint exploration and development of natural resources, Chinese law shall be applied as long as these contracts are performed within the territory of Mainland China.[8] For other investment contracts, Chinese law can also be chosen as the applicable law by parties' consent.[9]

1.4 When a foreign investor invests in an enterprise registered in China, this enterprise is not regulated under a Chinese BIT, no matter if a foreign investor wholly or partially owns it. China has used the place of incorporation or registration to determine the nationality of an enterprise since its first BIT with Sweden,[10] and this principle is reflected in its model BITs.[11] Article 1.1 of the latest draft version of China's Model BIT drafted by its Ministry of Commerce of China (MOC) in 2010 (the 'Chinese Model BIT (2010)') says:

> The term 'investor' means a national or an enterprise of one Contracting Party who is investing or has invested in the territory of the other Contracting Party:
> …

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[6] See below paras 1.21–1.23.
[7] See below paras 1.26–1.28.
[8] Contract Law of the People's Republic of China (1999) (Contract Law (1999)) art 126.2.
[9] Law on Choice of Law for Foreign-Related Civil Relationships of the People's Republic of China (2010) (Law on Choice of Law (2010)) art 3.
[10] Agreement Between the Government of the People's Republic of China and the Government of the Kingdom of Sweden on the Mutual Protection of Investments (signed 29 March 1982, entered into force 29 March 1982) (China–Sweden BIT (1982)) art 1(2).
[11] Chinese Model BIT Version I art 1.2(b); Chinese Model BIT Version II art 1.2(b); Chinese Model BIT Version III art 1.2(b). Chinese Model BIT Versions I–III are extracted from Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 421–437.

(b) the term 'enterprise' means any entity, including companies, firms, associations, partnerships and other organisations, *incorporated or constituted under the laws and regulations of either Contracting Party and that have their seat and substantial business activities in that Contracting Party, irrespective of whether it is owned or controlled by a private person or the government.*[12]

1.5 Under the Chinese domestic legal system, an enterprise incorporated in China that is wholly or partially invested by a foreign investor is called a foreign-invested enterprise (FIE)[13] and is subject to Chinese domestic law. Chinese foreign investment policies cover both foreign investors and their invested enterprises, but some treatments are only provided to FIEs or foreign investors. For example, according to the new Foreign Investment Law, it is FIEs – and not foreign investors – that can equally enjoy policies supporting the development of enterprises.[14] However, the treatments relating to expropriation and free transfer are provided to foreign investors.[15]

1.6 As discussed in Chapter 2, both foreign investors and their invested enterprises in China may submit their investment disputes against the Chinese government to the three domestic foreign investment dispute mechanisms under the Chinese domestic law: the Complaint Mechanisms for Foreign-Invested Enterprises,[16] administrative review[17] and administrative litigation.[18] These mechanisms also serve as part of the dispute resolution process under most Chinese IIAs. The application of law during these domestic proceedings in the context of investment disputes basically depends on the nationality of parties. When an administrative proceeding is launched by a foreign investor in its own name or jointly with its domestic-invested enterprise, the

[12] Emphasis added. The Chinese Model BIT (2010) is extracted from Xiantao Wen, 'Comments on the Draft of China's Model BIT (I)' (2011) 18 Journal of International Economic Law 169.
[13] Foreign Investment Law of the People's Republic of China (2019) (Foreign Investment Law (2019)) art 2.3.
[14] ibid art 9.
[15] ibid arts 20 and 21.
[16] See Chapter 2 Section B.
[17] See Chapter 2 Section C.
[18] See Chapter 2 Section D.

dispute is foreign-related, and the relevant international treaties will be applied.[19] If there is no applicable international law, for example, in cases between China and a US investor (as a China–US BIT does not exist), domestic foreign investment laws will apply if there is no investment contract between the parties. When an administrative proceeding is launched by a FIE only, domestic law applies because the enterprise is a domestic enterprise regardless of where its investment comes from.

1.7 However, even in cases where international law can be applied, Chinese national courts still seem to be stick to national laws. When searching for 'investment treaty' or 'investment agreement' in China Judgements Online (a unified platform to publish judgments across the nation set up by the Supreme People's Court (SPC) in 2013)[20] and Pkulaw (the most widely used Chinese law search engine),[21] only two administrative cases citing international investment agreements were found. In both cases, although the claimant foreign investors invoked investment treaties as legal grounds for their claims, the courts hardly addressed them in the judgments.

1.8 In *Pioneer International Holding PTY Ltd v the Mineral Resources Administrative Office of Guangzhou City in Guangdong Province*, two mining sites owned by two local CJVs collectively set up by local parties and Pioneer, an Australian company, were forced to close upon a notice issued by the Guangzhou City government. As disputes on natural resources must undergo administrative review proceedings before administrative litigation, the two CJVs applied for administrative review of the closure decision, but the applications were dismissed. Pioneer and the two CJVs launched administrative litigation against the local administration before the High Court of Guangdong Province requesting compensation of more than RMB 120 million. The High Court upheld the legality of the closing notice and dismissed the

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19 Administrative Procedure Law of the People's Republic of China (2017 Amendment) (Administrative Procedure Law (2017)) art 101; Civil Procedure Law of the People's Republic of China (2017 Amendment) (Civil Procedure Law (2017)) art 260.

20 See 'China Judgements Online' <https://wenshu.court.gov.cn> accessed 29 December 2020.

21 See 'Pkulaw' <www.pkulaw.com> accessed 29 December 2020.

compensation claims because the compensation for the mandatory closure of mining sites was beyond the jurisdiction of the court because the administrative agency had not decided the amount of compensation.[22] Pioneer then appealed to the SPC arguing that, among other things, compensation should not be delayed according to the China–Australia BIT. The SPC affirmed the High Court solely based on national law without touching the BIT. However, the court did suggest Pioneer was entitled to compensation that needed to be settled with the relevant administrative agency first. If no settlement could be reached, then Pioneer could launch a new proceeding on the amount of compensation.[23]

1.9 In *Illva Saronno Holding SPA v the State Tax Bureau of Zhifu District, Yantai City of Shandong Province*, Italian company Illva Saronno acquired 33% of shares of Changyu, a famous Chinese wine group, via transactions involving one of Illva Saronno's subsidiary in Italy. The transactions between the two Italian companies incurred additional taxation of RMB 46 million (nearly 1/10 of the acquisition price) for Illva Saronno according to a notice on taxation sent by the defendant. Illva Saronno paid the tax but launched an administrative review against the taxation notice. The review request was dismissed. Illva Saronno then filed an administrative litigation requesting a refund of the tax and invoked, among other things, the taxation agreement between China and Italy, the most-favoured-nation treatment clause under the China–Italy BIT and the national treatment clause under the China–Finland BIT. The court dismissed the claims without looking into the invoked international treaties.[24] Similarly, the court of appeal dismissed the appeal primarily based on national law and in a sentence stated that the taxation notice did not violate rules under the invoked three treaties.[25]

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[22] *Pioneer International Holding PTY Ltd v the Mineral Resources Administrative Office of Guangzhou City in Guangdong Province*, (2001) YueGaoFaXingChuZi No 1, Guangdong Province High Court.
[23] *Pioneer International Holding PTY Ltd v the Mineral Resources Administrative Office of Guangzhou City in Guangdong Province*, (2001) XingZhongZi No 15, Supreme People's Court.
[24] *Illva Saronno Holding SPA v the State Tax Bureau of Zhifu District, Yantai City of Shandong Province*, (2015) ZhiXingChuZi No 16, Shandong Province Yantai City Zhifu District People's Court.
[25] *Illva Saronno Holding SPA v the State Tax Bureau of Zhifu District, Yantai City of Shandong Province*, (2016) Lu06XingZhong No 324, Shandong Province Yantai City Intermediate People's Court.

1.10 Finally, Chinese domestic law may serve as the applicable law to an investor-State dispute when China is a host State in accordance with the relevant investment treaties. As article 13.6 of the Chinese Model BIT (2010) stipulates:

> The tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the disputing parties. In the absence of such agreement, *the tribunal shall apply the law of the Contracting Party to the dispute (including its rules on the conflict of laws)*, and such rules of international law as may be applicable, in particular, this Agreement.[26]

1.11 Similar regulation can be seen in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. When an agreement on the applicable law is absent, an arbitration tribunal or national court can decide an investment dispute under Chinese law if China is the host of the investment.[27]

1.12 This chapter will present an overview of Chinese domestic policies relating to foreign investment. It will begin with an introduction to the Chinese domestic legal framework of foreign investment, followed by the determination criteria of foreign investors and foreign investment under Chinese domestic law. Finally, major treatments on foreign investment under the new Foreign Investment Law will be summarised.

B. Chinese domestic legal regime on foreign investment

1.13 China's opening-up legislation started and developed from foreign investment legislation.[28] The first foreign investment law of China published in July 1979 – the Law on Chinese–Foreign Equity Joint Venture – signified and implemented China's

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[26] Emphasis added.
[27] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 42 (1).
[28] Chen Wang, *Note on the 'Foreign Investment Law of the People's Republic of China (Draft)'* (National People's Congress of the People's Republic of China (NPC), 8 March 2019) s 1.2.

opening the door to foreign investment. Since then, the Chinese government has gradually constituted a legal system for foreign investment in China.[29] In 1986 and 1988, China promulgated the Law on Wholly Foreign-Owned Enterprise and Law on Chinese–Foreign Cooperative Joint Venture, respectively. These three laws (collectively, the 'Three Foreign Investment Laws') and a large number of implementing and supporting laws and regulations at national and local levels created a good legal environment for the development of FIEs in China over the past 40 years.

1.14 After joining the World Trade Organization (WTO) in 2001, China amended the Three Foreign Investment Laws to satisfy its duties under the WTO by abolishing some mandatory burdens imposed on FIEs, such as duties to purchase locally,[30] achieve foreign exchange balance and fulfil export targets.[31] Since 2013, China began to set up pilot Free Trade Zones (FTZs) across the state, where the entry of FIEs would no longer need to be approved in advance if the investment was made in a field for which foreign investments were not precluded or restricted, namely fields outside the negative list.[32] This practice was extended to the rest of the state in 2016 via major amendments to the Three Foreign Investment Laws. Simultaneously, China launched the legislative project of a unified foreign investment law to replace the Three Foreign Investment Laws at the end of 2015. Finally, the formal Foreign Investment Law of China was passed in March 2019 and went into force on 1 January 2020.

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[29] Ministry of Commerce of People's Republic of China, 'The Legal System for Foreign Investment' (*Invest in China,* November 2020) <www.fdi.gov.cn/EN/come-newzonghe.html?parentId=125&name=The%20Legal%20System%20for%20Foreign%20Investment&comeID=3 > accessed 29 December 2020.

[30] For example, see article 9.2 of the Law on Chinese–Foreign Equity Joint Ventures (1990 Amendment) states that 'raw materials, fuels, supporting parts and others required by the joint venture shall be purchased in China as much as possible, or the joint venture may raise foreign currency by itself and purchase it directly on the international market'. The restriction was removed in the 2000 amendment. See also Law on Chinese–Foreign Equity Joint Ventures of the People's Republic of China (2016 Amendment) (Law on EJVs (2016)) art 10.1.

[31] For example, the Regulation on Balance of Foreign Exchange Income and Expenditure by Chinese–Foreign Joint Equity Ventures (GuoFa [1986] No 6) were adopted in 1986. Article 2, as the general principle of the regulations, requires Chinese–foreign joint ventures to export more products and earn more foreign exchange to achieve a balanced foreign exchange balance. This regulation was annulled in 2001 by section 53 of the Decision of the State Council Concerning the Annulment of Several Administrative Regulations Promulgated by the End of 2000 (2001), Order No 319 of the State Council of the People's Republic of China.

[32] Special Administrative Measures for Foreign Investment Access in China (Shanghai) Pilot Free Trade Zone (Negative List) (2013), HuFuFa [2013] No 75.

1.15 In this section, the main laws and regulations involving foreign investment will be discussed in detail according to the order of legal effect. Tax policies and financial policies are beyond the scope of this thesis.

The Constitution

1.16 The Constitution of the PRC has the highest legal status overriding any laws, regulations and government orders.[33] It provides fundamental principles for a particular legal regime, and it grants foreign investors constitutional rights to invest in China and commits protections for foreign investors and investments. The most important article, among others, is article 18:

> The People's Republic of China permits foreign enterprises, other foreign economic organisations, and individual foreigners to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organisations in accordance with the law of the People's Republic of China.
>
> All foreign enterprises, other foreign economic organisations as well as Chinese–Foreign joint ventures within Chinese territory shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.

1.17 This clause was first incorporated in the most recent version of the Constitution enacted in 1982. It remained unchanged in the five subsequent constitutional amendments in 1988, 1993, 1999, 2004 and 2018. It serves as a stable legal ground for all the other laws and regulations governing foreign investments in China.

[33] Law on Legislation of the People's Republic of China (2015 Amendment) (Law on Legislation (2015)) art 78.

General national laws related to foreign investment

1.18 General national laws under the heading of 'General Principles of the Civil Law' and a newly promulgated 'General Rules of the Civil Law' are on the second level of the hierarchy of Chinese legal system.[34] From the perspective of foreign investments, the two sets of laws provide the basic definitions, rights and liabilities of a natural person, a legal person, other entities as well as general rules of applicable laws of foreign-related matters.[35] Other relevant general national laws include the Civil Procedure Law,[36] Partnership Enterprise Law[37] and, most importantly, the Company Law.[38]

1.19 The Company Law provides general rules for all companies registered in Mainland China, including limited companies and joint-stock companies with foreign investors.[39] However, as the Company Law is not tailored for foreign investors and investment, it leaves significant blanks and even contradictions in legal practices. In this case, as a supplementary rule of application of law, when a provision of the Company Law differs from any other provisions of any law related to foreign investment, the latter will prevail.[40]

Three Foreign Investment Laws

1.20 Historically, when introducing laws regarding the subject of foreign investment in Mainland China, it usually referred to three specialised pieces of legislation

[34] The Civil Code of China was finally published on 28 May 2020 and will be in force on 1 January 2021. For evolution of the civil law in China, see Hanbin Wang, *Explanation Regarding the Draft of the General Civil Principles of People's Republic of China* (NPC, 2 April 1986); Yi Sun, 'Chinese Civil Code Is Ready to Come Out' (*The State Council Information Office of the People's Republic of China,* 2016) <www.scio.gov.cn/zhzc/8/4/Document/1482020/1482020.htm> accessed 28 February 2017; NPC, *Explanation of the General Rules of the Civil Law of the People's Republic of China* (2017).

[35] General Principles of the Civil Law (2009) (n 1) arts 9, 36 and 37; General Rules of the Civil Law (2017) (n 34) arts 13, 57 and 58.

[36] The current version is Civil Procedure Law (2017), based on the 1991 version and 2007 and 2012 amendments. The first Civil Procedure Law was introduced in 1982 and expired in 1991.

[37] The current version is Partnership Enterprise Law of the People's Republic of China (2006 Revision), first promulgated in 1997.

[38] The current version is Company Law of the People's Republic of China (2018 Amendment) (Company Law (2018)), first promulgated in 1993 and amended or revised in 1999, 2004, 2005, 2013 and 2018.

[39] ibid arts 2 and 217.1.

[40] ibid art 217.2; see also Law on Legislation (2015) (n 33) art 83.

concerning three major forms of foreign investments,[41] collectively known as the Three Foreign Investment Laws. Although the Three Foreign Investment Laws were replaced by the Foreign Investment Law on 1 January 2020, the original structures of enterprises set up under the three laws may be kept for another 5 years after the implementation of the new law.[42] Therefore, for the thesis, the Three Foreign Investment Laws still needs to be discussed, in particular on issues on the forms of investment.

a. Law on Chinese–Foreign Equity Joint Ventures

1.21 The Law on Chinese–Foreign Equity Joint Ventures (the 'Law on EJVs') was the first national law on foreign investment promulgated in 1979 and amended in 1990, 2001 and 2016. By definition, under this law, an EJV is a limited liability company jointly established by one (or more) foreign party and one (or more) Chinese party in the territory of China.[43] An EJV should be able to promote economic development and improve science and technology in China.[44] Any EJV that is inconsistent with the requirement of Chinese economic development or lead to environmental pollution will not be permitted.[45]

1.22 A capable foreign party of the EJV may be a foreign company, enterprise, other economic organisation or a foreign individual.[46] However, a Chinese individual could not be a Chinese party of the EJV,[47] which means foreign investors are only able to cooperate with Chinese companies, enterprises or other economic organisations to form EJVs.

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41 Information Office of the State Council of the People's Republic of China, *White Paper on the Socialist System of Laws with Chinese Characteristics* (2011) s 2.
42 Foreign Investment Law (2019) (n 13) art 42.
43 Law on EJVs (2016) (n 30) arts 1 and 4.1; see also Provision for Implementation of the Law on Chinese–Foreign Equity Joint Ventures of the People Republic of China (2014 Revision)(2014), Order No 709 of the State Council of the People's Republic of China (Provision for EJVs (2014)) art 16.1.
44 Provision for EJVs (2014) (n 43) art 3.1.
45 ibid arts 4.3 and 4.4.
46 Law on EJVs (2016) (n 30) art 1.
47 ibid.

1.23 All parties of the EJV share profits, risks and losses in proportion to their contributions to the registered capital of the EJV.[48] Usually, the proportion of foreign parties should not be less than 25% of the total registered capital.[49] Contributions made to the EJVs can be currencies and other tangible or intangible assets, including goods, equipment, industrial properties rights, know-how and land use rights.[50] However, foreign investors should be responsible for the nature of technologies or equipment that are used as investments in the EJVs: they must be advanced technologies or equipment satisfying the need of China, or otherwise malicious foreign investors should indemnify for damages if any.[51]

b. Law on Wholly Foreign-Owned Enterprises

1.24 The Law on Wholly Foreign-Owned Enterprises (the 'Law on WFOEs') was first enacted in 1986 and amended in 2000 and 2016. A wholly foreign-owned enterprise (WFOE) is an enterprise established by foreign investors exclusively with their own capital within the territory of China.[52] Usually, a WFOE is registered as a limited liability company, but it is also allowed to be in other forms of enterprises.[53] However, branch offices of foreign enterprises or other economic organisations are not regarded as WFOEs because a WFOE must have independent accounting and set up account books in China,[54] supervised by Chinese tax authorities as required.[55] As a WFOE is registered in China, it has Chinese nationality, though it is not necessarily a legal person.[56]

1.25 A WFOE is the main type of FIEs in China.[57] Since October 2016, establishing a WFOE

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48 ibid art 4.3.
49 ibid art 4.2.
50 ibid art 5.1.
51 ibid art 5.2.
52 Law on Wholly Foreign-Owned Enterprises of the People's Republic of China (2016 Amendment) (Law on WFOEs (2016)) art 2.
53 Detailed Rules for Implementation of the Law on Chinese-Foreign Equity Joint Ventures of the People's Republic of China (2014 Revision) (2014), Order No 648 of the State Council of the People's Republic of China (Detailed Rules for WFOEs (2014)) art 18.1.
54 Law on WFOEs (2016) (n 52) art 2.2.
55 ibid art 14.
56 ibid art 8.
57 Ministry of Commerce, *Report on Foreign Investment in China 2019* (2019) 61.

is no longer subject to prior approvals from Chinese authorities as long as it does not enter certain special business sectors.[58] However, there are still restrictions on the market access for a WFOE in general: it cannot injure China's sovereignty or public interests, endanger China's national security, violate Chinese laws or regulations, be inconsistent with the requirements of China's national economic development or result in environmental pollution.[59]

c. Law on Chinese–Foreign Contractual Joint Venture

1.26 The last legislation of the Three Foreign Investment Laws is the Law on Chinese–Foreign Contractual Joint Venture, published in 1988 and amended in 2000, 2016 and 2017. As the least popular form of FIE in China,[60] a CJV is a contract-based enterprise jointly set up by one or more foreign investors and at least one Chinese party, which cannot be a Chinese individual person, in the territory of China.[61] The cooperation contract is the key to a CJV, which includes conditions for investments and cooperation, distributions of profits or products, shares of risks and losses, and management and property rights after termination of the CJV.[62] The main difference between CJVs and EJVs is that parties to CJVs have more freedom on profit distributions.[63] The sharing of profits and losses in a CJV is based on the cooperation contract of the CJV, which is not necessarily in line with proportions of shares or investments of each party.[64] Contributions made by parties to a CJV, mainly in the form of currencies, materials, right of use of land, industrial property rights, non-patent technologies and other cooperation terms,[65] are appraised but not necessarily converted into shares of the CJV.[66] In contrast, contributions, whether

[58] Decision of the Standing Committee of the NPC on the Amendment of Four Laws including the Law on Wholly Foreign-Owned Enterprises of the People's Republic of China (2016) (Decision on the Amendment of Four Investment Laws) art 1.
[59] Detailed Rules for WFOEs (2014) (n 53) art 5.
[60] *Report on Foreign Investment in China 2019* (n 57) 61.
[61] Law on CJVs (2017) (n 58) art 1.
[62] ibid art 2.
[63] Detailed Rules for Implementation of the Law on Chinese–Foreign Contractual Joint Ventures of the People's Republic of China (2014 Revision) (2014), Order No 648 of the State Council of the People's Republic of China (Detailed Rules for CJVs (2014)) art 43.
[64] Law on CJVs (2017) (n 58) art 21.1.
[65] ibid art 8.
[66] ibid art 2.

tangible or intangible assets, made by the parties of an EJV should be appraised and converted into currencies so that shares of the EJV owned by each party are allocated proportionally, and profits and losses are shared based on the investment proportions as well.[67]

1.27 Furthermore, foreign parties to CJVs are allowed to recover their investments within the period of cooperation under certain circumstances subject to approvals from financial departments at the provincial level.[68] This rule is considered the most significant feature of CJVs.[69] There are five conditions for advance capital recovery. First, both foreign and domestic parties consent in the cooperation contract that fixed assets will belong to domestic parties upon the expiration of the CJV. Second, the CJV should guarantee that the payment of debts takes precedence to the advance recovery of investment. Third, the foreign investor should guarantee that it will be jointly and severally liable for the debts of the CJV to the extent of the recovered investment. Fourth, both foreign and domestic parties have fully contributed their investments to the CJV as agreed in the cooperation contract. Fifth, the CJV should be in sound status without any uncovered deficits.[70] On a practical level, the methods for arranging the recovery of foreign investments include increasing a foreign investor's distribution proportion of earnings after tax, allowing the recovery of foreign investments before the corporation income tax and designing a special distribution of profits.[71] Financially, a foreign investor can realise advance investment recovery through the depreciation of fixed assets, amortisation of intangible assets and CJV profits.[72]

1.28 In addition, another significant difference between a CJV and an EJV is the legal status

[67] Law on EJVs (2016) (n 30) art 5.4; Law on CJVs (2017) (n 58) art 4.3.
[68] Measures for Examination and Approval of Advance Recovery of Investments by Foreign Partners of Chinese and Foreign Cooperative Joint Ventures (2008), CaiQi [2008] No 159, art 5; see also Law on CJVs (2017) (n 58) art 21.2.
[69] Chongli Xu, 'A New Perspectives on the Legal Nature of the Foreign Party's Recovering Its Investment in Chinese–Foreign Contractual Joint Ventures Ahead of Time' (2004) 26 Modern Law Science 76.
[70] Measures for Examination and Approval of Advance Recovery of Investments (n 68) art 4.
[71] Detailed Rules for CJVs (2014) (n 63) art 44.
[72] Measures for Examination and Approval of Advance Recovery of Investments (n 68) arts 1 and 3; Law on CJVs (2017) (n 58) art 21.

of the enterprise. CJVs are not necessarily legal persons.[73] Those CJVs that meet all conditions of legal persons[74] are registered as limited liability companies; if not, they are generally regarded as partnership enterprises in practice.[75] In contrast, EJVs are always registered as legal persons,[76] usually in the form of limited liability companies.[77]

The new Foreign Investment Law (2019)

1.29 Since the end of 1970s, the Three Foreign Investment Laws and their supplementary rules have comprised the main body of the legal regime of foreign investment in Mainland China – until recently. The majority of foreign-invested entities registered in China, depending on their formation, were governed by these three sets of foreign investment law. Nevertheless, despite continuous improvements over the last 40 years, the system faced growing criticisms primarily about the entry approval examination for every single investment and ultra-national treatment for foreign investment after entry.[78] In addition, as illustrated later, this domestic law system lacked clear definitions for foreign investors and foreign investments, leading to a vague distinction between foreign investment and domestic investment in some cases.[79] Thus, the central government officially launched a complete review of the Three Foreign Investment Laws in 2014.[80] According to the legislature, the unified

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[73] Law on CJVs (2017) (n 58) art 2.2.

[74] According to article 37 of the General Principles of the Civil Law (2009) (n 1), there are four criteria to be considered a legal person in Mainland China: (1) it should be legally established; (2) it should have necessary assets or funds; (3) it should have its own name, organisation and premise(s); and (4) it can independently bear civil liabilities.

[75] According to article 4.1 of the Detailed Rules for CJVs (2014) (n 63), CJVs include those who have legally obtained Chinese legal person status and those who have not obtained such status. See also Xiaohong Zhao, 'Legal Thought on the Forms of Organisation of Foreign-Invested Enterprises in China' (1997) 1 Law Science 44.

[76] Provision for EJVs (2014) (n 43) art 1.

[77] Law on EJVs (2016) (n 30) art 4.1.

[78] Ministry of Commerce, *Record of Press Conference held by the Minister of Commerce Mr Gao Hucheng (Press Conference of the 3rd session of 12th NPC)* (Ministry of Commerce 2015) <www.mofcom.gov.cn/fangtan/bzat/150310.shtml> accessed 25 December 2020.

[79] NPC, *Report of the Economic Commission of the National People's Congress on the Result of Review of the Bills Submitted by the Delegates and Allocated by the Presidium of the Second Meeting of the 12th National People's Congress* (2014) annex, para 1.4.

[80] NSPC, 'The Legislation Plan of the Standing Committee of the 12th National People's Congress' (2013) People's Congress of China 14

Foreign Investment Law is designed as the basic law focusing on the establishment of a basic institutional framework and rules in the aspects of market access, promotion, protection and management of foreign investment in China.[81] Meanwhile, the new framework shall conform to China's basic national reality as well as international rules and practices.[82]

1.30 The legislative process of the unified Foreign Investment Law was expected to be completed in a year or two. However, the unified Foreign Investment Law was finally promulgated in 2019 and taken into force in 2020. The first published draft of the law was released by the MOC on 19 January 2015 (the 'Draft for Public Advice'). It was kept on the shelf until 23 December 2018, when a completely new draft (the 'Draft for the First Review') was ready to be discussed by the National People's Standing Congress (NPSC). The legislative process was significantly accelerated. Based on the comments of the NPSC on the Draft for the First Review, a new discussion draft was submitted to the NPSC on 29 January 2019 (the 'Draft for the Second Review'). A final draft was presented to the coming National People's Congress (NPC) Meeting on 8 March 2019 (the 'Draft for the NPC'). The formal Foreign Investment Law was then passed by the NPC on 15 March 2019.

1.31 Comparing these drafts and the final version, the most significant change occurred in the revision of the Draft for Public Advice in 2015, after which the numbers of articles dramatically shrank from 170 to 39 in the Draft for the First Review in 2018. Apart from other changes, detailed provisions regarding the national security review and foreign investors' information report duty were concentrated in general provisions, letting the practical issues be discussed in the future accompanied regulations. Furthermore, some treatments for foreign investors and investment commonly seen in the international treaties, such as the national treatment and transparency rules, have been clarified and emphasised since the Draft for the First Review. Significant

[81] Wang (n 28) s 2.2.
[82] ibid s 2.3.

progress was made on the protection of intellectual properties and prohibition of administrative mandatory technology transfer, which had been of increasing concerns to foreign investors in China.

1.32 The final Foreign Investment Law (2019) consists of six chapters on general provisions, investment promotion, investment protection, investment management, legal liabilities and supplementary provisions. Detailed features of the foreign investment law regime in China based on the new law and its auxiliary regulations will be discussed later in this chapter.

Important national regulations on foreign investment

1.33 Regulations promulgated by the State Council, namely the central government of China,[83] serves as a supplementary to the national law.[84] Most of the detailed rules on implementations of foreign investment law are incorporated into types of regulations promulgated by the State Council or its affiliated ministries and departments.[85] The most relevant regulation is the newly published Provision for Implementation of Foreign Investment Law (the 'Provision for Foreign Investment') which took effect on 1 January 2020. FIEs can enjoy favourable treatment in China, such as reductions or exemptions on certain types of fees or taxes, priorities in using public utilities and receiving loans, and simpler procedures in importing materials and exporting products. Details of favourable treatment in each field for each kind of investment are granted in the regulations and updated from time to time to satisfy public needs and interests. Two of the most comprehensive regulations on the

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[83] The State Council is the executive body of the highest organ of state power and the highest organ of state administration of China. See Constitution of the People's Republic of China (2018 Amendment) (Constitution (2018)) art 85.

[84] Law on Legislation (2015) (n 33) arts 8 and 9.

[85] This group of regulations does not have a uniform naming style, but usually administrative regulations promulgated by the State Council begin with Provisions (*Tiaoli* in Chinese), Rules (*Guiding* in Chinese) or Measures (*Banfa* in Chinese). Administrative regulations enacted by the affiliated departments of the State Council cannot be entitled 'Provisions'. See Provision for Formulation Procedure of Administrative Regulation (2017 Revision) (2017), Order No 694 of the State Council of the People's Republic of China art 5.

treatment of foreign investment, among others, are the Regulation on Encouragement of Foreign Investment issued by the State Council in 1986[86] and the Opinion on Further Encouraging Foreign Investment jointly formed by several central government authorities and approved by the State Council in 1999.[87]

1.34 Furthermore, given the Three Investment Laws primarily focus on greenfield investments, there are separate laws and regulations on mergers and acquisitions (M&As), natural resources explorations and other forms of investments, such as the Regulation of the Ministry of Commerce on Merger and Acquisition of a Domestic Enterprise by Foreign Investors,[88] Provision for Foreign–Cooperative Exploitation of Onshore Petroleum Resources (2013)[89] and Provision for Foreign–Cooperative Exploitation of Offshore Petroleum Resources (2013).[90]

Local laws and regulations on foreign investment

1.35 Although inferior in their legal effect compared with the national laws and regulations,[91] local laws and regulations applicable in the place of investment are often of more practical importance. Most of the local laws and regulations are merely detailed rules for the implementation of national laws and regulations in consideration of the local social and economic environment.[92] Article 18 of the Foreign Investment Law provides local governments at or above the county level the authority to take policy measures to promote and facilitate foreign investment in accordance with relevant national laws and regulations.

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[86] Regulation of the State Council on Encouragement of Foreign Investment (1986), GuoFa [1986] No 95.
[87] Circular of the General Office of the State Council on Forwarding the Opinions of the Ministry of Foreign Trade and Economic Cooperation and Other Departments on Further Encouragement of Foreign Investment (1999), GuoBanFa [1999] No 37.
[88] Regulation of the Ministry of Commerce on Merger and Acquisition of a Domestic Enterprise by Foreign Investors (2009), Order No 6 of 2009 of Ministry of Commerce of the People's Republic of China (Regulation of M&A (2009)).
[89] Order No 638 of the State Council of the People's Republic of China.
[90] ibid.
[91] Law on Legislation (2015) (n 33) art 79.
[92] ibid arts 63 and 64.

1.36 Despite the above general rule, the implementation of certain national laws and regulations may be suspended with regard to the local governments of some economically special areas, in particular, the pilot FTZs launched in recent years.[93] For example, in accordance with a new notice from the State Council circulated in January 2020,[94] the prohibition on foreign investors setting up wholly owned performance brokerage institutions has been temporarily lifted in the FTZs, and the involved local governments are required to set up new policies in line with this easing of restrictions.[95] Policies adopted in these pilot areas will be extended to other regions or nationwide if proved feasible.[96]

Regulatory documents

1.37 Any regulatory documents made by the central or local governments and their relevant departments concerning foreign investment shall comply with laws and regulations. However, in the areas where laws and regulations are silent, regulatory documents are forbidden from either derogating any lawful rights and interests of FIEs or augmenting their obligations; imposing any conditions on them for market entry and exit; or intervening in their normal operation activities.[97] Therefore, governments and relevant departments must undergo a thorough compliance review in accordance with the regulations made by the State Council when implementing a regulatory document, although a review on fair competence is deleted from the initial draft of the Provision for Foreign Investment.[98] If a foreign investor or a FIE believes that the regulatory document at issue is illegal, it can also request a compliance review of the regulatory documents when launching a relevant administrative review

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[93] The Pilot Free Trade Zones programme was first launched in Shanghai in 2013. As of August 2019, 18 FTZs have been implemented across Mainland China.

[94] Notice by the State Council of Temporarily Adjusting the Implementation of the Provisions of Relevant Administrative Regulations in Pilot Free Trade Zones (2020), GuoHan [2020] No 8.

[95] Provision for Administration of Commercial Performances (2016 Revision) (2016), Order No 666 of the State Council of the People's Republic of China, art 10.1.

[96] Provision for Implementation of Foreign Investment Law of the People's Republic of China (2019), Order No 723 of the State Council of the People's Republic of China (Provision for Foreign Investment) art 10.

[97] Foreign Investment Law (2019) (n 13) art 24.

[98] Provision for Foreign Investment (n 96) art 26.1.

or administrative litigation.[99]

1.38 Typical examples of regulatory documents related to foreign investment policies are the guidance on foreign investments. Since 1995, departments under the State Council have promulgated national investment guidance to keep foreign investments in line with the needs of the national economy and social development of China. Currently, the most important guidance is the two catalogues for sectors in which foreign investors are encouraged to or prohibited from investing: the Catalogue of Industries for Encouraging Foreign Investment (2019 Version)[100] and the Special Management Measures for the Market Entry of Foreign Investment (Negative List) (2020 Version).[101] Both catalogues are published and updated by the National Reform and Development Commission and the MOC. According to the two catalogues, as discussed later in detail, all foreign investors are encouraged to invest in certain sectors that are short of investments and advanced technologies but prohibited from certain areas where only domestic funds are allowed for national security reasons. For the thesis, another group of regulatory documents is related to the FIE's complaint mechanism, which is one of the major dispute settlement mechanisms of foreign investment disputes in China. Details of the mechanism and its supporting legal documents will be presented in Section B of Chapter 2 of the thesis.

C. Foreign investor

Definition of Foreign Investor

1.39 Whether before or after the implementation of the Foreign Investment Law, the definition of a 'foreign investor' in the domestic legal framework of China is not as comprehensive as commonly seen in modern BITs. Historically, in the first national

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[99] ibid art 26.2.

[100] Order No 27 of National Reform and Development Commission and the Ministry of Commerce of the People's Republic of China.

[101] Order No 32 of National Reform and Development Commission and the Ministry of Commerce of the People's Republic of China (Negative List 2020).

regulation on foreign investment in China rendered by the State Council in 1986, the Regulation on Encouragement of Foreign Investment, the phrase 'foreign investors' is an abbreviation of 'foreign companies, enterprises and other economic entities or individuals'.[102] This broad definition, serving as a shortening of major types of foreign investors, has been widely used not only in the special laws on foreign investment, particularly the Three Foreign Investment Laws in the past decades[103] but also in the current Constitution where it permits 'foreign enterprises, other foreign economic organisations and individual foreigners' to invest in China. Therefore, some academics also directly use it as the definition for foreign investors.[104]

1.40 However, when drafting the Foreign Investment Law, the legislature did consider another more detailed format. This could be seen in article 11 of the Draft for Public Advice of Foreign Investment Law:

> For the purpose of the Law, the term 'foreign investors' refers to the following parties who make investments within the territory of China:
> (1) Natural persons without Chinese nationality;
> (2) Enterprises incorporated in accordance to laws of other countries or regions;
> (3) Governments of other countries or regions and their subordinate departments or agencies; and
> (4) International organisations
>
> Domestic enterprises controlled by the parties prescribed in the preceding paragraph shall be deemed as foreign investors.

1.41 Compared with the historical concept of foreign investors, the Draft for Public Advice has proposed several changes. However, as pointed out in the official explanation on the draft, the most significant revolution of the definition is presented in the last paragraph of this article, which incorporates the criterion of 'actual control' into the

[102] Regulation of the State Council on Encouragement of Foreign Investment (n 86) art 2.
[103] Law on EJVs (2016) (n 30) art 1; Law on WOFEs (2016) art 1; Law on CJVs (2017) (n 58) art 1.
[104] Yongmei Chen, *Guidance for Essence and Basis of Foreign-Related Civil and Commercial Matters and Marine Law* (1 edn, People's Publishing House 2005); Zhikun Shen, 'Discussion on the Conditions of Establishment of Foreign Investment Enterprises' [1988] Law Science Magazine 25.

identification of foreign investors.[105]

1.42 This approach was abandoned in the next draft four years later, and the traditional approach prevailed. After several minor corrections, the term 'foreign investor' in the final version of the Foreign Investment Law is again used as a collective name of 'natural persons, business entities, or otherwise organisations of a foreign country' in article 2. It may suggest that the concept of 'actual control' no longer needed to be considered when identifying a foreign investor. One may thus conclude that the criteria for determining the 'foreignness' of a foreign investor within the context of foreign investment law in China are the nationality of an individual investor and the place of registration of an enterprise or entity. Nevertheless, as discussed later, there as an exception with regard to the Chinese nationals who settles in a foreign country.

Foreign individual investors

a. Nationality of individuals

1.43 A foreign individual means a person without Chinese nationality.[106] As China does not recognise the dual nationality of any Chinese national,[107] an individual cannot simultaneously hold Chinese nationality and foreign nationality. If a foreign national is granted Chinese nationality, he/she will automatically lose any other foreign nationality.[108] However, it is still possible for a foreign national to hold two or more nationalities other than a Chinese one. In this case, the applicable law when concerning a foreigner's nationality will be the law of the state where he/she habitually resides, namely a place where an individual lives for over one consecutive

[105] Ministry of Commerce of the People's Republic of China, *Explanation of the Foreign Investment Law of the People's Republic of China Draft for Public Advice* (2015) s 2.1.
[106] Law on Administration of Exit–Entry of the People's Republic of China (2012) art 89.3.
[107] Nationality Law of the People's Republic of China (1980) art 3.
[108] ibid art 8.

year,[109] or where he/she has the closest relation if there is no habitual residence.[110]

b. Determination of civil capacity

1.44 At the international investment law level, the determination of nationality of a foreign investor is crucial because it will trigger the application of different bilateral or multinational treaties. In the context of domestic law, another important result is to discover whether the foreign investor has the civil capacity to invest in China. Under the Chinese civil law system, a civil juristic act is a lawful act of a citizen (including foreign individuals) or legal person who has a relevant civil capacity to establish, change or terminate civil rights and obligations with genuine intention.[111] Therefore, if one lacks such a civil capacity for investment, the investment is null and void.[112]

1.45 Under Chinese law, the determination of the civil capacity of a foreign individual is irrelevant to his/her nationality. Instead, the civil capacity of a foreigner who conducts civil acts in China is subjected to the law at his/her habitual residence,[113] or, if there is no habitual residence, the law of the state where he/she currently resides.[114] However, as a supplementary rule of this general principle, the law of the place where the act was committed (*lex loci actus*) has a superior effect on the determination of the civil capacity of a foreign individual.[115] If a foreign individual investor is determined as civilly incompetent under the law of his/her habitual residence, he/she is still entitled to make investments in China as long as he/she is

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[109] A habitual residence under Chinese law is a place where a person has continuously lived for more than one year and is the centre of life of the person, excluding circumstances such as medical treatment, labour dispatch and official duty. See Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships of the People's Republic of China (I) (2012), FaShi [2012] No 24, art 15.
[110] Law on Choice of Law (2010) (n 9) art 19.
[111] General Principles of the Civil Law (2009) (n1) arts 54 and 55.
[112] ibid art 58.1.
[113] Law on Choice of Law (2010) (n 9) art 12.1.
[114] ibid art 20.
[115] ibid art 12.2.

deemed to have full legal capacity under Chinese law.[116]

c. Permanent residence

1.46 As China prohibits dual nationality, it is more common for overseas Chinese nationals to simply become a permanent resident of a foreign country rather than change their original nationalities. Usually, as the permanent residency will not impact the nationality an individual holds and is not necessarily relevant to the habitual residence of an individual, it will not directly affect the civil capacity of the individual.

1.47 Similar to most countries in the world, a foreign individual investor with good behaviour can apply for permanent residence in China if he/she makes an efficient amount of investment with stable operation and a good tax-paying record for three successive years.[117] After he/she becomes a permanent residence in China, he/she can still set up FIEs by technology and/or capital and conduct foreign direct investment in China with the Chinese currencies he/she legitimately receives.[118] Therefore, it can be inferred that being a permanent resident of China will not affect the status as a foreign investor and the nature of a foreign investment regardless of the origin or the currency of the capital.

1.48 Overseas Chinese who have settled down abroad but still hold Chinese nationality

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[116] Notice of the Supreme People's Court on Issuing the Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial Implementation) (1988), Fa(Ban)Fa [1988] No 6, art 180.

[117] Measures for the Administration of Examination and Approval of Foreigners' Permanent Residence in China (2004), Order No 74 of Ministry of Public Security and the Ministry of Foreign Affairs of People's Republic of China, art 6: 'Foreigners applying for permanent residence in China must abide by Chinese laws, be in good health and without any criminal record, and must meet at least one of the following requirements: (1) having made direct investment in China with stable operation and a good tax paying record for three successive years; … '. See also article 7 for the specific amount of investments required in several circumstances.

[118] Notice of the Organisation Department of the CPC Central Committee, Ministry of Human Resources and Social Security, Ministry of Public Security and other 22 Departments on Issuing the Measures for Relevant Treatments Enjoyed by Foreigners with Permanent Residence Status in China (2012), RenSheBuFa [2012] No 53, art 5.

(defined as the 'Overseas Chinese' under Chinese Law)[119] are encouraged by the Chinese government to make various kinds of investment in China. They can enjoy special treatments provided for foreign investors with reference to foreign-related laws and regulations.[120] Accordingly, despite the Chinese nationality of overseas Chinese investors, they are treated as foreign investors in the current domestic legal framework.[121] This position is reiterated in article 28.3 of the newly published Provision for Implementation of Foreign Investment Law (2019). Investors and investments that are treated as foreign investors and foreign investments are protected under Foreign Investment Law, which means they are capable for the treatments guaranteed in this domestic law, while they may not be protected under BITs where China sticks into the standard of nationality.

Foreign enterprises

a. Definition of foreign enterprise

1.49 Though the definition of a foreign enterprise does not appear in any of current laws, it was specified in the Income Tax Law for Foreign Enterprises (1982) as 'foreign companies, enterprises and other economic organisations'.[122] It is still used as a collective term for foreign companies, enterprises or other economic organisations in some national and regional regulations.[123]

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[119] Law on the Protection of the Rights and Interests of Returned Overseas Chinese and the Family Members of Overseas Chinese of the People's Republic of China (2009 Amendment) art 2.

[120] Regulation of the State Council on Encouragement of Investments from Overseas Chinese and Hong Kong and Macao Compatriots (1990), Order No 64 of the State Council of the People's Republic of China, art 5.

[121] Regulation of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises (I) (2010), FaShi [2010] No 9, art 22: 'any disputes in related with enterprises invested by investors from *Hong Kong SAR, Macau SAR, Taiwan district and Chinese nationals who reside abroad* in Mainland China shall refer to this regulation'. (emphasis added)

[122] Income Tax Law for Foreign Enterprises of the People's Republic of China (1982) art 1 states: 'Foreign enterprises under this law refer to foreign companies, enterprises and other economic organisations who have establishments within the territory of China engaged in independent business operations or in cooperative production or cooperative business operations with Chinese enterprises'. In its succeeding law, article 2.2 of the Income Tax Law for Foreign-Invested Enterprises and Foreign Enterprises of People's Republic of China (1991) still used the term 'foreign enterprises' when referring to 'foreign companies, enterprises and other economic organisations' but changed their attributes.

[123] For example, in the Interim Regulation on Control of Resident Offices of Foreign Enterprises of the People's Republic of China (GuoFa [1980] No 272), promulgated by the State Council on 30 October 1980, article 1 states: 'In order to facilitate the development of international economic and trade contacts and the

1.50 This definition, or classification, may cause confusion because the two concepts – company and enterprise – overlap in Chinese. An enterprise (*Qiye*) is an independently settled economic organisation that engages in the production and operation of goods and services according to the definition provided by *Cihai*, an authoritative Chinese dictionary.[124] Accordingly, a company is one form of enterprise, and other typical forms in China include partnership enterprise and proprietorship enterprise.[125] On the other hand, the term 'other economic organisations' is also not been defined in any statutes, but it is used to represent economic organisations other than enterprises since it first appeared in the Constitution.[126]

b. Nationality of foreign enterprise

1.51 The nationality of a foreign enterprise is subject to the place of registration under Chinese law. Take the company as an example. Article 192 of the Company Law defines a foreign company as 'a company incorporated in accordance with a foreign law outside the territory of China' so that the nationality of a company is based on the place of incorporation. Similarly, the China Banking Regulatory Commission determines the nationality of a foreign bank based on the place of registration rather than the name of the bank.[127]

1.52 There is an argument about whether the 'genuine' or 'effective' link criterion should be considered in the determination of the nationality of a company in the

control of resident offices in China of foreign companies, enterprises and other economic organizations (hereinafter referred to as foreign enterprises)….'

124 Zhengnong Xia and Zhili Chen, *Cihai*, vol 5 (Shanghai Lexicographical Publishing House 2009).

125 Several Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy (2005), GuoFa [2005] No 3, s 5.27.

126 Constitution (2018) (n 83), art 18.1: 'The People's Republic of China allows foreign enterprises and other economic organisations or individuals conduct economic cooperation….'

127 Implementation Measures of the China Banking Regulatory Commission for the Administrative Licensing Items Concerning Foreign-Funded Banks (2018 Revision) (2018), Order No 3 of 2018 of China Banking Regulatory Commission, art 6.

international law level. As a response, Mr Liu Zhenmin, as the representative of China, denied such an approach before the Sixth (Legal) Committee of the General Assembly of the United Nations in 2003. He considered that a genuine link between an enterprise and a country had already been incorporated if the enterprise was registered in that particular country so that the criterion of a genuine link or effective link was unnecessary. As a result, it is practicable to determine the nationality of a corporation solely based on the place of incorporation or registration.[128]

1.53 In addition, the origin of assets of a company also does not impact the nationality of the company according to the current legal system. For example, as explicitly stated in the General Principle of Civil Law, the nationality of FIEs, including EJVs, CJVs and WFOEs, are of Chinese nationality despite the origin of capital and nationality of shareholders.[129]

1.54 Similar to individual investors, the legal capacity of an enterprise is also determined by the nationality of the enterprises.[130] It is the law of the country where the enterprise is incorporated that decides whether or not a foreign company, enterprise or other economic organisation is a legal person and whether it should undertake limited liabilities or unlimited liabilities.[131] In *Chinese-environment Technology Group (Fujian) Ltd v Chinese-environment Technology Group Ltd*,[132] the claimant, SET Fujian, was a wholly owned subsidiary of the defendant, SET Singapore, who was registered in Singapore in accordance with Singaporean law. In 2010, the Supreme

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[128] Permanent Mission of the People's Republic of China to the UN, 'Statement Made by Representative of China Mr Liu Zhenmin with Regard to the Topic Diplomatic Protection in the 'Report of the International Law Commission on the Work of Its Fifty-Fifth Session' in the Fifty-Eighth Session of the Sixth Committee of the General Assembly of the United Nations' (*Permanent Mission of the People's Republic of China to the UN,* 2003) <www.china-un.org/chn/zgylhg/flyty/ldlwjh/t530817.htm> accessed 11 November 2016; see also the UNGA 'Report of the Commission, Official Records of the General Assembly, Fifty-Eighth Session' UN GOAR 61st Session Supp No 10 UN Doc A/58/10 (2004).

[129] General Principles of the Civil Law (2009) (n1) art 41.2.

[130] Law on Choice of Law (2010) (n 9) art 14; see also Notice of the Supreme People's Court on Issuing the Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law (n 116) art 184.

[131] Notice of the Supreme People's Court on Circulating the Meeting Minutes on the Trial of Foreign, Hong Kong and Macau Related Economic Cases in the Coastal Areas of China (1989), Fa[Jing]Fa [1989] No 12.

[132] *Sino-Environment Technology Group (Fujian) Ltd v Sino-Environment Technology Group Ltd,* (2014) MinSiZhongZi No 20, Supreme People's Court.

Court of Singapore ordered SET Singapore to enter into judicial management and nominated three liquidators. When a dispute arose between these two companies, one of the liquidators participated in the litigation procedure in China in the name of SET Singapore. The SPC dismissed SET Fujian's challenge to the qualification of the liquidator on the basis that the liquidator had the legal capacity before a Chinese court in accordance with Singaporean law, which was the law where SET Singapore was incorporated.[133]

c. Nominal shareholders

1.55 In practice, considering that a FIE may receive favourable treatments such as tax reductions and land usage rights, some Chinese investors choose to make arrangements with foreign parties. These investors stipulate that the foreign party should act as a nominal shareholder in a foreign-funded enterprise, and the Chinese investor should be the anonymous shareholder who makes the actual investment. In the view of the SPC, this kind of arrangement is valid unless it falls into one of the legal situations where a contract shall be regarded as null and void,[134] normally referring to those against public interests and violation of mandatory law and rules.[135]

1.56 On the other hand, foreign investors also can take advantage of this kind of arrangement to evade the restrictions or prohibitions in investment guidance to gain access to industries freely open to domestic investors. The SPC has not clarified whether or not this approach is permitted in a formal judicial interpretation. However,

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[133] This approach was followed by the Beijing High People's Court in *Shinko Industry Co., Ltd Bankruptcy Administrator Masahiko Miyashita v Beijing Longtou Estate Development Co., Ltd*, (2015) GaoMinChuZi No 26. In this case, Mr Miyashita acted as the bankruptcy administrator of Shinko, a business entity incorporated in Japan and declared by a Japanese court to be bankrupt in 2005. The court rejected defendant's challenge to the lawsuit qualification of Mr Miyashita with reference to article 80 of the Bankruptcy Law of Japan, by which a bankruptcy administrator should be listed as the party in a lawsuit related to the bankruptcy.
[134] Regulation of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises (I) (n 121) art 15.
[135] Contract Law (1999) (n 8) art 52.

the SPC's position can be implied from one of its decision that such an approach would not necessarily constitute a violation of mandatory rules if such an investment does not need to be approved in advance by the relevant authorities.

1.57 In this case, the High Court of Zhenjiang Province tended to reject the enforcement of an arbitration award from the London Court of International Arbitration on the ground of public interest under article V.2 (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The High Court believed that the investment guidance restricted the franchise business, and the disputed franchise investment was deliberately designed to avoid the restriction on market access, thus enforcement of the award would against the public interest of China. Nevertheless, the SPC upheld the arbitration award by confirming the validity of the disputed franchise agreement because this kind of agreement only needed to be filed, not approved, by government authorities according to the law.[136] As the failure to file the document with the relevant authorities would not challenge the validity of this agreement, the arbitration award was upheld.[137]

1.58 Usually, there are three criteria for determining an actual investor: whether there is an agreement between the nominal shareholder and the actual shareholder on the share arrangement, whether the actual shareholder has contributed the investment and whether other shareholders agree to pierce the veil of the nominal shares.[138]

1.59 An arrangement on shares between a nominal shareholder and an actual shareholder

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[136] See also Reply of the Supreme People's Court on Request for Instructions Re Recognition of the Arbitration Award in the Case of Tianrui Hotel Investment Co., Ltd (Applicant) v Hangzhou Yiju Hotel Management Co., Ltd (Respondent)(2010), [2010] MinSiTaZi No 18.

[137] According to article 42.2 of Contract Law (1999) (n 8) and article 9 of the Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Contract Law of the People's Republic of China (I) (1999, FaShi [1999] No 10), if a contract should be filed with authorities but is not, the validity of such a contract will be subject to the particular legal provision applied to this filing requirement. That is to say, if the law does not explicitly state that the contract can only be effective after filing, then a failure to file will not deny the validity of this contract.

[138] Regulation of the Supreme People's Court on Several Issues Concerning the Trial of Disputes Involving Foreign-Invested Enterprises (I) (n 121) art 14; see also Regulation of the Supreme People's Court on Several Issues Concerning the Application of the Company Law of the People's Republic of China (III) (2014 Amendment)(2014), FaShi [2014] No 2, art 24.

is not necessarily written. In a case between a Taiwanese company (the alleged actual shareholder/investor of a domestic company) and two Chinese nationals (the recorded shareholders of the domestic company at issue) in 2011, both courts of the preliminary and the appellate instances held that the real investor (or shareholder) of the domestic company at issue was the Taiwanese company, though there was no written agreement between the parties. The two courts determined that evidence submitted by the Taiwanese company could constitute the complete evidence chain: the Taiwanese company had contributed the investment used for registration and management of the company at issue instead of the two nationals, it was the chairman of the Taiwanese company who had taken control of the management of the company at issue, and it was the Taiwanese company that received an annual bonus from the company at issue and the two nationals had only received monthly salaries. As the business run by the company at issue was not restricted from foreign investment, the courts confirmed that the real shareholder of the domestic company should be the Taiwanese company.[139]

<u>Hong Kong, Macau and Taiwan</u>

1.60 Finally, it should be noticed that investors and investments from Hong Kong, Macau and Taiwan are not treated as domestic for historical and political reasons. Although investments from these regions are not foreign investments by nature, Hong Kong, Macau and Taiwan are separate customs zones. They are always incorporated into official statistics on foreign investment[140] and are subject to certain laws and regulations designed for governing foreign investments.[141] This practice continues in the new Foreign Investment Law.[142]

[139] See *A Co Ltd v Mr Bo, Mr Li and Shanghai X Fashion Ltd Co*, (2011) HuGaoMinEr (Shang) ZhongZi No14, Shanghai High People's Court.
[140] For example, see the Ministry of Commerce, *2013 Report on Foreign Investment in China* (2013) 10–11.
[141] For example, see Regulation of the State Council on Encouragement of Foreign Investment (n 86) art 20.
[142] Provision for Foreign Investment (n 96) art 48.

D. Foreign investment

1.61 The Foreign Investment Law is the first legislation to define a foreign investment. According to article 2, a foreign investment refers to 'an investment activity directly or indirectly conducted by one or more' foreign investors within the territory of China, including the establishment of FIEs, M&A, investment in new projects and other investment forms permitted by law. The Draft for Public Comments of the Foreign Investment Law adopted a longer inclusive list comprising 6 types of foreign investments in 2015. In addition to the greenfield investment and M&A, the drafted definition attempted to cover foreign investments include providing long-term financing to FIEs, obtaining the franchise for the exploration and development of natural resources, acquiring real estate rights and controlling domestic enterprises, or holding equity in domestic enterprises by agreements, trust or other ways.[143] However, the next Draft for the First Review in 2018 abandoned this attempt and adopted a definition similar to the formal version, although a catch-all clause covering any investments in other forms as provided by law, administrative regulations or by the State Council was added in the Draft for the Second Review.[144]

Foreign-invested enterprise

1.62 A foreign investor, individually or collectively with other investors, can establish a FIE within China.[145] In the context of the law, a FIE refers to an enterprise all or part of whose capital is invested by foreign investor(s) and duly registered and established within China in accordance with Chinese law.[146] Forms of organisation, organisational structures and by-laws of FIEs shall conform to the provisions of the laws, including the Company Law and the Partnership Enterprises Law.[147]

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[143] Foreign Investment Law (Draft for Public Advice) art 14.
[144] Foreign Investment Law (2019) (n 13) art 2.1 (4).
[145] ibid art 2.1 (1).
[146] ibid art 2.2.
[147] ibid art 31.

1.63 This is the most common form of foreign investment in China, as enterprises established under the Three Foreign Investment Laws and future EJVs, WOFEs and CJVs are all included in this category. Features of the EJVs, WOFEs and CJVs can be found in paragraphs 1.18–2.25 of Chapter 1, although some restrictions imposed by the Three Foreign Investment Laws have been lifted in the Foreign Investment Law. For example, Chinese individuals now are allowed to cooperate with foreign investors to form EJVs and CJVs,[148] which were prohibited under the Law of the EJVs and Law of the CJVs.[149] However, for FIEs set up under the Three Foreign Investment Laws, the original organisations may be kept for 5 years from the implementation of the Foreign Investment Law, namely, until the end of 2024.[150]

1.64 Historically, the establishment of FIEs was subject to prior approvals from administrative agencies. The criteria of the review included whether the proposed EJVs, WOFEs and CJVs would harm China's sovereignty, social welfare or national security, cause pollution to the environment or not conform with the national economic development requirements of China.[151] After the implementation of the Foreign Investment Law, setting up a FIE no longer needs to be approved but must be reported. The foreign investment information report mechanism was first introduced in the Draft of the First Review of the Foreign Investment Law. Foreign investors and FIEs shall report investment information to the competent departments in charge of commerce through the enterprise registration system and the enterprise credit information disclosure system.[152]

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148 Provision for Foreign Investment (n 96) art 3.

149 Law on EJVs (2016) (n 30) art 1; Law on CJVs (2017) (n 58) art 1.

150 Foreign Investment Law (2019) (n 13) art 42.

151 Except in the cases of setting up CJVs where the establishment of a CJV would not require consideration of the national economic requirement of China. See Detailed Rules for CJVs (2014) (n 63) art 9; Detailed Rules for WFOEs (2014) (n 53) art 5; Provision for EJVs (2014) (n 43) art 4.

152 Foreign Investment Law (2019) (n 13) art 34.

Merger and acquisition

1.65 A foreign investor may acquire stock shares, equity shares, interest in assets, or other like rights and interests of an enterprise within China.[153] Before the Foreign Investment Law was enacted, only the Three Foreign Investment Laws covered greenfield investments. The MOC has regulated M&A in a separate regulatory document, the Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors, since 2006.[154] The current version was amended in 2009.[155] Accordingly, foreign investors are allowed to merge and acquire a domestic enterprise, namely an enterprise without any foreign investment, via either equity M&A or asset M&A.[156] The equity M&A enables a foreign investor to purchase equity interest from original shareholders or increase the registered capital of a domestic enterprise.[157] The asset M&A requires a foreign investor to establish a FIE first and then purchase and manage the assets from a domestic enterprise, or purchase the assets from a domestic enterprise first and then use the assets to establish a new FIE for the management of the assets.[158] The target enterprise will be treated as a FIE if the contribution made by foreign investors to the registered capital is more than 25% of the total registered capital after M&A unless otherwise provided by the law.[159]

1.66 An M&A activity has to be reviewed and approved by the relevant government authorities before completion.[160] Foreign investors cannot use M&A to evade the restrictions or prohibitions on the entry into specific industries. In particular, a foreign investor cannot merge or acquire a domestic enterprise in a sector that is prohibited from foreign investment. An M&A application will be dismissed if deemed

[153] ibid art 2.1 (2)
[154] Regulation of the Ministry of Commerce on Merger and Acquisition of a Domestic Enterprise by Foreign Investors (2006 Amendment) (2006), Order No 10 of Ministry of Commerce, State Assets Supervision and Administration Commission of the State Council, State Administration of Taxation, State Administration for Industry and Commerce, China Securities Regulatory Commission and State Administration of Foreign Exchange of the People's Republic of China.
[155] Regulation of M&A (2009) (n 88).
[156] ibid art 2.
[157] ibid.
[158] ibid.
[159] ibid art 9
[160] ibid arts 6 and 10.1.

to let the foreign investor obtain all the shares or the controlling interest of a company in violation of the mandatory requirement of share proportion held by Chinese parties.[161] If an M&A involves a Chinese-renowned trademark or may affect national economic security, it will need approval from the MOC.[162]

1.67 Furthermore, there is a national safety review system implementing in the M&As of enterprises in sensitive industries. An M&A will be subject to a security review by the State Council if it involves the military industry and national defence security.[163] The security review will also be applied to M&As targeting enterprises related to national security if the foreign investor will acquire actual control of the target after the completion of the M&A.[164] These enterprises mainly concern essential agricultural products, energies and resources, infrastructural facilities, transportation services, key technologies and major equipment manufactures.[165] Standards of the security review contain the influences on the national defence security, stable operation of the national economy, basic social order and capacity of research, and development of key technologies involving national security.[166]

New investment project

1.68 The third form of foreign investment under the Foreign Investment Law refers to the circumstances where a foreign investor, individually or collectively with other

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161 ibid art 4.
162 ibid art 12.
163 Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (2011), GuoBanFa [2011] No 6, art 1.1.
164 ibid. As article 3 says, the actual control in context means one of the following circumstances after the M&A: (1) the total shares held by a foreign investor and its parent holding company and controlled subsidiary companies account for no less than 50%; (2) the total shares held by multiple foreign investors account for no less than 50% in total; (3) the total shares held by a foreign investor account for less than 50%, but the voting power it holds according to the stocks it holds is enough to have a material impact on the resolution of the shareholders' meeting, the general assembly of shareholders or the board of directors; or (4) any other circumstance that leads to the transfer of the actual controlling power (i.e. business decisions, financial affairs, personnel, technologies and others) of a domestic enterprise to a foreign investor.
165 ibid art 1.1.
166 ibid art 2.

investors, including Chinese individuals, invests in a new project within China.[167] In the draft of the Provision for Foreign Investment, the investment in a new project was defined as foreign investors investing particular project constructions within the territory of China, precluding setting-up FIEs or acquiring any shares or interests of Chinese enterprises.[168] Accordingly, under the initial concept of an investment in a new project, foreign investors would rely solely on contractual relationships when investing in new projects, such as natural resource exploration and development concession agreements and infrastructure construction and operation concession agreements. However, the formal Provision for Foreign Investment abandons the complete clause, which not only leads to investment in a new project as undefined but also confusion over whether foreign investors may set up or merge a domestic enterprise when investing in a new project.

Features of foreign investment

1.69 Foreign investments can be either tangible or intangible assets in addition to currencies. Article 27.1 of the Company Law requires shareholders of companies to contribute in currencies or non-currency assets, such as materials, intellectual property (IP) rights and land use rights, as long as they can be evaluated in currencies and are legitimately transferable. Article 16.1 of the Partnership Law has a similar clause that allows partners to contribute through currencies, materials, IP rights, land use rights and other property rights. Profits from foreign investments are allowed to be reinvested in China and will be treated as foreign investment.[169] A foreign investor that applies incomes accrued from its investment within China to expand its investment shall also enjoy the same preferential treatments like those for common foreign investment.[170]

[167] Foreign Investment Law (2019) (n 13) art 2.1 (3); Provision for Foreign Investment (n 96) art 3.
[168] Provision for Implementation of Foreign Investment Law (Draft for Comments) art 4.
[169] Provision for Foreign Investment (n 96) art 47.
[170] ibid art 12.2.

1.70 However, certain kinds of assets cannot be used as investments, such as credits, names of natural persons, commercial goodwill, franchise rights and pledged assets.[171] All these intangible assets are not regarded as transferable from the investor to the aimed investment company. Hence, it is comprehensible that labour services can only be used as investments in partnership enterprises,[172] but a shareholder of a company is unable to use his/her labour service as an investment.[173]

1.71 Historically, there was a limitation on the proportion of intangible assets in the capital structure of a company. For example, article 27 of the Company Law (2005 version) requested currencies contributed by shareholders should not be lower than 30% of the registered capital of a company. The restriction was even stricter in the previous versions. In article 24 of the Company Law (1999 version) and the Company Law (2004 version), the industrial properties and non-patented technologies should not exceed 20% of the total registered capital. This limitation has been removed from the 2013 version.

1.72 Unlike the Three Foreign Investment Laws, the new Foreign Investment Law does not impose mandatory requirements on foreign investment. The most typical example requirement of investment relates to technology and equipment. According to the Law on EJVs, technologies and equipment used by foreign investors as investments in EJVs had to be advanced technologies and equipment that can fulfil the needs of China.[174] In addition, machinery and equipment contributed by foreign investors as investments in a WFOE must be those are necessary to manufacture of foreign-invested companies.[175] All these requirements are abandoned in the new Foreign Investment Law, though the quality of technology and equipment will be reflected in the valuation of the investment.

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[171] Provision for Administration of Company Registration of the People's Republic of China (2016 Revision) (2016), Order No 666 of the State Council of the People's Republic of China, art 14.
[172] Partnership Enterprise Law (2006) art 16.1.
[173] Company Law (2018) (n 38) art 14.
[174] Law on EJVs (2016) (n 30) art 5.2.
[175] Detailed Rules for WFOEs (2014) (n 53) art 26; Provision for EJVs (2014) (n 43) art 24.1.

E. Protection and promotion of foreign investment

1.73 The Foreign Investment Law is the first national law that offers a complete set of rules for the protection of foreign investors and investment in China. The general policy of encouraging and protecting foreign investment is stated in article 3 of the Foreign Investment Law:

> The opening-up policy is maintained as a basic State policy, and foreign investors are encouraged to invest within China in accordance with law.
>
> The State adopts a high-level investment liberalisation and facilitation policy, establish and improve a mechanism for advancing foreign investment and create a market environment with stability, transparency, predictability and fair competition.

1.74 In addition to the general policy, China further promises to protect investments, incomes and other lawful rights of foreign investors that invest in China.[176] Other protecting rules commonly seen in modern BITs, such as those relating to national treatment, expropriation, transparency and free transfer, are also provided by law.

National treatment

1.75 As mentioned in paragraph 1.29, one of the major criticisms of the Three Foreign Investment Laws is the ultra-national treatment for foreign investment after entry.[177] Indeed, differential treatments, or more commonly preferential treatments, of foreign investors and foreign investments existed in China for the 40 decades. These preferential treatments, especially for taxation, had been justified when China was eager to attract foreign investments and import advanced technologies from

[176] Foreign Investment Law (2019) (n 13) art 5.
[177] Minister of Commerce of the People's Republic of China (n 78).

abroad.[178] However, when China entered the WTO, where national treatment was a principle of the system,[179] the country had taken steps to gradually removed differential treatment on foreign investments. For example, the last two tax benefits enjoyed by FIEs, foreign entities and nationals, namely city maintenance and construction tax and educational surcharge, were ceased before 1 December 2010.[180]

1.76 Nevertheless, it was not until the promulgation of the Foreign Investment Law that national treatment was recognised as a legal principle in China's foreign investment policies. Article 9 of the Foreign Investment Law explicates that 'foreign-invested enterprises equally enjoy… the various State policies supporting the development of enterprises.' According to the general rule, the national treatment under the Foreign Investment Law only applies to FIEs but not to foreign investors and entities holding foreign nationalities or foreign investment directly. To ensure the implementation of national treatment, governments at any levels, agencies or their staff will assume legal liabilities if making or implementing a policy that fails to equally treat FIEs and domestic enterprises in compliance with the law.[181]

1.77 In addition to the general provision, other articles in both the Foreign Investment Law and the Provision for Foreign Investment Law also mention FIEs shall be equally treated, which further contributes to the content of national treatment in China. Article 6.1 of the Provision for the Foreign Investment Law specifies that the national treatment shall be applied to aspects in funds arrangements, land supply, tax abatement or exemption, qualification licensing, standard setting, project application or human resources policies. Article 15 of the Foreign Investment Law allows FIEs to

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[178] Wei Ding, 'An Argumentation against the Validity and Reasonableness of Super-National Treatment: And the Rational Consideration for National Treatment in the Fields of Foreign Direct Investment' (2004) 22 (2) Journal of China University of Political Science and Law 164.

[179] World Trade Organization, 'Principles of the Trading System' (*World Trade Organization*) <www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 25 December 2020.

[180] These two taxes are the last two tax exemptions enjoyed by foreign investors, which were abandoned on 1 December 2010. See also Jie Han, Junbao Yuan and Rui Xu, 'The End of Foreign Tax Super-National Treatment is a Mature Performance of the Market Economy' (*Xinhua News Agency*, 2010) <www.gov.cn/jrzg/2010-12/01/content_1757840.htm> accessed 25 December 2020.

[181] Provision for Foreign Investment (n 96) art 41.1.

equally participate in the establishment and modification of any mandatory standards, including national, industry, local and group.[182] These mandatory standards are equally applied to FIEs and domestic enterprises, and the government shall not impose on the FIEs a standard for technology higher than the mandatory standard.[183] Furthermore, when applying for licences for investing in specific industries and sectors, administrative departments shall review foreign investors' application in accordance with the same conditions and procedures for domestic investors, unless otherwise provided by law.[184]

1.78 National treatment is also expressly regulated in government procurement, in which products produced or services provided by FIEs will be equally treated.[185] Governments and any relevant departments shall not obstruct or restrict a FIE from freely entering into the government procurement market in the local area or a specific industry.[186] Specifically, foreign suppliers shall enjoy equal and non-discriminated treatments on the access to procurement information, qualification review. Nor can FIEs be treated differently based on any unreasonable condition, such as ownership type, organisational form, equity structure, the nationality of investors, or brand of product or service.[187] However, although FIEs are treated equally as domestic enterprises, the national treatment is only extended to products manufactured and services provided within the territory of China,[188] so that overseas products and services from FIEs are allowed to be treated differently.

1.79 That said, there are exceptions to the national treatment of FIEs. The most important exception is the entry of investment where some industry sectors in a negative list are reserved for domestic investors only,[189] which will be discussed in the following

182 Foreign Investment Law (2019) (n 13) art 13.1.
183 Provision for Foreign Investment (n 96) art 14.
184 Foreign Investment Law (2019) (n 13) art 30.2.
185 ibid art 16. The national treatment on service was not added until the final version of the Foreign Investment Law after review by the NPC.
186 Provision for Foreign Investment (n 96) art 15.1.
187 ibid art 15.2.
188 ibid.
189 Foreign Investment Law (2019) (n 13) arts 28.1 and 28.2.

paragraphs. Foreign investors and investments also may still receive more preferential treatments in finance, tax, financing, land using and other areas than domestic investors and investments in specific industries, sectors or regions, as guided by the national government in accordance with the law.[190]

The Negative List

1.80 China grants a treatment to foreign investors and their investment during the pre-entry period no less favourable than that granted to Chinese domestic investors and their investment, subject to exceptions in the sectors on the negative list.[191] It is impressive progress for China in terms of national treatment, as China usually grants national treatment to foreign investors and investments in the BITs after they enter the market (i.e. in the operation, management, maintenance, use, enjoyment, sale or disposition of the investments).[192] However, the pre-entry period is not defined in the Foreign Investment Law, though the Draft for the Second Review did use 'establishment, acquisition and expansion of investment' rather than the word 'pre-entry' to illustrate the period of pre-establishment of investment.[193] This approach was abandoned by using the word 'pre-entry' in the next draft.[194]

1.81 A 'negative list' refers to special administrative measures on the entry of foreign investment in specific sectors,[195] which is issued or approved by the State Council and is adjustable to satisfy the needs for furthering the opening-up policy and economic and social development.[196] Since the negative list was first promulgated in 2018, it has been updated every year, and the most recent version took effect in July 2020.

[190] ibid art 14; Provision for Foreign Investment (n 96) art 12.
[191] Foreign Investment Law (2019) (n 13) art 4.
[192] Wen (n 12) 182.
[193] Foreign Investment Law (Draft for the Second Review) art 4.
[194] Foreign Investment Law (Draft for the NPC) art 4.
[195] Notice of the General Office of the State Council on Issuing the Special Management Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2015), GuoBanFa [2015] No 23, s 1.
[196] Provision for Foreign Investment (n 96) art 4.

1.82 The negative list divides sectors into three categories: prohibited, restrictive and other. Foreign investors are prohibited from investing in the prohibited sectors,[197] but they are allowed to invest in the restricted sectors on the negative list subject to specific conditions.[198] For example, according to the latest negative list that took effect in July 2020, the Chinese shareholding ratio of the entire automobile manufacturing shall not be less than 50%, except for special vehicles, new energy vehicles and commercial vehicles.[199] Other sectors that do not appear on the negative list are open to foreign investors that are equally administrated as domestic investors.[200] As promised by the Chinese premier, the negative list will be gradually shortened.[201] For example, the above restriction on the shareholding ratio of automobile manufacturing will be removed in 2022.[202]

Expropriation

1.83 Expropriation criteria are now in line with international investment treaty practice. This provision was first added in the Draft of the Second Review and kept in the final version. Accordingly, the expropriation of foreign investment is generally prohibited,[203] but it is allowed in specific circumstances for the benefit of the public in accordance with the law. All legal expropriation shall be exercised in accordance with legal procedure in a non-discriminatory manner, and fair and reasonable compensation should be given in a timely manner.[204] Article 21.2 of the Regulation on Foreign Investment Law further clarifies that compensation of the expropriated investment shall be determined according to the market value. However, unlike the

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197 Foreign Investment Law (2019) (n 13) art 28.1.
198 ibid art 28.2.
199 Negative List 2020 (n 101) r 8.
200 Foreign Investment Law (2019) (n 13) art 28.3.
201 Haocheng Han, 'Premier Li Keqiang Met with Chinese and Foreign Journalists Covering the Two Sessions and Answered Questions' (*Xinhua News Agency*, 2018) <www.gov.cn/premier/2018-03/21/content_5276056.htm#allContent> accessed 12 December 2020
202 Negative List 2020 (n 101) r 8.
203 Foreign Investment Law (2019) (n 13) art 20.1; Provision for Foreign Investment (n 96) art 21.1.
204 Foreign Investment Law (2019) (n 13) art 20; Provision for Foreign Investment (n 96) art 21.2.

expropriation provision under the Model BIT (2010),[205] the calculation method of the market value and whether interests before the payment of compensation shall be added in the final account, which needs to be clarified by the SPC in the future.

Protection of intellectual property rights and trade secret

1.84 The State promises to equally protect IP rights of both foreign investors and FIEs in the Foreign Investment Law and Provision for Foreign Investment via reinforcing punishment on infringement of IP rights, strengthening enforcement of protection of IP rights, promoting the establishment of a fast-track coordinative protection system for IP rights and improving a diversified system for resolving disputes on IP rights.[206]

1.85 Protection of IP rights is particularly important amid trade conflicts between China and the US in recent years. In the Statement by the US Trade Representative on Section 301 Actions released on 10 July 2018, the US accused China, among others, of committing the theft of IP rights and forced technology transfer, which provoked strong rebuts from China's government.[207] Meanwhile, provisions on the protection of IP rights of foreign investors and FIEs have been incorporated since the Draft of the First Review and finally developed into a series of regulations on the protection of IP rights and trade secrets.

1.86 It is a principle under the Foreign Investment Law that the lawful rights and interests of IP right holders and relevant right holders should be protected.[208] Technological cooperation during foreign investment is encouraged and must be based on voluntariness and commercial rules. Conditions of technological cooperation shall be

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[205] Xiantao Wen, 'Comments on the Draft of China's Model BIT (II)' (2012) 19 Journal of International Economic Law 132, 133.
[206] Provision for Foreign Investment (n 96) art 23.1.
[207] Ministry of Commerce of the People's Republic of China, 'Statement of the Ministry of Commerce' (*Press Office of Ministry of Commerce of the People's Republic of China,* 2018) <www.mofcom.gov.cn/article/ae/ai/201807/20180702765543.shtml> accessed 25 December 2020.
[208] Foreign Investment Law (2019) (n 13) art 22.1.

fairly determined with consultations with foreign investors.[209] An administrative mandatory technological transfer is prohibited by law, so the technology of foreign investors shall not be compelled or in disguised form transferred by administrative agencies or their employees by administrative measures, such as administrative licensing, inspection, penalty and coercion.[210] Where an administrative agency and its staff compels directly or in disguised form a foreign investor or FIE to transfer its technology, the directly responsible person in charge and other responsible staff shall receive sanctions in accordance with the law.[211]

1.87 As to the protection of trade secrets, administrative agencies or their employees have the duty to keep confidential the trade secrets of foreign investors and FIEs they obtain within their duties and authorities in accordance with the law and shall not disclose or illegally provide them to others.[212] An internal administrative system shall be set up, and effective measures shall be taken to protect these trade secrets from leaking, even when sharing information with other administrative agencies.[213] Any employee who violates this duty will be sanctioned in accordance with the law, and criminal liabilities will be imposed if the conduct constitutes a crime.[214]

Free transfer

1.88 Foreign investors are free to transfer their investments and benefits in and out of China in Chinese currency or any foreign currency, including capital contribution, profits, capital gains, proceeds out of asset disposal, IP rights licensing fee, indemnity or compensation legally obtained, or proceeds received upon settlement.[215] No restrictions can be imposed on the currency, amount or frequency of inbound or

[209] ibid art 22.2.
[210] ibid art 22.2; Provision for Foreign Investment (n 96) art 24.
[211] Provision for Foreign Investment (n 96) art 42.
[212] Foreign Investment Law (2019) (n 13) art 23; Provision for Foreign Investment (n 96) art 25.1.
[213] Provision for Foreign Investment (n 96) art 25.2.
[214] Foreign Investment Law (2019) (n 13) art 39.
[215] ibid art 21.

outbound remittance,[216] or the relevant departments or administrative staff will assume legal liabilities.[217]

Transparency

1.89 China grants transparency of foreign investment policies in several provisions of the Foreign Investment Law covering the legislative period to the implementation. First, suggestions and opinions of FIEs shall be sought before a relevant law, regulation or rule is made through various forms, including inviting written comments, convening seminars, demonstrating meets or public hearings.[218] Second, FIEs will be able to equally participate in the standard-making process in accordance with the law, and any information of establishment or modification of standards shall be disclosed to and supervised by the public.[219] Third, governments and their departments shall, through official websites or a national unified online governmental service platform, specify the laws, regulations, departmental rules, regulatory documents, policy measures and information on investment projects concerning foreign investment.[220] Foreign investors and FIEs will be provided with consultation, guidance and other services for such information.[221] Finally, any regulatory or adjudicative documents related to foreign investment should be timely publicised in accordance with the law.[222] Any unpublished documents shall not be cited as the basis for administration.[223]

Government's commitment

1.90 A government's commitment to policy is a written and legitimate commitment made

216 Provision for Foreign Investment (n 96) art 22.
217 ibid art 41.3.
218 Foreign Investment Law (2019) (n 13) art 10.1; Provision for Foreign Investment (n 96) art 7.1.
219 Foreign Investment Law (2019) (n 13) art 15.1; Provision for Foreign Investment (n 96) art 13.3.
220 Provision for Foreign Investment (n 96) art 9.
221 Foreign Investment Law (2019) (n 13) art 11; Provision for Foreign Investment (n 96) art 20.
222 Foreign Investment Law (2019) (n 13) art 10.2.
223 Provision for Foreign Investment (n 96) art 7.2.

by a local government at any level or its department within its legal authority concerning the supportive policies, preferential treatment, and facilitation conditions that apply to a foreign investor or a FIE that invests in the local area.[224] Local governments and departments shall honour their commitments on policies to foreign investors and FIEs and perform the contracts entered in accordance with the law.[225]

1.91 Contracts and commitments can only be altered for the benefit of national or public interests, but any such changes shall be made in accordance with legal procedures. This means that a local government is prohibited from breaching a commitment on grounds such as the administrative division is re-adjusted, government officials are re-elected, agencies or their functions are adjusted, or the relevant persons in charge have changed.[226] When a commitment has to be altered, fair and reasonable compensations will be paid to the foreign investors and FIEs for their losses.[227] The Provision for Foreign Investment further requires that any government, departments or administrative staff shall assume legal liabilities if it fails to honour a commitment on policies made in accordance with the law; fails to perform the contract legal entered; makes a commitment on policies in excess of its duly delegated authority; or makes a commitment on policies the content of which does not comply with the law or administrative regulations.[228]

National security review

1.92 A national security review is a tool for a host State to legally bar foreign investments that may, in its opinion, infringe its national security. Both the Foreign Investment Law and the Provision for Foreign Investment grant China to establish a security review system for foreign investment to review the foreign investments that affect or

[224] ibid art 27.
[225] Foreign Investment Law (2019) (n 13) art 25.1.
[226] Provision for Foreign Investment (n 96) art 28.
[227] Foreign Investment Law (2019) (n 13) art 25.2; Provision for Foreign Investment (n 96) art 28.
[228] Provision for Foreign Investment (n 96) art 41.4.

may affect its national security.[229] However, neither lays out any details of the system. Even basic questions, such as what a national security review is and how the national security review system works, remain unanswered at the national law level.

1.93 It should be noted that in the first draft of the Foreign Investment Law published in 2015, there was a whole chapter detailing the national security review. This chapter was deleted in the next draft four years later for undisclosed reasons. However, the State Council promulgated a notice on the trial of national security review of foreign investment in the FTZs in April 2015.[230] As pointed out earlier, policies adopted in the FTZs are of experimental value for the rest of the State. Therefore, one could look into the national security review currently used in the FTZs as guidance to predict the formal national security review in the future. In 2018, the State Council planned for the drafting of formal national regulations of the national security review on foreign investment by the end of 2018.[231] No further news has been heard by the end of September 2020.

1.94 According to the notice, the security review should be conducted on foreign investment that affects or may affect national security and the capabilities to ensure national security, or involves sensitive investors, sensitive targets of M&A, sensitive industry, sensitive technologies and sensitive areas.[232] A security review procedure will be triggered typically when a foreign investor tries to obtain actual control of a FIE related to military industry, important agricultural products, important energies and resources, important infrastructural facilities, important transportation service, important culture, important information technology products and services, key technologies and manufacturing of major equipment.[233] The review will be

[229] Foreign Investment Law (2019) (n 13) art 35.1; Provision for Foreign Investment (n 96) art 40.
[230] Notice of the General Office of the State Council on Issuing the Measures for the Pilot Programme of National Security Review of Foreign Investment in Pilot Free Trade Zones (2015), GuoBanFa [2015] No 24.
[231] Notice of the General Office of the State Council on Issuing the 2018 Legislative Work Plan of the State Council (2018), GuoBanFa [2018] No 14.
[232] Notice of the General Office of the State Council on Issuing the Measures for the Pilot Programme of National Security Review (n 230) s 1.
[233] ibid s 1.1.

conducted by an inter-ministerial joint meeting composed of the National Development and Reform Commission, the MOC and other relevant ministries of the State Council on the impact of the foreign investment on national defence security, stability of economic operation, social order, cultural security and public moral, national cybersecurity, and the research and development capabilities of key technologies related to national security.[234]

1.95 There are three results after the national security review: (1) if it is determined that the foreign investment will not impact national security, the relevant transaction will be allowed to proceed;[235] (2) if it is determined that a negative impact on the national security exists but could be alleviated on conditions, the foreign investor will be requested to issue a written commitment on the modification of the investment, and the transaction will be allowed afterwards;[236] (3) if it is determined there is or will be a negative impact in any way, the relevant transaction will be stopped.[237]

1.96 The Foreign Investment Law specifically states that a decision of national security review is final.[238] It may imply that a relevant foreign investor could neither appeal the decision nor file an administrative review or administrative litigation. Whether the investor could seek an international investor-State arbitration would require reference to the applicable investment treaty.

F. Conclusion

1.97 Apart from the conclusion of numerous international treaties, the Chinese government has endeavoured to create a favourable domestic legal environment that attracts foreign investors, especially with the recent enactment of new Foreign

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234 ibid s 2.
235 ibid s 3.5.
236 ibid s 3.3.
237 ibid s 3.4.
238 Foreign Investment Law (2019) (n 13) art 35.2.

Investment Law and its affiliated regulations. However, despite the improving legislation works, disputes on the implementation of laws and regulations between foreign investors and governmental parties are inevitable. According to the international treaties and domestic legislation of China, a foreign investor who encounters an investment dispute has a choice of remedies under both international law and national law, which will be discussed in detail in the following chapters.

Chapter 2: Domestic Investor-State Dispute Resolution

A. Introduction

2.1 Under the framework of Chinese domestic law, if a foreign investor or a foreign-invested enterprise (FIE, namely a foreign investor's wholly or partially owned enterprise registered in China) believes that its lawful rights or interests have been infringed by an administrative act of an administrative agency or its employees, it can choose to submit the claim to several dispute resolution settlement fora under article 26 of the Foreign Investment Law. These routes include a complaint mechanism for FIEs, administrative review and administrative litigation. As discussed in Chapter 3, these domestic routes play important roles in investor-State dispute settlement (ISDS) at the international law level. In particular, the ISDS provisions in most Chinese bilateral investment treaties (BITs) concluded after 2000 have imposed a mandatory duty on foreign investors to undergo administrative review proceedings before entering into international arbitration against China. This practice will likely continue in future BITs. A domestic court that hears administrative litigation is always an available forum for foreign investors in addition to an international investment arbitral tribunal under Chinese BITs. Most BITs concluded before 2000 only allow foreign investors to submit disputes related to the amount of compensation for expropriation to international arbitration tribunals. For investor-State disputes arising from a State's breach of other treaty commitments or even disputes on the legality of expropriation, investors under the BITs with limited arbitration agreement can only submit the disputes before Chinese domestic courts. For investors from countries that have not concluded international investment agreements with China, these domestic proceedings may be the only channels to settle their disputes with the Chinese government.

2.2 Apart from the three dispute resolution mechanisms mentioned above, although

foreign investors arguably may seek remedies against infringements from administrative agencies via other soft mechanisms under domestic law, these routes only play supplementary roles. For example, foreign investors and FIEs can send petitions via letters, emails, faxes, telephones, in-person visits or other forms to complain to the government at all levels and request assistance from the relevant administrative agency.[1] However, decisions on these petitions are neither enforceable nor litigable. A petitioner cannot apply to a court to enforce a decision, nor can it pursue administrative litigation against actions relating to the registration, acceptance, assignment, transfer, re-inspection and re-examination taken by an administrative agency pertaining to public complaint items.[2] As to arbitration, which is commonly seen in international ISDS, the national law of Mainland China does not provide foreign investors with an option of arbitration, as administrative disputes are beyond the scope of arbitration in China.[3] Therefore, this chapter will focus on the three mechanisms. The future possibility of conducting investment arbitration in China will be presented in Chapter 5.

2.3 Since 2014, the Ministry of Justice of China (MOJ) has published annual reports of national administrative review and administration litigation on its official website.[4] The annual reports starting from 1999, the year when the Administrative Procedure Law was enacted, have disclosed some key data on the performance of the two systems at both the national and provincial levels. Although the statistics specifications have changed continuously over the years, one may still glimpse the implementation of the administrative review mechanism and administrative litigation in China. Data in the most recent annual report from 2018 will be specifically referenced and discussed in this chapter.

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1 Provision for Complaint Letters and Visits (2005), Order No. 431 of the State Council of the People's Republic of China, arts 2 and 50.

2 Interpretation of the Supreme People's Court on Application of the Administrative Procedure Law of the People's Republic of China (2018), FaShi [2018] No 1 (IAPL) art 1.9.

3 Arbitration Law of the People's Republic of China (2017 Amendment), art 3.2.

4 See 'Data Release' < http://www.moj.gov.cn/government_public/node_634.html > accessed 29 December 2020.

2.4 Although the three domestic dispute resolution mechanisms are of significant importance for the protection of the rights of foreign investors and their invested entities in China, there is little discussion about the performance of systems on the settlement of foreign investment disputes in academia and practice compared with the investor-State arbitration, although administrative arbitration is generally not permitted under the current arbitration system in China. Therefore, in addition to the normal doctrinal analysis on the law provisions, this chapter will take a methodology of 'law in action' mainly based on the governments' report to illustrate the operation of the systems and why people tend to choose or not to choose the systems. The following sections of the chapter will discuss the complaint mechanism, administrative review and administrative litigation in China, covering a range of issues on the competence of disputing parties, subject of disputes, procedures, consequences, and advantages and disadvantages of each mechanism as related to foreign investment disputes.

B. Complaint Mechanism for Foreign-Invested Enterprises

2.5 The Complaint Mechanism for FIEs (the 'Complaint Mechanism') is an alternative dispute resolution designed for foreign investors and their invested enterprises in China who believe their legitimate rights have been infringed by specific administrative acts conducted by administrative agencies or their staff members.[5] As the first choice for foreign investors damaged by administrative agencies,[6] the Complaint Mechanism was initially regulated nationwide by the Ministry of Commerce (MOC) through a national administrative rule, the Interim Measures for the Work Relating to the Complaints of Foreign-Invested Enterprises (the 'Interim Measures'), in 2006.[7] Similar complaint proceedings had been established by local

[5] Working Measures for Complaints of Foreign-Invested Enterprises (2020), Order No 3 of 2020 of the Ministry of Commerce of the People's Republic of China (Working Measures) art 2.1.
[6] Foreign Investment Law of the People's Republic of China (2019) (FIL) art 26.2.
[7] Order No 2 of the Ministry of Commerce of the People's Republic of China (Interim Measures).

governments in some regions as early as the late 1980s.[8] Since the Interim Measures were published, more local governments at provincial and county levels have imposed their own sets of rules on local complaint proceedings with minor modifications of the Interim Measures. The MOC urged every local government at the provincial level to establish a sound mechanism for handling foreign complaints before the end of 2018.[9] These local rules have the same legal effect as the national rule and are implemented within their respective territorial jurisdictions.[10] Therefore, the below discussion on the complaint procedure in China will take into account local rules, especially those of major cities and provinces, as well as the national rule.

2.6 This Complaint Mechanism is re-iterated in the new Foreign Investment Law promulgated in 2019 that imposes a duty on both the central government and local governments of China to coordinate and improve the system to timely resolve administrative disputes involving foreign investors and foreign investments. In this regard, the MOC decided to modify the current Complaint Mechanism based on the practices of the past decade and the new foreign investment law regime. The first draft was published as the Working Measures for Complaints of Foreign-Invested Enterprises (Draft for Comments) in March 2020 (the 'Draft Measures'). After further consultations with foreign investor representatives,[11] the formal Working Measures for Complaints of Foreign-Invested Enterprises (the 'Working Measures') was published on 31 August 2020 and came into force on 1 October 2020.[12] The Interim Measures thus have been repealed simultaneously.[13] Local rules on the

[8] For example, the government of Shanghai promulgated the Shanghai Municipal FIEs Complaints and Handling Measures in 1989 (Shanghai Municipal People's Government Order No 22, amended by Shanghai Municipal People's Government Order No 52 in 2010) (Shanghai Measures (2010)); Hangzhou City of Zhejiang Province published its first FIEs Complaints and Handling Measures in 1990 (City Government Order No 6, amended by Hangzhou City People's Order No 262 in 2010)

[9] Notice of the General Office of the State Council on Focusing on Business Concerns and Further Promoting the Implementation of Policies to Optimise the Business Environment (2018), GuoBanFa [2018] No 104, s 2.5.

[10] Law on Legislation of the People's Republic of China (2015 Amendment), art 91.

[11] 'Special Press Conference Held by the Ministry of Commerce on Working Measures for Complaints of FIEs' (*Invest in China*, 2020) <http://www.fdi.gov.cn/questionDetial.html?id=41425> accessed 27 December 2020.

[12] Working Measures (n 5)

[13] ibid, art 33.

implementation of the regional Complaint Mechanism that have been primarily based on the Interim Measures are still effective unless otherwise abolished by local governments.

2.7 Given the Working Measures were implemented shortly before the submission of this thesis and few cases and literature have addressed the new rules, the following analysis will focus on the Interim Measures, taking into account the trend of reform reflected in the Draft Measures and the Working Measures.

The Complainant

2.8 Article 2 of the Interim Measures provided that a capable complainant of the Complaint Mechanism should be a FIE registered in China and/or its investors, which included both domestic investors and foreign investors. A FIE refers to an enterprise all or part of whose capital is invested by foreign investor(s) and duly registered and established within China in accordance with Chinese law.[14] Although most local complaint centres usually only accept complaints raised by local registered foreign-related enterprises and/or their investors, domestic shareholders in some provinces are also allowed to file complaints at local complaint centres in accordance with local rules.[15] However, the new Working Measures clarifies that a capable complaint should be a FIE or a foreign investor; a domestic shareholder of a FIE is barred from lodging a complaint in its own name in principle.[16] It is also noteworthy that the Working Measures govern complaints concerning invested-enterprises with investors from Hong Kong, Macau, Taiwan and Chinese residing overseas, though

[14] FIL (n 6) art 2.3.
[15] For example, see Shanghai Measures (2010) (n 8) art 2; Beijing Municipal Foreign-Invested Enterprises Complaints and Handling Measures (2019), JingShangHanZi [2019] No. 127 (Beijing Measures (2019)) art 2. However, complaint centres in Sichuan Province accept complaints filed not only by FIEs and foreign investors, but also domestic enterprises registered in other provinces of China investing in Sichuan Province. See Sichuang Province Foreign-Invested Enterprises Complaints and Handling Measures (2016), ChuanFuFa [2016] No 30 (Sichuan Measures), art 2.
[16] Working Measures (n 5) art 2.1.

these invested-enterprises are not technically FIEs by definition.[17]

The Agency Handling Complaints

2.9 Under the Interim Measures, a competent agency empowered to handle a foreign investment-related complaint referred to the National Centre for Complaints of Foreign-Invested Enterprises (the 'NCC') and competent departments/centres of local governments at all levels (collectively, the 'Agency Handling Complaints').[18] The Draft Measures retains the NCC but restricts the authorisation of local governments so that only governments at or above the county level can set up local complaint centres.[19] When promulgating the Working Measures, the MOC follows the provision in the Draft Measures and publishes an inclusive list of contact details of agencies comprising the NCC and other provincial agency handling complaints in 31 provincial administrative regions.[20]

2.10 Traditionally, the NCC not only accepted cases directly filed with them but also handled cross-provincial or high-impact cases referred to them by local complaint centres.[21] However, the scope of acceptance has been limited in the Draft Measures and the following final version, where the NCC only accepts cases involving departments of the State Council or governments at the provincial level, and, subject to the NCC's discretion, cases of significant impact nationwide or worldwide.[22] This approach conforms with the principle of territorial jurisdiction in the Interim Measures: a complaint should be handled by a complaint centre located in the area where the complained issue occurred.[23] Accordingly, local complaint departments or

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17 ibid art 31.
18 Interim Measures (n 7) art 5.1.
19 Working Measures (n 5) art 2.3; Working Measures for Complaints of Foreign-Invested Enterprises (Draft for Comments) (2020) (Draft Measures) art 2.3.
20 Guide to the National Centre for Complaints of Foreign-Invested Enterprises (30 September 2020), Department of Foreign Investment Administration of the Ministry of Commerce of the People's Republic of China.
21 Interim Measures (n 7) art 5.2.
22 Working Measures (n 5) art 6; Draft Measures (n 19) art 6.
23 Interim Measures (n 7) art 5.4.

centres are expected to handle cases filed by FIEs registered in the corresponding local areas or transferred by the NCC.[24]

2.11 Besides the NCC, the MOC set up a coordinating office under the Interim Measures – the FIE Complaint Coordinating Office (the 'Coordinating Office') – for two purposes: (1) to coordinate, guide and supervise complaint handling nationwide and (2) to handle cases referred by the NCC that involve multiple departments or industries and need to be heard by cross-department joint meetings.[25] The structure of the Coordinating Office was changed in the Draft Measures; the new Joint Meeting will replace the Coordinating Office under the inter-ministerial joint meeting system set up by the MOC with other departments under the State Council.[26] According to article 6 of the Draft Measures, the Joint Meeting will accept complaints transferred by the NCC when they involve multiple departments. However, the power of handling complaints has been removed in the Working Measures. The Joint Meeting now only performs administrative functions, such as coordinating and facilitating the handling of complaints at the central level and guiding and supervising works at the regional level.[27]

2.12 Before the promulgation of the Draft Measures, in response to the call for establishing a Joint Meeting in a notice of the State Council in 2018,[28] provincial governments have attempted to set up own their joint meeting offices. For instance, Xinjiang Province published a notice on the inter-department joint meeting system about FIEs complaints on 29 December 2018, in which members of the joint meeting (i.e. the 35 provincial government agencies) would be led by the Department of Commerce of the province to review complaints on demand.[29] It is also common for local governments

[24] ibid art 5.3; Working Measures (n 5) art 7.2.
[25] Interim Measures (n 7) art 6.
[26] Draft Measures (n 19) art 5.
[27] Working Measures (n 5) art 5.
[28] Notice of the State Council on Certain Measures for Actively and Effectively Utilising Foreign Investment to Promote Quality Economic Development (2018), GuoFa [2018] No 19, s 15.
[29] Notice on Circulating the Joint Meeting System of FIEs Complaints Service in Xinjiang Uighur Autonomous (29 December 2018), Department of Commerce of Xinjiang Uighur Autonomous, s 2.

to set up a coordinate office in addition to the complaint centre, and both departments assume responsibilities in handling complaints from different aspects. For example, Beijing Municipal Government divides the complaint centre of Beijing into two divisions: the Foreign-Invested Complaint Coordinate Centre under the Department of Commerce of Beijing to coordinate, guide and supervise foreign-invested complaints in the city, and the Foreign-invested Complaint Acceptance Centre under the Beijing Municipal Investment Promotion Service Centre, a public institution directly under Beijing Municipal Government, to accept and handle initial complaints.[30]

<u>Scope of complaints</u>

2.13 The Interim Measures provided that a complainant may lodge complaints for two reasons:

a. The complainant believed that its legitimate rights and interests had been infringed by an administrative act done by an administrative agency.

b. The complainant wanted to report an issue or make suggestions, opinions or requests to the Complaint Centres requesting the latter to coordinate with other departments.[31]

2.14 However, complaint matters already submitted to other administrative or judicial proceedings, such as administrative disciplinary inspection, administrative review proceedings, administrative litigation and arbitration, were excluded from the

[30] Beijing Measures (2019) (n 15) art 3; see also 'Public Institutions Directly under Beijing Municipal Government' (*Office of Organisational Setup Committee of Beijing Committee of the Communist Party of China*, 2019) <www.bjbb.gov.cn/szf/> accessed 30 December 2020. Although the Beijing Municipal Investment Promotion Service Centre is a public institution, the management refers to the Civil Servants Law, which means all staff of the centre are treated as civil servants. See Civil Servants Law of People's Republic of China (2018 Revision) art 112; 'Budget Information of Beijing Investment Promotion Service Centre 2020' (*Beijing Investment Promotion Service Centre*, 2020) <http://invest.beijing.gov.cn/zwgk/zfxxgk/zfxxgkpt/fdzdgknr/ysjs/202002/t20200221_1663254.html> accessed 30 December 2020.

[31] Interim Measures (n 7) art 2.1.

Complaint Mechanism.[32] Moreover, complaints that did not conform with standards of acceptance were also precluded, so that anonymous complaints were not acceptable.[33]

2.15 In the Draft Measures and the following Working Measures, the scope of acceptable complaints has been modified. First, the object of the complaint is extended to any administrative acts done by administrative agencies and organisations legally authorised with the function of public affairs administration and their staff.[34] Second, the scope of acceptable reports and suggestions now is limited to issues related to the investment environment only.[35] Third, civil and commercial disputes between the complainant and other persons or entities are explicitly excluded from the scope of acceptance of the Complaint Mechanism,[36] which further clarifies the role and function of the Complaint Mechanism.

2.16 The scope of complaints accepted by some local agencies handling complaints varies from the Interim Measures. That is to say, local rules published prior to the Interim Measures generally exercising broader jurisdiction over the scope of complaints. For example, complaint centres in Shanghai accept any cases where the FIEs have different opinions with local governments and staff or face difficulties on the investment, establishment, management, production and liquidation of the enterprises since 1989.[37] Some other complaint centres, such as those in Ningbo City of Zhejiang Province, can accept disputes between shareholders of FIEs or even disputes with other enterprises in accordance with its local regulation published in

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32 According to articles 9.1 to 9.3 of the Interim Measures, complaint matters that had already been submitted to or completed by judicial proceeding, administrative review proceeding or arbitration proceeding, that had already been accepted by administrative departments of disciplinary inspection, supervision or investigation, or that had already been accepted by (another) complaints centres were not accepted.
33 Interim Measures (n 7) arts 9.4 and 9.5. According to article 8, an acceptable complaint that fell into the scope of complaint should be raised by a capable complainant against a specific respondent with clear claims and supporting facts, reasons or evidence.
34 Working Measures (n 5) art 2.1; Draft Measures (n 19) art 2.1.
35 Working Measures (n 5) art 2.2; Draft Measures (n 19) art 2.2.
36 Working Measures (n 5) art 2.1; Draft Measures (n 19) art 2.1.
37 Shanghai Measures (2010) (n 8) art 2.

2004.[38]

2.17 Most local rules made or modified in recent years generally follow the wording of the Interim Measures with only non-material changes. For instance, complaint centres in Sichuan Province could accept contractual disputes and even employment disputes in accordance with article 3 of the Regulation of Handling FIEs Complaints in Sichuan Province published in 1996. This regulation has been replaced by the newly enacted Regulation of Handling Complaints of External Enterprises in Sichuan Province published on 15 August 2016.[39] According to the new article 3, complaint centres in Sichuan Province now only accept administrative disputes or contractual disputes with both parties' consent.

<u>How to solve a complaint</u>

2.18 Each complaint centre has its own set of procedures to process a complaint, which is generally based on the NCC rules provided in the Interim Measures. Article 10 of the Interim Measures summarised the steps of the complaint handling procedure from start to finish: decide whether to accept the case and request additional materials if needed, file the complaint, notify the respondent, deal with the complaint, notify the complainant of the result and close the file. Specifically, the Interim Measures listed general approaches to deal with the complaint,[40] which local rules largely followed already:

a. Producing written advice to both the complainant and the respondent based on facts and laws that suggest solutions to solve the dispute. In *Shaoguan Yinlian Asian Agriculture Development Co., Ltd v Ruyuan Yao Autonomous County People's Government*, prior to the administrative proceedings, the claimant filed a

[38] Ningbo City Measures for Handling Complaints of Foreign Investment Enterprises (2004), Ningbo City People's Government Order No 199, arts 4.2 and 4.3.
[39] Sichuan Measures (n 15).
[40] Interim Measures (n 7) art 11.

complaint with the Guangdong Province FIEs Complaint Centre after the local government terminated its investment. The complaint centre stated in its written advice to the complainant that the termination was reasonable based on the reply of the local government, but the Claimant could initiate judicial proceedings against the local government.[41] Written advice may influence the case process by pressuring the local court that hears the dispute. In *Zheng Mingru v Beihai City People's Government*, the claimant, Mr Zheng, a Thai national, sought to recover land transfer fees from a local government on account of the improper cancellation of land concession. Evidence presented by the claimant included an investigative report issued by the Guangxi Foreign Investor Complaint Centre, which was forwarded by the Guangxi Province Government to the State Council. The court found in favour almost all claims of the claimant.[42]

b. Coordinating with relevant official departments to solve the complaint from the administrative aspect. For example, Heibei Province disclosed two investor complaints in 2016: International Paper against a local industrial and commercial bureau and Saint-Gobain's land dispute with a local government. Both cases were received and investigated by the provincial commerce department. Instructions were given to the relevant local authorities for resolution.[43]

c. Referring to local complaint centres or other relevant departments to handle the case. A complaint centre may refer the case to the disciplinary departments or the head departments in charge of the respondent to pursue administrative disciplinary punishment of the respondent, the person with direct responsibilities on the matter and the person in charge.[44] If the complaint centre discovers that

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[41] (2011) YueGaoFaXingZhongZi No 30, Guangdong Province High People's Court.
[42] (2004) GuiMinSiChuZi No 1, GuangXi Zhuang Autonomy High People's Court. The Supreme People's Court (SPC) as the second instance court upheld the judgement despite the appeal raised by the local government. See (2005) MinYiZhongZi No 31.
[43] Department of Commerce of Hebei Province, *Report of the Department of Commerce of Hebei Province on Law-based Administration in 2016* (2017) s 5.1.
[44] For example, see Guangdong Province Measures for Handling Complaints of Foreign Investment Enterprises (2014), Guangdong Province People's Government Order No 204 (Guangdong Measures) art 20.

the respondent is suspected of committing a crime, it may transfer the case to the prosecution department or other judicial departments.[45]

d. Other appropriate ways to solve the complaint, such as hosting mediation.[46]

2.19 In contrast, the Draft Measures and the following Working Measures do not illustrate every step of proceedings, which means complaint centres have been given greater discretion on methods for solving complaints under the new rules.[47] Furthermore, the new rules have introduced more practical and effective solutions than the current Interim Measures. Most importantly, complaint centres are now encouraged to promote legally binding written settlement agreements between disputing parties.[48] When the respondent refuses to perform its duty under the settlement agreement, the Working Measures refers to article 41 of the Regulation for Implementation of Foreign Investment Law, under which the respondent and its staff will assume legal liabilities if they fail to honour their commitments legally entered into with foreign investors or FIEs.[49] Additionally, a complaint centre may take any method deemed appropriate to settle a complaint, such as coordinating the administrative agency and proposing suggestions on policies to relevant government departments.[50]

2.20 It seems from the Interim Measures that the main burden of proof fell on the complainant, who was required to present facts and evidence when filing the complaint and provide further evidence if asked by the complaint centre when deciding whether a complaint was acceptable.[51] Furthermore, the complainant had an implied duty to produce more information for the NCC to determine the truth after

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45 Notice of Zhejiang People's Government Department of General Office on Circulating Zhejiang Province Interim Measures for Handling Complaints of Foreign Investment Enterprises (7 December 2005), Department of General Office of Zhejiang People's Government (Zhejiang Measures) art 19.

46 Interim Measures (n 7) art 12.2.

47 Working Measures (n 5) arts 16 and 17 simply suggest that the NCC may hold meetings with both the complainant and respondent to discuss a possible solution and may invite experts to present expert opinions on the specific issues.

48 Working Measures (n 5) art 18.1.

49 Working Measures (n 5) art 18.

50 Working Measures (n 5) arts 18.2, 18.3 and 18.4.

51 Interim Measures (n 7) arts 8.3 and 10.1.

the complaint is accepted; otherwise, the complaint will be closed.[52] Nevertheless, the Draft Measures and the following Working Measures, though still keeping the significant burden of proof on the complainant, tend to impose liability on the respondent to cooperate with the NCC when asked to provide relevant information.[53] At the local level, it is often explicit that the respondent has the responsibility to cooperate with the complaint centre according to the local complaint rules. Otherwise, the person in charge and other personnel with direct responsibilities may receive administrative disciplinary punishment.[54]

Legal consequences

2.21 Rules on the termination of a complaint are largely unchanged. A complaint may be settled via the approaches discussed above or terminated by the complaint centre or the complainant. In other words, a complaint centre may dismiss a complaint when it believes facts and evidence produced by the complainant are not true or when the complainant fails to coordinate with the centre to find the truth.[55] That said, the complainant is not barred from launching administrative review procedure, administrative litigation or other proceedings on the same matter in the future and arguably no further adverse legal consequences will be assumed to the complainant.

2.22 It is worth reiterating that the Complaint Mechanism is available to foreign investors and invested enterprises voluntarily, which means that it is never a precondition of administrative review or administrative litigation.[56] After a complaint is accepted, a complainant is still free to withdraw its application at any time and shift to arbitration, litigation or administrative review.[57] When a complainant chooses to switch to another proceeding before the resolution of the complaint, the complaint is regarded

[52] ibid art 12.6.
[53] Draft Measures (n 19) art 16.1; Working Measures (n 5) art 17.1.
[54] Zhejiang Measures (n 45) art 20; Guangdong Measures (n 44) art 20.3.
[55] Interim Measures (n 7) arts 12.4 and 12.6; Working Measures (n 5) arts 20.1.(2), 20.1.(3) and 20.1.(6).
[56] FIL (n 6) art 26.1.
[57] Interim Measures (n 7) arts 12.3 and 12.5; Working Measures (n 5) art 20.2.

as withdrawn by the complainant so that the complaint can be closed.[58] The complainant may apply to withdraw the complainant without stating a reason.[59] The same complainant arguably could file a new complaint based on the same facts and reasons because there was no prohibition in the Interim Measures on repeated complaints. However, the new Working Measures have prohibited repeated complaints to the same complaint centre without any new evidence or legal grounds.[60] The doctrine of estoppel also exists in rules of local complaint centres in some provinces.[61]

2.23 When a complainant is unsatisfied with the result of the complaint proceeding, several remedies are available to the complainant. Above all, a complainant is always free to pursue administrative review or administrative litigation to resolve the dispute. Second, before the implementation of the new rules, an appeal of an unsatisfactory decision to a complaint centre at an upper level or the provincial department in charge, usually the department of commerce, was only permitted within some provinces.[62] However, article 22 of the Working Measures explicitly allows a complainant to appeal to an upper complaint centre, but whether the latter will accept the appeal is still subject to its own rules. Third, seldomly may a complainant request the same complaint centre or the corresponding coordinate office, which often acts as a link between the complaint centre and relevant government agencies, to review the decision.[63]

Advantages of the Complaint Mechanism

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[58] Interim Measures (n 7) art 12.3; Working Measures (n 5) art 20.2.
[59] Interim Measures (n 7) art 12.5; Working Measures (n 5) art 20.1(4).
[60] Working Measures (n 5) art 14.6.
[61] Zhejiang Measures (n 45) art 12.3; Notice of Hebei Province People's Government on Circulating Hebei Province Measures for Handling Complaints of Foreign Investment Enterprises (2008), JiZheng [2008] No 96 (Hebei Measures) art 17.
[62] For example, see Zhejiang Measures (n 45) art 17; Guizhou Province Measures for Handling Complaints of Foreign Investment Enterprises (2019), QianFuBanHan [2019] No 49 (Guizhou Measures) art 7.
[63] Shanghai Measures (2010) (n 8) arts 15 and 16.

2.24 Compared with other dispute resolution mechanisms, the complaint procedure is regarded as a soft solution with less confrontation between a foreign investor who feels aggrieved and the host government.[64] It is, by nature, not a judicial procedure that judges the rights and wrongs of a dispute. Indeed, in solving complaints, the main duty of complaint centres is conducting sufficient communication with both parties to collect information, coordinate each other and work towards an appropriate solution.[65] As mentioned in the above paragraphs, complaint centres are encouraged to promote mutual understanding and reach a settlement agreement between disputants.[66] Moreover, complaint centres may reference other factors besides laws and regulations when solving a dispute. For example, article 13.2 of the rules on the local Complaint Mechanism in Shanghai provides that one of the principles of the complaint centre in solving disputes is conforming to international custom as much as possible. At all events, a complainant is not bound by the complaint mechanism given it is free to withdraw from the complaint procedure and switch to other dispute resolution mechanisms at any time during the proceedings or after the complaint proceedings are completed unless there is a binding settlement agreement voluntarily reached by parties.

2.25 Furthermore, complaint procedures are relatively quicker and free of charge compared with other dispute resolution methods. The Interim Measure required the complaint centre that received the complaint to decide whether to accept it within five working days. Usually, a complaint should be resolved within 30 working days after being accepted by the complaint centre, but this time limit could be extended as long as the complainant is timely notified of the extension.[67] The Draft Measures extend the time limits for accepting a case to seven working days if no further documents need to be supplied by the complainant and solving a case to 60 working

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[64] Fang Xu, 'On the Construction of the New Mechanism of Coordinating and Handling the Complaints about Foreign Investment in China – Comment on Foreign Investment Law (Draft)' (2016) 34 (2) Hebei Law Science 45

[65] Working Measures (n 5) art 16.

[66] Working Measures (n 5) art 18.1 (1).

[67] Interim Measures (n 7) art 10.1.

days.[68] Although the Draft Measures do not provide a maximum period for extension of the time limit, they require any cases lasting for two years from the acceptance to be reported to the government at the level of the complaint centre.[69] This time for alert has been shortened to one year in the Working Measures to mitigate the delay of proceedings.[70]

2.26 At the regional level, time frames defer from each other in local complaint centres, but in general, they are either equal to or more stringent compared with the NCC. For example, complaint centres in Guizhou Province usually are required to reply to the complaints within 5 to 20 working days depending on the complexity of the cases,[71] while centres in Hebei Province shall render decisions within 15–20 working days.[72]

2.27 None of the Interim Measures, the Draft Measures or the Working Measures state whether there are any charges for the complaint procedure. Few local rules, as far as the writer reviewed from the online databases, have provisions on fees, but all of them state that the complaint proceedings are free of charge at these areas.[73]

2.28 Nevertheless, there are sufficient reasons to conclude that the complaint proceeding is free of charge nationwide. As discussed above, the NCC and local complaint centres are generally public institutions, whose charges must be listed in the catalogue for charges announced by the Ministry of Finance (MOF) or local department of finance, respectively. Nationally, the MOF published the Announcement on the Implementation of Issuing the Catalogue for Administrative Charges and Government

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[68] Draft Measures (n 19) arts 14 and 18; Working Measures (n 5) arts 15 and19.
[69] Draft Measures (n 19) art 20.
[70] Working Measures (n 5) art 21.
[71] Guizhou Measures (n 62) art 6.
[72] Hebei Measures (n 61) art 10.
[73] Rushan City People's Government, *Guide of Service of Complaints and Mediation of Foreign-Invested Enterprises (2020)* s 7;
'Binzhou City Public Institution List of Business Scope' (*Binzhou City Public Institution Supervision and Management Forum*, 2018) <http://106.13.95.43:8080/public/displaymx?bid=1835>accessed 30 December 2020;
Notice of the People's Government Office of Ziyang City on Adjusting the Members of the Complaint Centre for External Enterprises of the People's Government of Ziyang City (2007), ZiFuBanHan [2007] No 178, s 2 art 3.

Fund in 2014, on which the complaint proceeding charges are not listed.[74] Therefore, the NCC does not have the authority to charge any fees for the proceeding. The local department of finance of each province also has a duty to publish a similar announcement on the charges. Since 2017, the central government has summarised the current administrative charges of the central government and local governments on its official website in accordance with the announcements. It returns no results when searching the term 'complaint' on the website.[75] However, complainants may still be expected to undertake other costs in addition to its own legal counsel fees, as some local rules explicitly state that costs and expenses occurred during complaint proceedings, including those on travel, files and translation, shall be undertaken by complainants.[76]

2.29 In addition, foreign investors may take advantage of the complaint procedure to achieve arguably more favourable results.[77] Complaints of foreign investors are of great concern for governments that are eager for foreign investments. Local governments are more likely to reach a settlement via this amicable resolution so as to avoid disclose negative information to the central government.[78] Take Liaoning Province as an example. The provincial government demands all complaint centres take special care on cases that have attracted the attention of the provincial governors. Specifically, the main leaders of each city of the province shall 'personally intervene, follow up and order competent personnel to catch up to the end' to ensure that the complaint is properly resolved in a timely manner.[79] In *Jiaozuo AES Wanfang Company v Jiaozuo City Bureau of Labour*, the report produced by the FIEs Complaint Centre of Henan Province to the government of the province was forwarded to the

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[74] Announcement No 80 of 2014 of Ministry of Finance of the People's Republic of China.

[75] See 'List of National Government Funds and Administrative and Public Institutional Charges' <www.gov.cn/zhuanti/shoufeiqingdan/shoufeiqd.html>accessed 9 June 2020.

[76] Zibo City Measures for Handling Complaints of Foreign Investment Enterprises (1999), ZiZhengFa [1999] No 77, art 16.

[77] Tao Du, 'Hela Schwarz v China and the Concurrency of Litigation and Arbitration in ISDS' [2019] Business and Economic Law Review 130

[78] Guiguo Wang, 'Chinese Mechanisms for Resolving Investor-State Disputes' (2011) 1 (1) Jindal Journal of International Affairs 204.

[79] Notice of Liaoning Province People's Government on Further Strengthening the Handling Complaints of Foreign-Invested Enterprises, LiaoZhengFa [2002] No 6, s 3.

High People's Court of Henan Province, in which it said the controlling shareholder of the Claimant was the AES Corporation from the United States, the first Fortune 500 Company invested in Henan Province. According to the report, if the case were unfairly handled, it would have a 'negative impact on Henan's image of opening-up, investment environment and investment attraction'.[80] The report further suggested that the provincial government take the lead in organising a joint investigation team with the provincial congress, the High Court of the province and other seven relevant administrative departments to investigate the issues complained by the AES. The report was specifically cited and reported to the Supreme People's Court (SPC) when the High Court sought a judicial interpretation on the key issue of the case.[81]

Concerns on the Complaint Mechanism

2.30 Although rules on the Complaint Mechanism have emphasised continuously that complaints should be handled fairly and legally,[82] whether the fairness can be achieved is highly doubted as complaint centres are not independent dispute settlement centres. Instead, complaint centres are either closely linked to or controlled by government agencies from all aspects of the structure, funding and personnel.

2.31 The NCC is the national complaint centre being established by the MOC as a sub-division of the China Investment Promotion Agency (CIPA), a public institution of the MOC.[83] A public institution is not a government agency but has a quasi-official status because it is by definition set up and led by a government agency, supported by public funds and provided public services in areas such as education, technology, culture

[80] Telephone Reply of the Administrative Trial Court of the Supreme People's Court on Henan High People's Court's Request of Instruction on Determination of Work Injury in *Jiaozuo AEC Wanfang Company v Jiaozuo City Bureau of Labour* (2005), [2004] XingTaZi No 14.
[81] Ibid.
[82] Interim Measures (n 7) art 4; Working Measures (n 5) art 3.
[83] 'Functions of Investment Promotion Agency of the Ministry of Commerce' (*Investment Promotion Agency of the Ministry of Commerce*, 2020) <www.cipainvest.org.cn/article/guanywm/201412/20141200838506.shtml> accessed 30 December 2020.

and hygiene.[84] Not all public institutions are fully funded by the government. Whether and to what extent a public institution receives government funds depends on the status of each public institution. CIPA is one of the 15 public institutions included in the annual accounts of the MOC.[85] Furthermore, at least some NCC staff also hold offices in the Legal Affair Posts, a sub-division under the General Affairs Department of the CIPA.[86] That is to say, the NCC and its staff, either on duty or retired, are primarily supported by the government funds apportioned to the MOC as shown in the final accounts of 2018.

2.32 At the regional level, a local government may either set up a government department or a service centre to accept and handle FIE complaints. In the first scenario, an agency designated to handle complaints, most likely being set up under the local department of commerce, is an administrative agency fully supported by the local government.[87] For example, the FIEs Complaint Centre of Henan Province is the other name of the office set up by the Leading Group for Rectifying and Regulating Market Economic Order of Henan Province in the Department of Commerce.[88] In this case, it is a de facto government department regardless of what its name might be to the public.

2.33 However, it is more commonly seen that a local complaint centre is a public institution set up by the local government, its agencies or another public institution. For example, the Complaint Centre of Guangxi Autonomous Region is defined as a public institution

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[84] Interim Provision for Registration of Public Institutions (2004 Revision) (2004), Order No 411 of the State Council of the People's Republic of China, art 2.

[85] Ministry of Commerce of the People's Republic of China, *Final Account of the Ministry of Commerce in 2018* (2019)

[86] 'Legal Affairs Post of Position Setting Table of CIPA' (*Invest in China*, 13 July 2007) <www.fdi.gov.cn/1200000027_3_37_0_7.html> accessed 3 October 2020.

[87] For example, the Division of Foreign-Related Investment is a department of the Department of Commerce of Shaanxi Province, which is responsible for, among others, accepting and handling complaints of FIEs. See 'Organisation Structure' (ShaanXi Provincial Department of Commerce) <http://sxdofcom.shaanxi.gov.cn/newstyle/pub_newsshow.asp?id=29017721&chid=100325> accessed 30 December 2020.

[88] Notice of the General Office of Henan Province People's Government on Issuing the Provisions on the Main Responsibilities, Internal Organisations and Staffing of the Department of Commerce of Henan Province (2004), YuZhengBan [2004] No 29 (Henan Staffing) s 5.2.

at the department level directly under the government of Guangxi Autonomous Region.[89] Zhejiang Complaint Centre for Foreign Invested Enterprises is a department of Zhejiang International Investment Promotion Centre, which is itself a public institution under the Department of Commerce of Zhejiang Province.[90] Most public-institutional complaint centres also receive government funds from local governments. For instance, Liaoning Province FIEs Complaints Centre is a subsidiary of Liaoning Province Business Environment Development Bureau, a public institution directly under the provincial government. According to the Summary Table of Approved Revenue and Budget of the Bureau in 2019, all revenue of the complaint centre comes from the fiscal appropriation from the provincial government covering all salaries and benefits for staff and other expenditures.[91]

2.34 Not all complaint centres are supported by government funds. In the Final Accounts of Yunnan Foreign Investment Service Centre in 2018, the Yunnan Foreign Investment Service Centre which is responsible for accepting and handling foreign-invested complaints in the province is listed as a self-receiving and self-supporting public institution. This means the income of the centre relies on its business operation rather than governmental funds. As shown in the Final Accounts of 2018, the service centre did not receive any government funds or subsidiaries in 2017 and 2018, and salaries of the staff were paid from incomes of the centres that were purely from its business operation.[92]

2.35 Staff members of complaint centres that handle complaints have a different

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[89] Notice of the General Office of Guangxi Zhuang Autonomous Region People's Government on Circulating the Provisions of the Internal Arrangement and Staffing of the Foreign Complaint Centre of the People's Government of Guangxi Zhuang Autonomous Region (2000), GuiZhengBanFa [2000] No 146 (Guangxi Staffing).

[90] 'Overview of the Centre' (*Zhejiang International Investment Promotion Centre*, 2012) <www.zjfdi.com/news/20131114/n60811667.html> accessed 30 December 2020.

[91] 'Departmental Budget of Liaoning Provincial Business Environment Development Bureau in 2019' (*Liaoning Provincial Business Environment Development Bureau*, 22 February 2019) <http://ysj.ln.gov.cn/zwgk/czyjs/201902/t20190222_3442211.html> accessed 30 December 2020.

[92] 'Final Accounts of Yunnan Foreign Investment Service Centre 2018' (*Department of Comment of Yunan Province*, 2019) <http://swt.yn.gov.cn/zfxxgk/zfxxgknr/zfxxcwgk/202003/t20200318_930539.html> accessed 30 December 2020.

employment status depending on the local rules: they can be merely employees of public intuitions, civil servants, government officials or professional judges wearing two hats.[93] The head of a local complaint office is more likely one of the senior officers in the government. For instance, the chairman of the Complaint Centre of Sichuan Province is the vice governor of the province, and the vice-chairman is the Director of the Department of Justice of the province.[94] In addition to the leaders of the complaint centres in Sichuan Province, members of the provincial complaint centre include the provincial parliament, the provincial political consultative conference, the High People's Court, the Prosecutors Office and other 20 government agencies of the city covering almost every aspect where foreign-related disputes may be of relevance.[95] On the positive side, the involvement of senior officers in the complaint centres may benefit the settlement of administrative disputes. On the negative side, one could hardly expect that the complaint centres would act impartially, especially when the dispute is with the government agency where the senior officers take the seats. Other full-time members of a complaint centres are either holding officially budged posts (permanent staff) or contractual positions.[96]

2.36 While all staff are demanded to act with due diligence and impartially,[97] parties do not have rights to challenge a staff member either under the Interim Measures or the new rules. This would have been reformed in the Draft Measures, where either the complainant or the respondent would be able to challenge a staff member who was

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[93] For instance, the FIEs Complaint Centre of Henan Province is in fact a governmental department with staffing of 3 civil servants holding governmental budged posts. See Henan Staffing (n 88)

[94] Notice of the Sichuan Province People's Government Foreign Enterprise Complaint Centre on Adjusting Members of the Sichuan Province People's Government Foreign Enterprises Complaint Centre (2007), ChuanWaiTouZi [2007] No 02.

[95] The practice of Sichuan Province is followed by its subordinate cities by nominating senior city governors as the heads of complaint centres and involving a large number of departments in the constitution of centres. For example, see Notice of Panzhihua City People's Government Office on the Establishment of Foreign-Enterprises Complaint Centres of the City Government (2014), PanBanHan [2014] No 52; Notice of Ziyang City People's Government Office on the Adjusting Members of the Ziyang City People's Government Foreign Enterprises Complaint Centre (2007), ZiFuBanHan [2007] No 178. Other provinces and cities including Xi'an City of Shaanxi also take this approach. See Notice of Xi'an City People's Government Office on the Establishment of Xi'an City Foreign-invested Complaint Centre (2000), ShiZhengBanFa [2000] No 45.

[96] For instance, the complaint centre of Guangxi Province maintains a staff size of 18 budged posts, including 1 chairman, 2 vice chairman and 7 leaders at division level. Guangxi Staffing (n 89) s 4.

[97] Interim Measures (n 7) art 14.

responsible for the complaint if the staff member had interests with either party that might impact his/her impartiality.[98] The complaint centre would decide whether a challenge was allowed, and the proceeding would be suspended before a decision is made.[99] Nevertheless, the right of challenge is deleted in the Working Measures. Agencies and staff members now will face administrative or even criminal penalties if they abuse powers, neglect duties, engage in malpractices for personal gain or release confidential information obtained during the handling process.[100]

2.37 There are no requirements of legal or economic qualifications for these staff in the Interim Measures or the new Working Measures. Few local rules explicitly require qualifications or professional requirements of the staff. The only currently effective local rule at the provincial level that contains such requirements is the one Shanghai promulgated in 1989: staff of the complaint centres in Shanghai shall, among other things, be familiar with laws, regulations, rules and policies, be proficient in business and know international custom.[101]

2.38 In summary, the Complaint Mechanism, as one of the major dispute resolution mechanisms for foreign investors, has benefitted foreign investors in solving investment disputes with government agencies in the past 14 years owing to its flexibility and weak confrontational nature. After the new Working Measures takes effect, Agencies Handling Complaints at all levels are given a clearer scope of jurisdiction and granted more discretion in the procedure. However, Agencies Handling Complaints are neither adjudicators nor mediators in a neutral position. They are by and large affiliate government agencies staffed by persons sharing common interests with the respondents. In addition, given the new set of national rules just implemented, the Complaint Mechanism is under a transitional period

[98] Draft Measures (n 19) art 22.1.
[99] ibid, art 22.2.
[100] Working Measures (n 5) art 29; FIL (n 6) art 39. Some provinces also inflict administrative punishments or even pursue criminal liabilities on the member staff in severe circumstances in their local rules when a member staff fails to perform his/her duty in the complaint procedure. See Zhejiang Measures (n 45) arts 22 and 23; Guangdong Measures (n 44) art 19.
[101] Shanghai Measures (2010) (n 8) art 7.

nationwide. How the national rule will be implemented, how local rules will be reformed and how Agencies Handling Complaints at all levels will coordinate to form a uniform and consistent system remains unclear.

C. <u>Administrative review</u>

2.39 Administrative review is, by nature, an internal correction mechanism within the administration system.[102] It was first formally regulated in the Provision for Administrative Review in 1990 and amended in 1994 by the State Council. After several years of practice, the formal Administrative Review Law of the People's Republic of China was promulgated in 1999 and subsequently amended in 2009 and 2017. The affiliated administrative regulation, the Provision for Implementation of the Administrative Review Law (the 'Interpretation Provision'), was published by the SPC in 2007 and is still in force.[103]

2.40 In accordance with the Administrative Review Law, any citizens, legal persons or other entities who believe their legal rights and interests have been infringed by specific administrative acts can apply for administrative reviews before competent administrative agencies.[104] Foreign nationals and organisations have been granted the same legal status as Chinese nationals in administrative review proceedings against administrative agencies since 1990.[105] Today, any foreign parties engaged in the administrative review procedure shall also be subject to the Administrative Review Law.[106]

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[102] Administrative Law Office of the Commission for Legislative Affairs of the NPC Standing Committee, *The Administrative Procedure Law of People's Republic of China-Interpretation and Application* (Law Press China 2015) (Interpretation of APL)131

[103] Order No 499 of the State Council of the People's Republic of China (Interim Provision).

[104] Administrative Review Law of the People's Republic of China (2017 Amendment) (ARL 2017) art 2.

[105] Provision for Administrative Review (1994 Revision), Order No 166 of the State Council of the People's Republic of China, arts 55 and 2; Provision for Administrative Review (1990), Order No 70 of the State Council of the People's Republic of China, art 51.

[106] ARL 2017 (n 104) art 41.

Scope of administrative review

2.41 By definition, the administrative review procedure focuses on any illegal or improper specific administrative acts considered to have infringed one's rights and interests.[107] An administrative review agency can review both the legitimacy and the reasonableness of the original administrative act. Article 6 of the Administrative Review Law lists 10 categories of specific administrative acts and one general provision that covers any other specific administrative acts that are within the jurisdiction of administrative review proceedings. Some other laws and regulations may also explicitly state that administrative acts conducted under them may be subject to administrative review proceedings. According to the statistics on the causes of action of administrative review published by the MOJ,[108] administrative review proceedings are more likely raised against the following specific administrative acts:

2.42 Administrative penalties, such as warnings, fines, confiscations of illegal gains or properties, orders to suspend productions or business, suspensions or rescissions of licenses or permits, administrative attachments and other sorts of administrative penalties.[109] This cause of action has the largest number of cases (97,001) from the very beginning of the implementation of the Administrative Review Law, occupying 45.96% of the total number of cases of administrative review accepted in 2018 nationally.[110]

2.43 Disclosing government information: the request for administrative review of disputes related to government agencies' acts on the disclosure of government

[107] ibid art 1

[108] All statistics on national administrative review and administrative litigation in the chapter are either directly cited or calculated from National Administrative Review and National Administrative Litigation Case Statistics published every year from 1999 to 2018 by the Ministry of Justice on its official website (n 4). The URL for each report is listed in the bibliography.

[109] ibid art 6.1; See also article 8 of the Administrative Penalty Law of the People's Republic of China (2017 Amendment) for all sorts of administrative penalties.

[110] '2018 National Administrative Review and National Administrative Litigation Case Statistics' (*Ministry of Justice of the People's Republic of China*, 9 May 2019) <www.moj.gov.cn/organization/content/2019-05/09/560_234638.html> accessed 30 December 2020 (2018 Annual Report).

information is based on the Provision for Disclosure of Government Information of the People's Republic of China on first published in 2007 and revised in 2019.[111] The percentage of cases on open government information has dramatically increased over the years, from 0.59% in 2007 to 14.15% in 2015, but then gradually decreased to 10.23% in 2018. However, it remains the second largest cause of action of administrative review since 2014.

2.44 Handling whistleblowing and complaints: a whistle-blower or complainant who aims to protect his/her legitimate rights and interests can launch administrative review proceedings against an administrative agency when the latter refuses to deal with the reported issue or the result is unsatisfying.[112] In other words, whistle-blowers or complainants who act purely for the public benefit are disallowed from requesting administrative review proceedings.[113] Since 2016, cases connected with whistleblowing and complaints have been the third-largest group among all administrative review cases. The latest number was 9.79% in 2018.[114]

2.45 Administrative expropriations: this is one of the administrative acts specified in article 6.7 of the Administrative Review Law that can be reviewed. Other administrative acts covered by this section include illegal raising funds, levying properties, apportioning charges or demanding performance of duties. Administrative expropriation is also a major cause of action for administrative review in recent years, occupying 8.24% of the total in 2018.[115]

2.46 Administrative confirmation: administrative confirmation is not defined in laws or

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[111] Order No 492 of the State Council of the People's Republic of China, art 33.2; Order No 711 of the State Council of the People's Republic of China, art 51.

[112] Reply of the Supreme People's Court on Whether Informers May be Qualified as Applicants for Administrative Review When They Are Dissatisfied with the Handling of the Matters Reported of the Administrative Omission by Administrative Agencies (2013), [2013] XingTaZi No 14.

[113] *Lijun v Liaoning Province People's Government*, (2019) ZuiGaoFaXingShen No 14230, Supreme People's Court; *Wang Wujun v Guangdong Province Shenzhen Municipality People's Republic*, (2018) ZuiGaoFaXingShen No 6603, Supreme People's Court.

[114] 2018 Annual Report (n 110).

[115] Ibid.

regulations in China. However, a judgment of a guiding case by the SPC presents that administrative confirmation is an administrative act that determines and confirms legal facts and legal relations of the person subject to administration. A notice on the recorded result of examination on fire protection of a construction project, for example, should be regarded as an administrative confirmation and within the jurisdiction of administrative review.[116] Another typical example of administrative confirmation is the determination of occupational injury, which is also shown in a guiding case approved by the SPC.[117] The percentage of administrative review cases on administrative confirmation is declining in general, from 10.82% in 2010 to 4.8% in 2018.

2.47 Administrative compulsory measures: as defined by article 2.2 of the Administrative Compulsion Law (2011), administrative compulsory measures refer to temporary restrictions of personal freedom of citizens or temporary control of the property of citizens, legal persons or other organisations according to law by administrative agencies for such purposes as stopping illegal acts, preventing the destruction of evidence, avoiding damage and containing the expansion of danger.[118] Typical administrative compulsory measures include restricting personal freedom or sealing up, seizing or freezing of properties.[119] This section occupied 4.77% of the total cases nationwide in 2018.[120]

2.48 Administrative omissions: this section covers any failure of administrative agencies

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[116] *Daishihua v Jinan City Public Security Fire Division*, Guiding Case No 59, Notice of the Supreme People's Court on Issuing the Twelfth Group of Guiding Cases (2016), Fa [2016] No. 172, Supreme People's Court.

[117] *Chongqing Municipality Fulin Zhida Property Management Co., Ltd v Chongqing Municipality Fulin District Bureau of Human Resources and Social Security*, Guiding Case No 94, Notice of the Supreme People's Court on Issuing the Eighteenth Group of Guiding Cases (2018), Fa [2018] No 164, Supreme People's Court.

[118] It is notable that though article 6.2 of the Administrative Review Law only mentions administrative compulsory measures, while according to the articles 2 and 8 of the Administrative Compulsion Law (2011), all compulsory administrative acts, including both administrative compulsory measures and administrative compulsory enforcement (an application to the courts by administrative agencies against any person who fails to perform an administrative act), can be submitted to administrative review and administrative litigation. Besides, article 12.2 of the Administrative Review Law also mentions both administrative compulsory measures and administrative compulsory enforcement.

[119] ARL 2017 (n 104) art 6.2; see also Administrative Compulsion Law (2011), art 9.

[120] 2018 Annual Report (n 110).

in performing statutory duties, including the failure to protect one's personal rights, property rights or rights to receive education,[121] failures of administrative agencies to issue legal pensions, social insurances, or minimum maintenance fees for living and other administrative omissions.[122] Cases on administrative omission comprise 4.68% of all administrative review in 2018.[123]

2.49 Administrative confirmations on rights: this refers to administrative decisions to confirm ownership or rights to use natural resources, such as lands, mineral resources, rivers, forests, mountains, grasslands, un-reclaimed lands, beaches and maritime waters,[124] after the original registrations.[125] It is notable that for disputes arising from the administrative confirmation of rights, the administrative review procedure is a mandatory precondition for administrative litigation.[126] This is so except in cases where the administrative confirmation on rights are made by governments at the provincial level; in these cases, the results of the administrative review are final.[127] The number of cases related to administrative confirmation of rights is relatively small in recent years and only accounted for 3.94% in 2018, though they peaked to 16.54% in 2009.

2.50 Administrative licensing: administrative licensing is an administrative act that permits, upon examination according to law, applicants to engage in specific activities in line with their applications.[128] Based on article 7 of the Administrative Licence Law and articles 6.3 and 6.8 of the Administrative Review Law, both administrative decisions of alerting, suspending or discharging certificates, such as licenses, permits, credit certificates, credentials, and administrative omission on the licensing (i.e.

[121] ibid art 6.9.
[122] ibid art 6.10.
[123] 2018 Annual Report (n 110).
[124] ibid art 6.4.
[125] Reply of the Administrative Division of the Supreme People's Court on Whether an Administrative Agency's Act of Issuing a Certificate or Ownership of or Right to Use Natural Resources is a Confirming Administrative Act (2015), [2005] XingTaZi No 4, Supreme People's Court.
[126] ARL 2017 (n 104) art 30.1.
[127] ibid art 30.2.
[128] Administrative License Law of People' Republic of China (2019 Amendment), art 2.

failures of administrative agencies to issue certificates or approve or register related matters) can be submitted for administrative review. Administrative licensing comprised merely 2.09% of the total administrative review cases in 2018.[129]

2.51 Other administrative specific measures conducted by administrative agencies that infringe one's legal rights and interests, including infringements upon one's rights to independence in management,[130] alterations or nullifications of one's agricultural contracts that infringe one's legal rights and interests,[131] decisions on compulsory ratification issued by environmental departments and other specific administrative acts scattered in laws and regulations,[132] such as administrative rulings, administrative allocations, administrative payments, administrative registration and administrative approvals.[133]

2.52 In the Draft of the Administrative Review Law, the scope of the administrative review was strictly limited to specific administrative acts (as listed above). After several rounds of legislative review,[134] the final version adopted suggestions by incorporating article 7, in which part of general administrative acts can be reviewed along with the application of the review of a specific administrative act, as long as the general administrative act at issue is regarded as the grounds of the disputed specific administrative act. Concerning foreign investment, article 26.3 of the Foreign Investment Law provides that the scope of administrative review and administrative litigation is limited to administrative acts conducted by administrative agencies and their staff, which can be inferred to include both specific administrative acts and

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[129] 2018 Annual Report (n 110).

[130] ARL 2017 (n 104) art 6.5.

[131] ibid art 6.6.

[132] Reply of the Ministry of Environmental Protection that Environmental Protection Departments May Apply to the People's Court for Compulsory Execution of Decisions on Demanding Correction (2010), HuanHan [2010] No 214; See also Measures for Environmental Administrative Punishment (2010 Revision) (2010), Order No 8 of the Ministry of Environmental Protection of the People's Republic of China, art 12.

[133] See '2017 National Administrative Review and National Administrative Litigation Case Statistics' (*Ministry of Justice of the People's Republic of China*, 11 January 2019) <www.moj.gov.cn/Department/content/2019-01/11/601_228943.html> accessed 30 December 2020 (2017 Annual Report), note of the chart on cause of action of administrative review.

[134] Boyong Li, *Report of National People's Congress Law Committee on Review of the People's Republic of China Administrative Review Law (Draft version)* (NPC, 26 April 1999) (NPC Report (1999)).

general administrative acts.

2.53 The scope of reviewable general administrative acts is limited to (a) administrative rules made by the departments of the State Council; (b) administrative rules made by local governments at or above the county level and their affiliated departments; (c) administrative rules made by local governments below the county level. However, as article 27 of the Administrative Review Law indicates, the review of general administrative acts (i.e. the administrative rules) is merely limited to the legality review rather than the full review of legality and rationality. A further clarification is that regulations, a source of law governed by the Law on the Legislation,[135] are excluded from the administrative review procedure to avoid disruptions of the legislation power though they are also made by the State Council's departments and local governments.

2.54 Last, it is notable for foreign investors that results of national security review under the Foreign Investment Law cannot be submitted for either administrative review procedure or administrative litigation proceedings. This rule was explicitly provided in article 73 of the Foreign Investment Law (Draft for Public Opinion) published on 19 January 2015. Although the whole chapter on national security review is reduced to just one provision in the final version of the Foreign Investment Law (2019), article 35.2 expressly states that the security review decision made in accordance with law shall be final. Although China has not yet promulgated a national law on national security review mechanism on foreign investment, one may infer from the current Foreign Investment Law that foreign investors or FIEs are unable to seek remedies via administrative review or administrative litigation proceedings against decisions of national security review.

[135] Law on Legislation of the People's Republic of China (2015 Amendment) Chapter 4.2

Administrative review agencies

2.55 When an applicant believes that its legal rights or interests have been infringed by a specific administrative act (the 'disputed administrative act' or the 'original administrative act'), it shall request an administrative review against the administrative agency that conducted the original administrative act (the 'respondent' or the 'original administrative agency') before a competent administrative review agency determined in accordance with relevant provisions in the Administrative Review Law and the Interpretation Provision.[136] The request should be raised within 60 calendar days after it is aware of the act unless otherwise provided by law.[137]

2.56 Unlike a complaint centre or a court, an administrative review agency is not a specific independent judicial authority. It is an executive administrative agency that can be the State Council, a department of the State Council, a local government or the department at the upper level of the respondent, depending on the complex jurisdiction provisions in articles 12–15 of the Administrative Review Law and/or articles 23–25 of the Interim Measures applied to different scenarios. Up to 2013, 30,450 local government agencies had the authority to conduct administrative review nationwide, among which 3,281 were local governments, and 27,169 were departments of governments.[138]

2.57 Generally speaking, a review agency is always a governmental agency that is one level above and can manage the conduct of the original agency that conducted the disputed administrative act. There is one exception to this general rule: in a case where the disputed administrative act is conducted by a department of State Council or by a local government at the provincial level, the review agency will be the department of

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[136] ARL 2017 (n 104) art 2; Implementation Provision (n 103) art 5.
[137] ARL 2017 (n 104) art 9.
[138] Shengjun Wang, *Report of the Law Enforcement Inspection Team of the Standing Committee of the National People's Congress on the Inspection of Administrative Review Law of the People's Republic of China* (NPC, 23 December 2013) (NPC Report (2013)) s 3.4.

State Council or the provincial government itself. As a supplement remedy to these self-review cases, article 14 of the Administrative Review Law provides the applicants who are unsatisfied with the results of the self-review with choices of further remedies: namely, either submitting the disputes before administrative litigation proceedings or applying for a second administrative review that will be conducted by the State Council. In the latter case, the decision of the State Council is final and cannot be further appealed to an administrative court.

Results and consequences of administrative review proceeding

2.58 An administrative review is conducted in principle via paper hearings so that review decisions will depend primarily on the facts and written evidence presented by both parties. Investigations may be launched upon application or initiative of the review agency.[139] Any third-party that has a direct interest in the disputed administrative act can apply to participate in the administrative review procedure as a third-party[140] who is allowed to present opinion and review the response and other affiliate documents relied upon by the administrative agency.[141] However, a third party is not expected to attend any hearings of administrative review (if there is one) nor can it influence the result of the review.[142]

2.59 Review decisions are not made by the actual reviewers but by the legal departments of the review agencies, who handle the administrative review and conduct relevant investigations on the front line. The legal department can only propose suggestions on the decision. In contrast, a review decision is made upon either approval of the head of the review agency or outcomes of group discussions within the review agency.[143]

[139] ARL 2017 (n 104) art 22.
[140] ibid art 10.3.
[141] ibid arts 22 and 23.2.
[142] Implementation Provision (n 103) art 9.3.
[143] ARL 2017 (n 104) art 28.1.

2.60 Consequences of administrative review in general fall into one of the following catalogues in accordance with the Administrative Review Law and the Interpretation Provision, in particular article 28 of the Administrative Review Law. The following statistics on the ratio of nationwide administrative review decisions came from the annul records on administrative disputes published by the MOJ from 1999 to 2018.

2.61 First, an review agency may order to uphold the original administrative act if the latter is supported by clear facts and abundant evidence, is based on correct legal documents and conducted in line with legal procedure rules, and the content of the administrative act is appropriate.[144] Data show that among all administrative review cases, decisions that uphold the original administrative act have always occupied the highest portion in any year since 2000 (when relevant data became accessible to the public). The average percentage from 2000 to 2018 was 57%.

2.62 Second, an application of the administrative review may be dismissed in cases where the applicant claims the respondent fails to perform a statutory duty, but the review agency discovers that the Respondent does not have such a statutory duty or has already performed such a duty;[145] or after the application has been accepted, the review agency finds that the application does not comply with the criteria of acceptance of an administrative review request.[146] This decision option was added in the Interpretation Provision so that courts can only dismiss applications after 1 August 2007, when the Interpretation Provision came into force. The numbers of cases dismissed have significantly increased and become the second-largest category since 2017, occupying 12.06% of the total number of administrative review decisions in 2018.

[144] ibid art 28.1; Implementation Provision (n 103) art 43.
[145] Implementation Provision (n 103) art 48.1.1.
[146] ibid, art 48.1.2.

2.63 Third, an applicant may withdraw its application of administrative review, subject to the approval of the review agency, any time before the decision is rendered,[147] especially after the respondent changes its original administrative act.[148] This is the third-largest group of results of administrative review proceedings in recent years, accounting for 10.85% of the total in 2018. After the application is successfully withdrawn, the applicant cannot request another administrative review before any agencies based on the same facts and reasons, except in the cases where the applicant can prove the withdrawal is not based on the true intention.[149]

2.64 The most desirable category of decisions for applicants cover cases where the review agencies determine that the original administrative acts are wrong. The review agency may order to annul or alter the original administrative act or confirm the illegality of the original administrative act if there is a lack of factual grounds, legal grounds or evidence, violation of legal procedure, excess of or abuse of administrative power, or manifest inappropriateness of the original administrative act.[150] In this case, the review agency can also demand the original administrative agency conduct a new administrative act within a certain period,[151] which cannot be identical or essentially identical to the original administrative act based on the same facts and reasons.[152] Similarly, the review agency may order a specific performance within a specific time of the respondent if the latter is determined nonfeasance.[153] It is noteworthy that an administrative agency is not allowed to render a decision that is more unfavourable to the applicant within the scope of application.[154] If an applicant is unsatisfied with a specific administrative act, it will not expect to receive a more adverse result if requesting an administrative review. Besides, compensations to the applicant will also be ordered if the specific administrative act is deemed illegal or

[147] ibid, art 38.1.
[148] ibid, art 38.
[149] ibid, art 38.2.
[150] ARL 2017 (n 104) art 28.3.
[151] The new period should in line with the laws and regulations, or within 60 days if it is not specifically provided by law. See Implementation Provision (n 103) art 49.
[152] ARL 2017 (n 104) arts 28.3 and 28.5.
[153] ibid, art 28.2; Implementation Provision (n 103) art 44.
[154] Implementation Provision (n 103) art 52.

inappropriate.

2.65 In practice, the most common remedy granted by a review agency against a wrong original administrative act is to annul the original administrative act, which comprised 9.91% of the total administrative review decisions in 2018, while the percentage of a decision confirming the illegality of the original administrative act was 3.03%. The alteration of the original administrative acts is regarded as one of the most meaningful remedies to the applicant because it can materially solve disputes without any further procedures.[155] However, the proportion of cases that the review agencies changed the original administrative acts was negligible. It substantially declined from 6% in 2000 to 0.20% in 2013 and gradually decreased again in recent years after a brief recovery in 2014, from 0.45% of 2014 to 0.21% of 2018. The percentage of ordering specific performance was higher but still relatively small compared with other decisions, only occupying 1.96% of the total in 2018.

2.66 Fifth, administrative review proceedings may be ended with settlements. Settlements can be reached via two ways: a private negotiation between parties at any time before a review decision is made or a mediation hosted by the review agency. Not all administrative acts are settleable: rather, it depends on the public nature of the disputed administrative act. For a voluntary settlement between parties, a settlement agreement will only be admissible if the dispute concerns a specific administrative act made within the legitimate discretion of the respondent. In terms of mediation, a settleable administrative dispute extends to the amount of compensation or indemnification.[156] However, the scope of settleable administrative disputes is sometimes extended by local governments. For instance, the Kunming City government broadens the scope to include disputes involving non-performance of the respondent and a breach of procedure which is so minor that an annulment or

[155] Wanhua Wang, 'The Modification and Perfection of Administrative Review Law – From the Aspect of Material Settlement of Administrative Disputes' [2019] Chinese Journal of Law 99.
[156] Implementation Provision (n 103) art 50.

alteration decision will be meaningless.[157] The Nanjing City government further extends it to disputes involving administrative decisions made by an administrative agency on civil disputes between equal parties.[158]

2.67 For disputes that are settleable, a settlement agreement must be approved by the review agency even if it is reached via the private negotiations of the parties. Such approval will not be withheld unless it infringes the legitimate interests of other parties or public benefits.[159] A settlement even resulting from the mediation of administrative review agency can be a package deal covering other disputes that have not been submitted to administrative review. In all cases, a mediation/settlement agreement must be made in writing and is legally enforceable upon affixing the stamp of the administrative review agency.[160]

2.68 Both the central and local governments are encouraged to promote mediation in the administrative review procedure. In some local areas, the mediation procedure is even a mandatory phase in the administrative review proceeding. For example, Jilin City of Jilin Province in 2007 regulates that a review agency shall conduct and record at least one mediation before a final decision being made.[161] In 2016, in response to the central government's promotion of diversified dispute resolution mechanism, the SPC stated in a judicial opinion that administrative agencies were encouraged to hold mediation either upon parties' application or according to their statutory duties.[162] Since 2017, the ratio of administrative review cases that ended with mediation/settlement agreement has dramatically jumped from around 3% between

[157] Notice of the General Office of Kunming City People's Government on Circulating the Regulation of Administrative Review Mediation and Settlement in Kunming City (2011), KunZhengBan [2011] No 141, arts 7.3 and 7.4.

[158] Notice of the General Office of Nanjing City People's Government on Circulating the Interim Measures of Administrative Review Mediation and Settlement in Nanjing City issued by the Legal Affairs Office of the City Government (2010), NingZhengBanFa [2010] No 106, art 5.3.

[159] Implementation Provision (n 103) art 40.

[160] ibid art 50.2.

[161] Notice of the General Office of Jilin City People's Government on Issuing Several Regulations on Administrative Review and Mediation (2007), JiShiZhengBanFa [2007] No 12, art 10.

[162] Opinion of the Supreme People's Court on People's Courts Further Deepening the Reform of Diversified Dispute Resolution Mechanism (2016), FaFa [2016] No 14.

2007 to 2016, to 8.8% in 2017 and further increased to 10.05% in 2018.

2.69 Last, administrative review proceedings may be ended with no results, which is mainly caused by the termination of the capacity of the applicant.[163] For instance, when a FIE is dissolved, the ongoing administrative review will be terminated if all the successors of the enterprise abandon the rights and interests under the administrative review.[164]

Advantages of administrative review

2.70 Similar to the Complaint Mechanism, the application of administrative review itself is free of charge,[165] but the applicant is still expected to undertake costs for appraisals during the investigation.[166] The statutory time limits for a review agency to deliver a decision is also strict: a review decision usually is made in 60 calendar days, or 90 calendar days in complicated cases, by a competent review agency from the date of acceptance of the request.[167]

2.71 However, the most important advantage of administrative review is that its decisions are enforceable within the administration system compared with the Complaint Mechanism. A review agency, as mentioned above, is an agency at a higher level of the respondent in most cases. A complaint centre is usually an affiliate organisation or department of an administrative agency. Therefore, though the applicant who receives a favourable review decision cannot apply to enforce the review decision before a court, the respondent has a statutory duty to timely perform a written review decision. Otherwise, the review agency or relevant upper administrative agency that has the supervisory power over the respondent shall demand the performance of the

[163] Implementation Provision (n 103) art 42.
[164] ibid art 42.3.
[165] ARL 2017 (n 104) art 39.
[166] Implementation Provision (n 103) art 37.
[167] ARL 2017 (n 104) art 31.

review decision.[168] Furthermore, it shall impose administrative sanctions on the person in charge and the person with direct responsibilities of the respondent.[169]

2.72 If an applicant is unsatisfied with the result of the administrative review, it can always file administrative litigation before a competent court in accordance with the Administrative Procedure Law, though in certain circumstances the administrative review procedure is final as provided by law.[170] However, if the applicant fails to file administrative litigation within the prescribed time, the review decision will become enforceable by the original administrative agency if the review upholds the original administrative act or by the review agency if it alters the original administrative act. In either case, the corresponding administrative agency may apply to the court to enforce the review decision.[171]

Concerns on the administrative review proceedings

2.73 As pointed above, the administrative review proceeding is not a mandatory phase before administrative litigation proceedings in most cases. Whether to seek remedies via administrative review is in the applicant's discretion. Despite the benefits of administrative review illustrated above, statistics show that parties that suffer infringements from governmental acts seem reluctant to choose administrative review when other remedies are available. According to the 2018 statistics published by the MOJ, most parties (about 68.4%) chose to submit disputes directly to administrative litigation rather than request an administrative review first. On the other hand, in the remaining 31.6% cases where parties did go through the administrative review process, 34% still filed administrative litigation afterwards.[172]

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[168] ibid art 32.
[169] ibid art 36.
[170] ibid art 5.
[171] ibid art 33.
[172] Zhezhe Wei, 'A Total of 257,000 Administrative Review Cases Were Handled Nationwide Last Year' (*People's Daily*, 27 March 2019) <www.gov.cn/xinwen/2019-03/27/content_5377315.htm> accessed 30 December 2020.

Only 20.81% of administrative disputes were settled in the administrative review proceeding.

2.74 Indeed, since the implementation of the Administrative Review Law, the administrative review mechanism has faced constant criticisms, mainly on the messy jurisdiction and unbalanced resources of hearing agencies and the questionable neutrality and professionality of staff and rigid administrative procedures. Such criticisms have led to the generally low social credibility of the administrative review proceeding among the public.[173]

2.75 Among all defects of the current administrative review system, one of the most critical issues is the shortage of qualified staff at numerous local administrative review agencies. As noted above, an administrative review agency shall review both the legality and properness of an original administrative act. Therefore, one would expect that an administrative review should be carried out by staff members who have a profound knowledge of both law and administrative practices. Traditionally, the legal department of an administrative review agency is responsible for accepting, investigating and reviewing an administrative review request, proposing suggestions on the decision of review and handling other matters related to the administrative review.[174] However, administrative review staff face a double crisis in quantity and quality.

2.76 As a mandatory requirement in the Interpretation Provision, there must be 2 or more administrative review staff members when handling an administrative review case.[175] According to the statistics of the MOJ, the average number of cases accepted by administrative review agencies nationwide is 108,319.65 from 1999 to 2018,

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[173] Jun Fang, 'Pilot Situation Review of the Administrative Review Committee in the Past Five Years' [2014] China Law 21.22. Mr Fang is the Deputy Director of the Department of Administrative Review, Legislative Affairs Office of the State Council.
[174] ARL 2017 (n 104) art 3; Jingyu Yang, *Explanation Regarding the Draft of the Administrative Review Law of People's Republic of China* (NPC, 27 October 1998).
[175] Implementation Provision (n 103) art 32.

which was higher than the average number of cases filed with administrative courts in administrative litigation proceedings (80,249.45). In comparison, full-time staff being engaged in administrative litigation in the courts were more than 3.5 times those in the administrative review.[176] As admitted by the State Council, there was a severe shortage of full-time administrative review staff, especially at the county level and below. Up to 2008, there were only 1,532 full-time members of staff at all levels of local governments. Even worse, the average numbers of staff of each review agency at the county (or district) level were only 0.2.[177] The total number of full-time members more than doubled to approximately 3,500 by 2013 after the pilot reform project,[178] but the average full-time specialists in each administrative agency at the county level was still less than 1 person at that time.[179] Not all administrative agencies that assume the authority to hear administrative review cases have their own specific judicial departments. This is especially true for governments at the county level or below, or when the administrative review agency is only a small department. In practice, many country government legal departments are the general offices too and are wearing two hats. Up to 2013, approximately 38.2% of the county governments did not have legal departments or only had nominal legal departments with no full-time staff.[180]

2.77 Despite the general shortage of full-time specialists engaged in administrative review, the workload is distributed unevenly nationwide. According to the investigation launched by the NPC on 1,407 counties in 2013, 306 and 277 counties, respectively, in 2011 and 2012, did not accept any administrative review applications on that year, and some counties had never conducted one administrative review since the implementation of the Administrative Review Law.[181] In contrast, the average proportion of cases accepted by governments below the provincial level is 81.3%,

[176] Fang (n 173) 24.
[177] Notice on the Pilot Work of Administrative Review Committees in Some Provinces and Municipalities (2008), GuoFa [2008] No 71 (Notice on Administrative Review Committee).
[178] Fang (n 173) 24.
[179] NPC Report (2013) (n 138) s 3.3.
[180] ibid.
[181] ibid.

which shows a serious imbalance among review agencies despite the overall shortage.[182]

2.78 In terms of the professionality of the staff, article 4 of the Interpretation Provision requires that full-time staff for administrative review shall possess the qualities, expertise and capabilities that are appropriate for performing their responsibilities for administrative review and shall have obtained relevant qualifications. Furthermore, administrative review agencies at all levels shall provide regular training to administrative review staff to improve their professionality.[183] Nevertheless, the detailed requirements and specifications for the qualities, which should have been made by the Department of Legislative Affairs of the State Council with other relevant authorities of the State Council,[184] has not yet promulgated.

2.79 Due to the lack of national qualification determination of administrative review personnel, some provinces introduced their own qualification certificates for administrative review. For example, Guangxi Zhuang Autonomous requires all administrative review personnel to pass a qualification test after training and acquire a certificate for administrative review, which is generally recognised throughout the province.[185] Even before the Interpretation Provision, Jiangsu Province set out a rule that since 2002 all administrative review personnel should acquire a Jiangsu Province Administrative Review Respondent Qualification Certificate by passing special tests.[186] This rule has been eased in recent years by providing alternative approaches for new administrative review personnel to acquire the qualification certificates other than passing tests. Specifically, anyone who holds a lawyer's

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[182] The MoJ only publishes data of review agencies at different levels from 2015 to most recently 2018, at 77.85%, 80.77%, 82.47% and 84.11% respectively for review agencies below the provincial level, including departments and governments of counties and cities.
[183] Implementation Provision (n 103) art 60.
[184] ibid art 4.
[185] Notice of the General Office of Guangxi Zhuang Autonomous Region People's Government on the Implementation Plan of Further Enhancement on the Standardisation Construction of Administrative Review Work (2012), GuiZhengBanFa [2012] No 297, s 2.6.2.
[186] Notice of the General Office of Jiangsu Province on Several Opinion on the Implementation of the Administrative Review Law of People's Republic of China (2001), SuZhengBanFa [2001] No. 161, s 1.3.

certificate or legal professional qualification, has acted as a judge or prosecutor for one year, or retains a middle-grade title in legal teaching or researching work will be exempted from the qualification tests.[187]

2.80 However, a large number of provinces or cities still do not have provincial or local rules on the qualification of the administrative review personnel. Given the lack of both national law and local rules, applicants of administrative review could hardly raise challenges or objections on the qualification or capacities of administrative review staff. In *Lu Yaojia v Shennongjia Forest Region Development and Reform Commission and Hubei Province Development and Reform Commission*, the claimant Mr Lu invoked article 4 of the Interpretation Provision and argued that, among other things, the administrative review decision made by the review personnel from Hubei Province Development and Reform Commission did not hold corresponding qualification certificates of administrative review so that the review decision was void. However, the review agency defended itself in that the lack of corresponding certificates did not violate the legal procedure rules of administrative review at that time or infringe the claimant's legal rights. The State Council had not promulgated the detailed implementation rules for the certificates and Hubei Province had not yet started the determination procedure on the qualification of administrative review personnel within the province. As a result, both the courts of first instance and appeal instance rejected the claimant's challenge on the issue and upheld the legality of the administrative review decision despite the lack of qualification certificates of the reviewer.[188]

[187] These exemptions are extracted from a notice of Yangzhou City Government of Jiangsu Province published online in 2016. The notice is a local implementation of a provincial notice issued by the legal department of Jiangsu Province Government. See Notice on the Application and Renewal of Jiangsu Province Administrative Review Respondent Qualification Certificate (2016), SuFuFa [2016] No 109; Notice on the Application of Administrative Review Respondent Qualification Certificate (2016), YangFuFa [2016] No 6.

[188] (2016) E05XingZhong No 82, Hubei Province Yichang City Intermediate People's Court; See also *Wang Zhenli v Liaoyang County Planning Bureau and Liaoyang City Housing and Urban-rural Construction Committee*, (2016) LiaoXingZhong No 144, Liaoning Province Liaoyang City Intermediate Court; *Bai Liu and Others v Liulin County Housing Security and Urban-rural Construction Management Bureau and Others*, (2016) Jin11XingZhong No 105, Shanxi Province Lvliang City Intermediate People's Court.

2.81 Since the amendment 2017 of the Administrative Review Law, there is a national mandatory rule that any staff members who are newly engaged in the administrative review proceedings shall pass the national judicial exam and obtain the legal professional qualification.[189] This clause nevertheless does not apply to staff members who have already conducted administrative review before the implementation of the amendment (i.e. before 1 January 2018). Although there is no published case on the new amendment of the clause to date, it is foreseeable that there will be more qualified reviewers involved in the administrative review procedure. Reviewers with no qualifications may still be inevitable in some areas before a stricter national law is introduced.

2.82 Apart from the issue on the shortage of qualified staff, poor implementation of the current administrative review laws and regulations have also discredited the system. For example, as mentioned earlier, a review agency shall generally make a review decision within 90 calendar days at the longest after accepting a review application.[190] However, despite the statutory time limitation, it is frequently extended for various reasons. According to a report to the national congress, for cases accepted in a city (whose name was intentionally omitted in the report) within three years before the report was made, only less than 30% of cases were completed in two months, and some cases even dragged for several years.[191] Legitimate excuses that may be used by review agencies to suspend the calculation of time limits vary. For example, when the review agency determines that the administrative act at issue is improper after review and investigation, it can render a decision on the issue if it has proper competence to hear the case, or it can suspend the review and transfer the case to a competent authority for further action.[192] Other acceptable suspensions may include time spent on site surveys,[193] appraisals,[194] or rescuing flaws on the

[189] ARL 2017 (n 104) art 3.8.
[190] ibid art 31.1.
[191] NPC Report (2013) (n 138) s 3.2.
[192] ARL 2017 (n 104) art 27.
[193] Implementation Provision (n 103) art 34.3.
[194] ibid art 37.

application of administrative review.[195] Due to the prolonged duration of administrative review, the applicant's legal costs may be unpredictable because the applicant has to undertake its costs for retaining legal counsels, and such costs usually cannot be recovered from the respondent, though the application of administrative review itself is free of charge.

2.83 The transparency of proceedings is another example to show the inconsistency between the provision and the implementation of the rules. Article 4 of the Administrative Review Law provides that publicity is one of the principles of administrative review, which literally means that the proceedings, results and reasons of administrative review cases shall be accessible to the public. Nevertheless, unlike administrative litigation proceedings discussed below – where the publicity of hearings and judgements are expressly regulated in the law – the disclosure of administrative review is far from satisfactory. First, in contrast with administrative litigation where public hearings are mandatory, an administrative review is conducted in principle via paper hearings, so those review decisions will largely depend on the review of facts and evidence in written presented by both parties, though investigations may be launched upon applications of an applicant or by the review agency initiatively.[196] Second, though statements and supporting documents submitted by the respondent can be reviewed by applicants and the third party upon request, the administrative review agencies may refuse the request on the grounds of state secrets, trade secrets or personal secrets.[197] Third, decisions of review are not expressly open to the public. In fact, it is only until 2013 when the government of Shanghai Metropolis as the first government decided to publish all administrative review decisions to the general public.[198] So far, administrative review decisions cannot be found on the official case search engine maintained by the SPC, though

[195] ibid arts 29 and 30.
[196] ARL 2017 (n 104) art 22.
[197] ibid art 23.2.
[198] NPC Report (2013) (n 138) s 2.4.

nationwide judgements of administrative litigation are accessible to the public.[199]

Reform of administrative review

2.84 In response to the public concerns on the administrative review system, the State Council launched a pilot project on the reform of administrative review by introducing administrative review committees in 8 provinces in 2008. This project was further extended to 24 provinces by the middle of 2013.[200] According to the guidance of the State Council and practices in the pilot areas, the reform was to centralise the power of administrative review to an administrative review committee set up at each level of administrative divisions. For example, applications of administrative review, which would have been submitted to different departments and bureaus of a pilot county government, will now be heard by one specific administrative review committee of the county government. As to the members of the administrative review committee, though the head of the committee is usually the head of the government to ensure the committee is led by the government, the committee shall invite external experts in different fields and social elites to the discussion of cases to enhance the professionality and publicity of the review.[201] For example, external members in the review committee in Shanghai now exceeds 75% of the total.[202]

2.85 In September to October 2013, an inspection team authorised by the Standing Committee of the National Congress (NPSC) carried out a nationwide inspection on the enforcement of Administrative Review Law after 14 years from its implementation.[203] After the inspection, the Administrative Review Law was slightly

[199] See 'China Judgements Online' <https://wenshu.court.gov.cn> accessed 29 December 2020.
[200] NPC Report (2013) (n 138) s 2.4.
[201] Fang (n 173) 22; Notice on Administrative Review Committee (n 177).
[202] Jian Zhu, 'Non-Permanent Members of Shanghai Administrative Review Committee Continued to Exceed 75%' (*Legal Daily*, 25 October 2019) <www.moj.gov.cn/Department/content/2019-10/25/601_3234419.html> accessed 30 December 2020.
[203] NPC Report (2013) (n 138); Fang (n 173).

amended in 2017 by adding a qualification requirement for new staff of review agencies. In other words, few concerns were addressed, and the pilot project on the administrative review committee was no longer on the table.

2.86 However, after several suspensions on the reform, the revision of the Administrative Review Law was relaunched in 2019 by the NPSC, and the draft of a revision made by the MOJ has already been reviewed and commented by the NPSC by June 2020.[204] Moreover, the Reform Plan on the Administrative Review System was approved by the central government in February 2020.[205] Although neither the draft of the revision of the law nor the reform plan has been published for general public review, as indicated by the head of the Bureau of Administrative Review and Litigation of the MOJ, the main reform would be based on the pilot project, in particular, includes the following issues.

a. administrative review agencies will be unified so that each government at or above county level will only keep one administrative review agency so that departments of the government will no longer have the jurisdiction over administrative review applications;
b. more qualified and professional full-time staff will be engaged in the administrative review proceedings to ensure the capacity of administrative review agencies can meet the demands;
c. administrative review procedure will be standardised so as to ensure the efficiency of administrative review proceedings.

2.87 Nevertheless, just like the pilot project, the reform will be proceeded step by step and from local governments first. Therefore, when and how the national reform will take

[204] Working Plan of Legislation of the National People's Congress Standing Committee in 2020 (2020), s 1.2.10.
[205] Liqing Zhang, 'The Reform of Administrative Review System Officially Kicked Off This Year' (*Legal Daily*, 3 July 2020) <www.moj.gov.cn/Department/content/2020-07/03/601_3252024.html> accessed 30 December 2020.

place depends on the practices of local governments. A material revision of Administrative Review Law may not be expected in the near future.

D. Administrative litigation

2.88 In contrast to the Complaint Mechanism and the administrative review proceedings, administrative litigation is a judicial proceeding in nature. It is litigation launched by a citizen, legal person or other organisation who considers its legal rights to have been infringed by an administrative act conducted by an administrative agency or its staff, or by an organisation authorised by laws, regulations and administrative rules before a court in accordance with the Administrative Procedure Law.[206]

2.89 The Administrative Procedure Law was first promulgated in 1989 before the enactment of the Administrative Review Law and was further amended in 2014 and 2017, respectively. In addition to the national law, the SPC has issued more than 40 judicial opinions on the implementation of the law, among which the most important existing one is the Interpretation on the Application of Administrative Procedure Law made in 2018.[207] In terms of administrative proceedings related to foreign parties, though all these laws and regulations are applied to foreign-related cases equally, some legal documents are designed explicitly for foreign issues. For example, in response to the duties under the World Trade Organization, China further promulgated a set of judicial opinions in 2002 on special regulations related to foreign-related administrative litigation, including provisions on hearing cases on international trade and service,[208] anti-dumping[209] and anti-subsidy.[210]

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[206] Administrative Procedure Law of the People's Republic of China (2017 Amendment) (APL 2017), art 2.
[207] IAPL (n 2).
[208] Regulation of the Supreme People's Court on Several Issues Concerning the Trial of International Trade Administrative Cases (2002), FaShi [2002] No 27.
[209] Regulation of the Supreme People's Court on Several Issues Concerning the Application of Laws in the Trial of Administrative Cases on Anti-Subsidy (2002), FaShi [2002] No 36.
[210] Regulation of the Supreme People's Court on Several Issues Concerning the Application of Laws in the Trial of Administrative Cases on Anti-Dumping (2002), FaShi [2002] No 35.

Parties of administrative litigation

2.90 By definition, a claimant to administrative litigation is the object of an administrative act. Other citizens, legal persons or other organisations with interests in an administrative act have the right to bring a lawsuit.[211] This includes a foreign party of a Chinese-foreign cooperative joint venture or a foreign shareholder of a FIE when the foreign party believes either its interests or the joint venture's interests have been infringed by an administrative act.[212] In addition, a third party whose interests have been impacted by an administrative review decision upon which the original administrative act has been annulled or changed is also a capable claimant of an administrative lawsuit.[213]

2.91 Foreign individual and entities have the same rights as Chinese nationals when launching administrative litigation in China unless otherwise provided by law.[214] However, its rights will be restricted to the same extent as those imposed by the home state of the foreign party to a Chinese national or entity in an administrative proceeding.[215] Another special restriction on a foreign party concerns the engagement of lawyers. When a foreign claimant intends to engage a legal counsel representing it before an administrative court, it can only choose from qualified Chinese lawyers from Chinese law firms.[216] However, this mandatory rule does not prevent a foreign claimant from hiring a foreign national who does not act as a professional lawyer or authorising an official from the embassy of its home state as long as the latter does not act in an official capacity.[217]

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211 APL 2017 (n 206) art 25.1.

212 IAPL (n 2) art 16.2. See also *Pioneer International Holding PTY Ltd v the Mineral Resources Administrative Office of Guangzhou City in Guangdong Province*, (2001) XingZhongZi No 15, Supreme People's Court. In the case, the first instance court confirmed that the foreign co-operator of the Chinese-foreign cooperative joint venture was capable to initiate an administrative lawsuit by its own name after the joint venture being required to close in accordance with an administrative notice issued by a local government agency.

213 IAPL (n 2) art 12.4.

214 APL 2017 (n 206) art 98.

215 APL 2017 (n 206) art 99.

216 ibid art 100.

217 *Interpretation of APL* (n 102) 280.

2.92 The defendant before an administrative court is the administrative agency who did the disputing administrative act.[218] When the administrative dispute has been reviewed via an administrative review procedure, the defendant depends on the result of the review. If the administrative act is sustained by the review agency, both the original agency and the review agency will be the co-defendants.[219] If the administrative act is changed by the review agency, only the review agency will be the defendant.[220] If the review agency fails to issue a decision within a statutory time period, either the original agency or the review agency can be the defendant, depending on the cause of action.[221]

2.93 Both the claimant and the defendant (i.e. the administrative party) have equal status before the court.[222] However, only the defendant bears the burden of proof to show the legitimacy of the administrative act at issue, except in cases where the claimant claims that the defendant fails to perform its legal duties.[223] Specifically, the defendant shall provide evidence and the regulatory documents that support the administrative act at issue within the time limit for adducing evidence.[224] If the defendant fails to meet the burden of proof, it will face adverse effects on the final judgment. The defendant and its legal counsels are prohibited from collecting evidence from the claimant, the third party or witnesses in the course of the lawsuit,[225] except when the claimant or the third party raises new reasons or evidence previously unknown to the defendant.[226] In other words, evidence and documents obtained before the decision of the administrative act are the exclusive record for decision which must justify the legitimacy of the administrative act.[227]

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218 APL 2017 (n 206) art 26.1.
219 ibid art 26.2.
220 Ibid.
221 APL 2017 (n 206) art 26.3.
222 ibid art 8.
223 ibid art 38.
224 ibid art 34.1.
225 ibid art 35.
226 ibid art 36.2.
227 *Interpretation of APL* (n 102) 109.

2.94 Any person who has interests in an administrative act under litigation or in the outcome of the litigation may, as a third party, file a request to participate in the proceedings or may participate in them when so notified by the court.[228] The third party has the right to appeal against the judgment of the litigation if the third party is demanded to bear duties or its rights or interest is mitigated by the judgment.[229]

Causes of action

2.95 Causes of action of administrative litigation are listed in article 12 of the Administrative Procedure Law, which has 12 specific causes of action and 1 pocket clause to cover all other unlisted situations. According to the statistics published by the MOJ on the nationwide causes of action of administrative litigation in 2018, disputes on administrative expropriation was the most frequent cause of action (16.49%), followed by administrative penalty (12.45%), administrative confirmation (12.03%), administrative compulsory measure (9.67%), disclosure of government information (7.55%), administrative confirmation on rights (6.56%), administrative omission (6.38%), whistleblowing and complaints (4.5%) and administrative licensing (4.40%). Apart from these specific causes of action, quite a few cases fell into the category of 'Other Causes', accounting for 19.97% of total cases. It covers, most importantly, disputes arising from an administrative agreement, including the conclusion, performance, modification and termination of the agreement, against an administrative agency shall be accepted by a court.[230]

2.96 An administrative agreement is an agreement negotiated and made between an administrative agency and a non-administrative party on the rights and obligations over the administrative law to achieve the goals of administrative management or

[228] APL 2017 (n 206) art 29.1.
[229] ibid art 29.2.
[230] Regulation of the Supreme People's Court on Several Issues Concerning the Trail of Administrative Agreement Cases (2019), FaShi [2019] No 17, art 4.

public services.[231] A typical administrative agreement includes a government concession agreement, a compensation agreement of expropriation or requisition of land, building or other assets and an assignment agreement on using state-owned natural resources (e.g. an assignment agreement of mineral rights).[232] The reason disputes on arbitration agreement are noteworthy, for the purpose of the thesis, is the possible arbitrability of an arbitration agreement in the future. Article 25 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Agreement Cases provides that an arbitration agreement in an administrative agreement is generally void, with exceptions provided by other laws, regulations or international treaties to which China is a party.[233] Though currently the exceptional scenarios have yet been determined by law, it is the only provision that shines a light on a foreseeable extension of arbitrability on administrative disputes in China amid the general prohibition under the current domestic legal frame. Issues on the arbitrability in China will be discussed in Chapter 5.

2.97 Causes of actions of administrative litigation seem to materially overlap with the scope of reviewable administrative acts under the Administrative Review Law as illustrated above. However, the jurisdiction of administrative review is broader than administrative litigation. The fundamental difference between the jurisdictions of the two procedures is that the administrative review procedure can accept disputes on both the legality and proportionality of an administrative act.[234] In contrast, an administrative court shall only review and determine the legality of an administrative act.[235]

2.98 For cases where any person challenges the legality of an administrative act carried out by an administrative agency in China, he/she may choose between directly

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[231] ibid art 1.
[232] ibid art 2.
[233] ibid art 25.
[234] ARL 2017 (n 104) art 1.
[235] APL 2017 (n 206) art 7.

submitting the dispute to an administrative court and applying for administrative review prior to the administrative litigation proceedings if the dispute has not been solved in the prior procedure. Nevertheless, in certain situations, there is no choice but to request for an administrative review first. Article 31.1 of the Administrative Review Law provides that those who believe their legally obtained ownership rights or usage rights on natural resources have been infringed by specific administrative acts of administrative agencies shall apply for administrative review first, and file administrative lawsuits if they are not satisfied with the administrative review decisions.[236] Therefore, as confirmed by both the first instance court and the SPC in *Pioneer International Holding PTY Ltd v the Mineral Resources Administration Office of Guangzhou City in Guangdong Province*,[237] the administrative review procedure serves as a precondition for initiating administrative litigation over disputes falling into this category.

2.99 Furthermore, in other cases, a dispute can only be decided in the administrative review procedure. The decision made by the administrative review agency is final. For instance, when an individual foreign investor is dissatisfied with the restrictive measures taken by the police or entry and exit officers in related to the board control, such as detention review, restriction on activity scope or deportation, the investor may apply for an administrative review. Any decisions made by the administrative review are final and cannot be further submitted to administrative litigation.[238]

2.100 Some administrative disputes can only be settled via administrative review. The decisions in these cases are final and cannot be further submitted for administrative litigation. For example, when a party requests that the State Council decide a dispute arising from an administrative act made by a department of the State Council or by a

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[236] These natural resources include but not limited to land, mining, water flow, forests, mountains, grasslands, wasteland, tidal flats or sea.

[237] *Pioneer International Holding PTY Ltd* (n 212).

[238] Exit and Entry Administrative Law of the People's Republic of China (2012), art 64.

government at the provincial level, the State Council's review decision is final.[239] Another example is the determination of ownership rights or usage rights of natural resources – a review decision reached by the government at the provincial level is also final and cannot be sued.[240]

Results and consequences of administrative litigation

2.101 Articles 69–78 of the Administrative Litigation Law list general rules on the judgments that a court may render in an administrative lawsuit. For the purpose of this thesis, the criteria for each judgment will not be illustrated in detail, but some important types of judgments will be discussed with the MOJ statistics on national administrative litigation of 2018 to show the propensity of Chinese courts in administrative litigation.[241]

a. Claims will be rejected where the evidence supporting the administrative act is solid, laws and regulations are applied correctly, and the administrative act is exercised in line with the legal procedures, or where the grounds for requesting the defendant perform a duty or payment is not established.[242] In 2008, nearly 40% of the total accepted administrative lawsuits were rejected by courts in the first instance, which occupied the largest portion of total judgments.

b. The second major group of judgments consists of the judgments that deem to change the disputed administrative act, which will be rendered when the disputed administrative act is determined illegal by the courts on account of defects in merits and procedure issues related to the original administrative act. Judges thus may order the annulment or modification of the original administrative act,[243] determine the

[239] APL 2017 (n 206) art 14.
[240] APL 2017 (n 206) art 30.
[241] 2018 Annual Report (n 110).
[242] APL 2017 (n 206) art 69.
[243] Specifically, the administrative act at issue will be (partially) annulled and a new administrative act may be ordered if the court determines that (1) major evidence relied by the administrative agency is

illegality or invalidity of the original administrative act and order the original administrative agency to perform its statutory duties.[244] In 2008, the number of judgments of first instance that changed the original administrative acts only accounted for 12.5% of the total cases, far less than the judgments that maintained the disputing acts.

c. Only a few administrative litigations (1.5% in 2018) end with mediation. The court usually does not organise or facilitate mediation in administrative litigation, with exceptions in cases involving administrative compensation or subsidiaries or where the defendant exercised discretion in accordance with law or regulations.[245] The administrative power exercised by an administrative agency is a public power granted by law so that the administrative agency is not allowed to dispose of such power by itself arbitrarily. Furthermore, a court shall only review and judge the legitimacy of the disputed administrative act. The administrative agency at issue can only offer concessions to the extent which it is allowed to exercise its discretionary power during mediation in the administrative proceeding.[246] In short, mediation shall be conducted legally and voluntarily and shall not infringe national interest, public interest, or the lawful rights and interests of others.[247] When a settlement is reached via mediation, the court shall produce a written mediation agreement signed by the

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inadequate,(2) the administrative agency has wrongly applied laws and regulations or violated prescribed procedure, (3) the administrative agency has acted beyond authorisation or abused authorisation, or (4) the administrative act is manifestly improper. Besides, the disputing administrative act will be annulled upon application of the claimant when there is a significant and manifest violation of law, such as the disputed action is executed by an unqualified entity or with no basis. The court may modify the administrative act only in the cases of manifestly improper administrative punishment or other administrative act involving determination of the amount of payment, but in no case can a court impose further obligations or derogate rights and interests of the claimant except where an interested party is also a claimant holding opposite claims. See APL 2017 (n 206) arts 70, 75, 77.1 and 77.2.

[244] The defendant the administrative agency will be ordered to perform its duty or make payment within a prescribed time when the court determines that the administrative agency fails to do so as claimed by the claimant. If the judgment demanding the performance of duty is meaningless, the court will only determine the illegality of the failure of performance. In certain circumstances, the administrative act will be confirmed unlawful but not revoked by the court in consideration of other legal interests, so that the administrative act is still effective. These situations include when the revoke will significantly harm state interests or public interests or when the violation to the legal procedure is too slight to cause any material impact on the claimant's rights. In other circumstances, the administrative act is determined unlawful but does not need to be revoked by the court. For example, when there is nothing to be revoked or the defendant has already changed the administrative act. See APL 2017 (n 206) arts 72, 73 and 74.

[245] ibid art 60.1.

[246] *Interpretation of APL* (n 102) 181.

[247] APL 2017 (n 206) art 60.2.

judges and clerk and stamped by the court. The mediation agreement comes into legal effect upon receipt and signature of both parties. It becomes enforceable against the party who refuses to perform its duty under the agreement.[248]

2.102 An administrative litigation judgment is appealable.[249] If either party is dissatisfied with the original judgment made by the court of the first instance, it may appeal the judgment to an upper court, except when the first instance is taken in the SPC. Judges at the second instance will form a new tribunal to conduct a full hearing on the case from the aspects of both facts and law.[250] The court of the second instance will reject the appeal and maintain the original judgment if it discovers that facts are clearly ascertained, and the laws and regulations are correctly applied in the original proceedings.[251] Where there are defects in the factual evidence, application of laws, regulations or procedure rules, the appeal court may either directly amend, revoke or modify the original judgment or remand to the original court for a retrial.[252] The judgment made by the court of the second instance is final.

2.103 A legally effective judgment, ruling or mediation agreement must be performed by and otherwise enforceable against the parties.[253] When the claimant refuses to perform its duty, either the administrative agency (i.e. the defendant) or the third party can apply for the court of the first instance to enforce the effective document, or directly enforced by the administrative agency.[254] This provision also applies to those who neither file administrative litigation nor follow the instruction of the administrative act.[255]

2.104 When the administrative agency becomes the party that refuses to obey an effective

248 ibid arts 95 and 100; Civil Procedure Law of the People's Republic of China (2017 Amendment) art 97.
249 APL 2017 (n 206) art 7.
250 ibid arts 86 and 87.
251 ibid art 89.1.
252 ibid arts 89.2, 89.3 and 89.4.
253 ibid art 94.
254 APL 2017 (n 206) art 95.
255 ibid art 97.

judgment, ruling or mediation agreement, the court of the first instance may take one or more measures to enforce the judgment. The most effective measure the legislature believes is to publicly announce the defendant's refusal to perform so as to impose public pressure on and thus force the latter to perform its duties under a judgment.[256] Other approaches include informing the bank to directly transfer the payment from the administrative agency's account when fines should be returned or payments should be made to the claimant; fining the person in charge personally per day from the date that the time limit expires; and submitting a judicial recommendation to the procuratorate or the superior administrative agency that is bound to deal with the non-performance of the defendant and inform the court of the result.[257] In the worst scenario, when the non-performance of the defendant results in a repugnant social impact, the person in charge and other persons directly responsible may be put into judicial custody. Where the circumstance is serious and a crime has been committed, both of them may be pursued for criminal liabilities.[258]

Advantages of administrative litigation

2.105 Comparing with the Complaint Mechanism and administrative review proceedings, administrative litigation procedures may benefit foreign investors in some respects when solving administrative disputes. For example, it is a key advantage of administrative litigation that a final judgment of administrative litigation is enforceable via various routes as illustrated above. In addition, a court that hears the administrative dispute may concurrently deal with relevant civil disputes in cases involving administrative licensing, registration and expropriation.[259] Moreover, a claimant may request the court to review the legality of the administrative document made by the State Council and local governments on which the disputing

[256] ibid art 96.3; *Interpretation of APL* (n 102) 272.
[257] APL 2017 (n 206) arts 96.1, 96.2 and 96.4.
[258] ibid art 96.5; See also Criminal Law of the People's Republic of China (2020 Amendment), art 313.
[259] APL 2017 (n 206) art 61.

administrative act is based when launching the administrative litigation.[260] All these unique advantages of administrative litigation may not only save costs and efforts of parties but also conduct a complete settlement of administrative disputes.

2.106 In addition, there is an incomparable strength of administrative litigation that deserves to be mentioned in detail. Article 3.3 of the Administrative Procedure Law provides that the person in charge of the administrative agency, whether as the defendant or the third person, shall attend the hearing in person. The compulsory attendance of a person in charge in China was first introduced in several counties in Shaanxi Province and Jiangsu Province at the end of 1990s and promoted nationwide in the amendment of Administrative Procedure Law in 2014.[261] It is believed by the legislative body that an administrative dispute could be materially solved and a settlement is more likely to be achieved by demanding those who have the decisive rights to attend the hearings in person.[262] Comparing the heads of administrative agencies, legal counsel who serve as the attorneys at court are comprehensibly less familiar with the implementation of administrative acts though they are experts on the law.[263] Therefore, the person in charge of the defendant (i.e. the administrative agency) bears more duties in the hearings of administration proceedings compared with civil proceedings.

2.107 In practice, nevertheless, whether this provision had been well implemented in the past 6 years is under debate. According to the statistics kept by the Legal Work Committee of the NPC, the attendance rate of the person in charge before hearings of administrative litigation was high – above 95% in many areas.[264] According to the

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[260] ibid art 53.

[261] 'Regarding the System of Persons in Charge of Administrative Agencies Attending to Court, All Questions You Want to Ask' (*Supreme People's Court Wechat Official Account*, 23 June 2020) <www.chinanews.com/gn/2020/06-23/9219601.shtml> accessed 30 December 2020 (Press Conference on Attendance at Court).

[262] ibid.

[263] ibid.

[264] *Interpretation of APL* (n 102) 15. In the reply of the head of administrative court of the Supreme Court on the press conference of the new interpretation, the head gave another example that the appearance rate was close to 100% in Heilongjiang Province in the past three years. See Press Conference on Attendance at Court (n 261).

MOJ, who published the number of cases of which the person in charge attended the hearings in 2017 and 2018, the national appearance rate was only 30% of the total accepted cases (55,383 out of 184,852 in 2017, and 63,748 out of 211,354 in 2018).[265] The actual performance might be higher, considering some cases had been settled or withdrawn before hearings or dismissed by the court without formal hearings.

2.108 In March 2020, the compulsory attendance was further regulated in detail in a new judicial interpretation promulgated by the SPC to standardise and promote the attendance rate nationwide.[266] Accordingly, when an administrative agency is sued or involved in any administrative proceedings, including the first instance, the second instance and the review instance, as the third party,[267] the person in charge who is demanded to attend the hearings can be either the principal or the deputy head of the government agency, or the leader responsible for implementing the disputed administrative act.[268] Only in exceptional cases, when the person in charge is unable to attend, he/she may appoint and authorise relevant staff who is aware of the dispute and as the capacity to exercise administrative acts to attend the court.[269] Nevertheless, a court may still adjourn hearings when the person in charge has legitimate reasons to be absent.[270] This is more likely to happen in cases where the person in charge is mandated by the court to attend hearings, namely, cases involving major public interests, such as food and drug safety, ecological environment and resources protection and public health safety, and cases of high concern to society or cases that may trigger group incidents.[271]

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[265] 2017 Annual Report (n 133); 2018 Annual Report (n 110).
[266] Regulation of the Supreme People's Court on Several Issues on the Responsible Persons of Government Agencies Attendance at Court, FaShi [2020] No 3 (Regulation on Attendance at Court).
[267] ibid art 1.3.
[268] ibid art 2.1.
[269] APL 2017 (n 206) art 3.3; Regulation on Attendance at Court (n 266) art 8 provides that exceptional cases only include force majeure, accidents, performance of official duties that cannot be replaced by others, or other fair reasons that can justify the absence from the hearing.
[270] Regulation on Attendance at Court (n 266) art 9.2.
[271] ibid art 4.1.

2.109 The SPC has emphasised that the person in charge must participate in the hearing. It is mandatory that the person in charge shall present his/her opinion on the substantive settlement of disputes.[272] He/she and other administrative staff who attend the hearing, rather than legal counsel, may be required by the court to present or defend the case, produce evidence, take part in the debate, make a final statement, or illustrate the case and the administrative documents on which the disputed administrative act is based.[273] If anyone fails to perform his/her duty in the hearings (e.g. being absent from the hearing without any legitimate reasons, leaving the court during the hearing without the court's permission or failing to illustrate issues as required so that a hearing cannot proceed), the court may announce the wrongdoings to the public and make a judicial recommendation to the procuratorate or the upper administrative agency to impose sanctions on the person in charge or the one with direct responsibility.[274] However, it should be noted that the absence of the person in charge of the defendant is not an obstruction to the hearing. The claimant is still bound to attend the hearing; otherwise, the claims will be withdrawn.[275]

2.110 Due to the new regulation on compulsory attendance just enacted, there are few statistics or comment on the implementation so far. However, although the new regulation seems to extend the permissible scope of attendees from the person in charge of the administrative agency, whether the principal or the deputy head, to the leader of the disputing administrative act, the attendees now bear a heavier duty in the court proceedings. They now have legal obligations to present the case and propose a settlement plan for the administrative dispute. Indeed, if this new regulation can be well implemented in practice, claimants, especially foreign investors, will benefit primarily from administrative litigation, as an arbitration tribunal would hardly be able to summon the head of the counterparty in the hearing of arbitration launched under international law.

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[272] ibid art 11.3.
[273] ibid art 11.2.
[274] APL 2017 (n 206) art 66.2; Regulation on Attendance at Court (n 266) art 12.
[275] Regulation on Attendance at Court (n 266) art 13.

Concerns about administrative litigation

2.111 Despite the above benefits a claimant may enjoy from submitting an administrative dispute before an administrative court, the claimant may inevitably face challenges during the litigation. For instance, legal counsels' fees of the winning party are hardly recoverable from the losing party,[276] although the acceptance fees for filing the administrative litigation charged by the court are nominal.[277] In addition, although the prescribed time limits for the first instance and the second instance of administrative litigation usually are 3 months and 6 months, whether these time frames apply to foreign-related administrative proceedings is debatable.[278] In 2002, the SPC stipulated in an official reply to Guangdong Province High People's Court that regulations on the time limits of trial provided in the Administrative Procedure Law shall apply to foreign-related administrative litigation.[279] Nevertheless, Beijing High People's Court stated in the appeal instance of *Trademark Review Committee of the State Administration for Industry and Commerce of the People's Republic of* China *v 3M Company* in 2016 that foreign-related administrative litigation proceedings did not need to follow these prescribed time limits because these provisions do not explicitly apply to foreign-related cases under the Administrative Procedure Law.[280] Therefore, if the approach is recognised nationwide or confirmed by the SPC in the future, the duration of administrative litigation involving a foreign investor or FIE will be

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[276] The SPC admitted in a reply to public question that the practice was 'the one who engages the lawyer shall pay the lawyer fee' according to the Notice of the National Development and Reform Commission and the Ministry of Justice on Issuing the Measures for Administration of Lawyers' Fees (2006, FaGaiJiaGe [2006] No 611), but it also indicated that a reform would be possible in the future. See 'Reply on the "Question on the State's consideration of the Lawyer's Fees to be Paid by the Losing Party"' (*Supreme People's Court*, 28 March 2014) <www.court.gov.cn/hudong-xiangqing-6259.html> accessed 18 May 2020.

[277] Measures on the Payment of Litigation Costs (2016), Order No 481 of the State Council of the People's Republic of China, art 14.5. For example, the acceptance fee is RMB 100 (USD 15.25) for each instance of administrative litigation in trademark, patent or maritime cases, and RMB 50 (USD 7.62) for all the other administrative litigations.

[278] APL 2017 (n 206) arts 81 and 85.

[279] Reply of the Supreme People's Court on How to Handle the Time Limits of Trail of Foreign-Related Administrative Cases, [2002] XingLiTaZi No 2.

[280] (2016) JingXingZhong No 3502.

indefinite and unpredictable.[281]

2.112 However, the most crucial concern in administrative litigation lies in the independence of the judicial body. The court that accepts the cases may be susceptible to administrative agencies at the same level as the court given the financial allocation system. The judges who hear the cases may be unable to decide the issues independently due to the judicial committee system.

2.113 Generally speaking, the hearing court of the first instance of administrative litigation is, in principle, the basic court in which the original administrative act has occurred. For lawsuits launched by a foreign investor, the court of the first instance is more likely the intermediate court at the level higher than the basic court in considering the impact and complexity of the case.[282] Currently, the establishment and allocation of courts are consistent with the administrative divisions of China. Despite appropriation from the central government and litigation fees charged from parties, the main component of court funding comes from the government at the same level, and the amount of local grant is determined by local government at its discretion.[283] Academia has criticised that the financial dependence on local government has resulted in the court being an administrative department of the local government, leading to a tendency of 'judicial local protectionism'.[284] Even the legislature expressed a similar concern on the possibility that the subordination of the finance of the court to the local government may impact the independence and impartiality in the administrative litigation.[285] Since 2014, the legislature has tried to mitigate the dilemma of local courts by allowing certain courts in other administrative regions to exercise cross-jurisdiction over administrative litigation under the arrangement of

[281] Even where the foreign-related party is merely the third party. See *Huang Weidong v Trademark Review Committee of the State Administration for Industry and Commerce of the People's Republic of China*, (2017) JingXingZhong No 4441, Beijing High Court.
[282] IAPL (n 2) art 5.2.
[283] Weimin Zuo, 'An Empirical Study on the Financial System of China's Basic Court' [2015] China Legal Science 257.
[284] Yaxin Wang, 'Judicial Cost and Judicial Efficiency: Financial Guarantee for Courts and Incentives to the Judges in China' [2010] The Jurist 132.
[285] *Interpretation of APL* (n 102) 60.

the high court in this region upon SPC approval.[286] However, practices are still in the trial stage at the provincial level by every high court.

2.114 As to the internal level of a court, all administrative litigations are heard in a special administrative division of a court that shall hear and judge the case independently and without inference from administrative agencies, social groups or individuals.[287] In other words, the judicial independence is exercised by the court in whole, not by a single judge or the tribunal who sit in the specific hearing.[288] A judgment made by judges either in the first instance or the second instance may not represent the opinion of the judges who hear the case and sign the judgment. Instead, a decision in the judgment may be taken by the Judicial Committee in the court.

2.115 A Judicial Committee is an internal committee that exists in each court in China. Acting as the highest judicial unit in a court, the Judicial Committee in each court is usually composed of singular numbers of members, including the chairman and/or the vice-chairmen of the court, the persons in charge of special divisions and several senior judges with specialities.[289] Although in the Administrative Procedures Law the Judicial Committee is only mentioned in one clause that authorises it to decide whether supervision proceeding against an effective judgment should be allowed,[290] the functions of the Judicial Committee also include summarising trial works, discussing the law application of important, difficult or complex cases and other issues relating to the trial work.[291] In practice, the major duty of the committee is to discuss cases that are believed not to be able to be decided by the hearing tribunals.[292]

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286 APL 2017 (n 206) art 18.2.
287 ibid art 4.
288 *Interpretation of APL* (n 102) 20.
289 Law on Structure of the People's Courts of the People's Republic of China (2018 Revision) (Law on Structure of Courts), art 36.1. Opinion of the Supreme People's Court on Improving and Perfecting the Working Mechanism for the Judicial Committee of People's Court (2019), FaFa [2019] No 20 (Opinion on Judicial Committee), art 5.
290 APL 2017 (n 206) art 92.
291 Law on Structure of Courts (n 289) art 37.
292 Xu Xianghua Research Team, 'Empirical Study on the Judicial Committee System Reform Path' [2018] China Legal Science 28. The empirical study done by Prof Xu's team in Guzhou Province shows that the majority (over 80%) of issues discussed by the Judicial Committees are case studies.

When a tribunal that hears the case believes it should be discussed by the Judicial Committee, usually because of significant disagreements within the tribunal,[293] the chairman shall make an application to the chairman of the court. The tribunal shall take responsibility for the facts of the case stated in the report. The decision of the committee must be followed by the tribunal and such a decision as well as supporting reasons will be stated in the judgment.[294]

2.116 The judicial committees are regarded as an essential part of the Chinese judicial system. Historically, the judicial committee system was created to ensure the judicial quality of the court on important and complex cases amid a poor legislation system at the beginning of the establishment of China.[295] Today, only a very small portion of cases are decided by the Judicial Committee, and the trend is descending. According to the report by the Xu Xianghua team published in 2018 on the judicial committees in Guzhou Province, the ratio of cases discussed by the committees in Guzhou was 0.6% in the first half of 2017, reducing from 3.3% in 2014 in response to the recent judicial reform.[296] However, it has faced doubts on the possible violation of transparency and fairness of litigation proceedings in China, mainly from the following aspects.

2.117 First, meetings of the judicial committee on cases are closed to the parties, which is inconsistent with the principle of open trial provided by the Administrative Procedure Law. Members of the judicial committee discuss and decide cases only based on the written and oral reports produced by the tribunal, and evidence is not necessarily presented to the committee. Parties do not have chances to present their cases before the committee, let alone to debate before them. Although the decisions of the committees and reasons are presented in the judgment, the decisive procedure of the committee is not known by parties, which will not be recorded in the judgment.

[293] ibid.
[294] Law on Structure of Courts (n 289) art 39.
[295] Xu Xianghua Research Team (n 293).
[296] ibid.

2.118 Second, members of the judicial committee cannot be challenged or changed by parties. According to the most recent regulation promulgated by the SPC in 2019, members of the judicial committee may withdraw themselves from a case meeting if they have interests in the case that may impact their impartiality.[297] However, parties to the case still do not have a chance to challenge a member as they will not be given the list of members of the Judicial Committee or who will participate in the discussion of their cases before or after receiving the judgment. They may even not know if their cases are reviewed and decided by the committee.

2.119 In consideration of the above flaws of the Judicial Committee system, whether it should be abandoned has been debated for decades in China. The SPC at the moment holds the view that the system should be maintained but reformed.[298] That said, the SPC promulgated a detailed regulation on the functions, composition, workflow and supervision of the judicial committees in 2019. Despite some improvements that seem to enhance the correctness and quality of the judgment, the inherent defect of the judicial committee – namely, the interference of the independence of hearing tribunal – still exists.

E. Conclusion

2.120 To sum up, when facing administrative disputes with a Chinese administrative agency, a foreign investor is usually free to choose from the three administrative dispute resolution mechanisms under the Chinese domestic legal framework, except for exceptional cases where administrative review serves as a precondition for administrative litigation or where disputes are not litigable. Each mechanism has

[297] Opinion on Judicial Committee (n 289) art 14.
[298] 'Improving Working Mechanism of Judicial Committee Promoting Full Implementation of Judicial Responsibility – Answers of the Person in Charge of the Trial Management Office of the Supreme People's Court to Press Question' (*Supreme People's Court*, 22 September 2019) <www.court.gov.cn/zixun-xiangqing-186501.html> accessed 30 December 2020.

advantages and disadvantages from the foreign investor's perspective.

2.121 The Complaint Mechanism is a mediation-like alternative dispute resolution led by an administration-related organisation that aims to promote an amicable settlement of a dispute. The administrative review is an internal correction system within the administration conducted by a superior administrative agency or department that may review both the legality and reasonableness of the disputing administrative act. The administrative litigation is a judicial proceeding before courts capable of issuing an enforceable and final judgment on the legality of the disputing administrative act. This seems to be the most independent and impartial route of the three but may still be prone to administrative influences.

2.122 Just like the *Hela* case mentioned in the Introduction chapter,[299] if a dispute cannot be settled by one or more of the three domestic proceedings, a foreign investor may seek remedies under international law subject to conditions agreed by its home State and China in each treaty, where a foreign investor may choose international arbitration in as an alternative route to domestic administrative litigation proceedings. However, as illustrated in the next chapter, international arbitration may not be a perfect choice for the foreign investor, either.

[299] *Hela Schwarz GmbH v People's Republic of China*, ICSID Case No ARB/17/19.

Chapter 3: Chinese International Legal Regime on Foreign Investment

A. Introduction

3.1 As discussed in the previous chapter, Chinese domestic law provides foreign investors with three dispute resolution mechanisms to solve investment disputes with Chinese authorities: the specific complaint procedure for foreign-invested enterprises, the administrative review procedure and administrative litigation proceedings. All three mechanisms have concerned foreign investors in different ways. Equally, a foreign investor may seek other remedies available under international law, in particular, those arising from bilateral investment treaties (BITs) concluded between the home State of the investor and China.

3.2 China has concluded more than 140 BITs and other international investment agreements (IIAs) by September 2020. The majority of them contain an investor-State dispute settlement (ISDS) provision, which provides foreign investors with dispute resolution mechanisms ranging from amicable negotiation and administrative review proceedings to investor-State arbitration and court proceedings. This ISDS clause has been changing with the development of global investment environment and continuing evolution of Chinese BITs in the past thirty years since the first Chinese BIT concluded in 1982.

3.3 This chapter will first review the international investment legal framework of China including the BITs and other investment-related treaties. It then examines features of the ISDS clauses in Chinese international investment agreements (IIAs) and explains developments of the ISDS clauses over the past decade using specific treaty provisions.

B. <u>International investment agreements</u>

3.4 According to the statistics in the International Investment Agreement Navigator, the database maintained by the IIA section of the United Nations Conference on Trade and Development (UNCTAD), China entered into 145 bilateral investment treaties (BITs) up to September 2020. Of the 145 BITs, 107 are in force, 21 are signed but not yet in force, 15 have been replaced by new BITs and 3 have been terminated unilaterally by the other party.[1] This number excludes BITs entered by Hong Kong, Macao or Taiwan in their individual capacity as sovereign actors. China is second to Germany in number of BITs.[2]

3.5 Given that UN member States provide information to UNCTAD voluntarily,[3] there may be discrepancies between the UNCTAD documents and a particular country's government website. According to a chart published by the Department of Treaty and Law of the Ministry of Commerce (MOFCOM) online, only 103 BITs and 1 trilateral investment treaty (between China, Korea and Japan) is in force at this moment.[4] Comparing the UNCTAC and MOFCOM lists and the Chinese Ministry of Foreign Affairs' (MFA) database on Chinese international treaties,[5] one can infer that the discrepancy is largely because UNCTAD has marked some signed but not yet in force BITs as effective, such as China–Bangladesh BIT (1996), China–Cameroon BIT (1997), China–Mozambique BIT (2001), China–Bosnia and Herzegovina BIT (2002), China–Costa Rica BIT (2007) and China–Colombia BIT (2008). Though UNCTAD lists China–Mexico BIT (2008) as in force with an unsigned copy of the text, neither MOFCOM nor the MFA has any record of this BIT. In contrast, UNCTAD marks China–Singapore BIT

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[1] 'International Investment Agreements Navigator' (UNCTAD) <https://investmentpolicy.unctad.org/international-investment-agreements/> accessed 30 December 2020.
[2] Germany has concluded 155 BITs with 127 BITs in force.
[3] 'Methodology – Disclaimer' (UNCTAD) <https://investmentpolicy.unctad.org/international-investment-agreements/> accessed 30 December 2020.
[4] Department of Treaty and Law of the Ministry of Commerce of the People's Republic of China, 'List of Bilateral Investment Treaties Ratifying by China' (Ministry of Commerce of the People's Republic of China, <http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml> accessed 21 September 2020.
[5] 'People's Republic of China Database of Treaties' (Ministry of Foreign Affairs of the People's Republic of China) <http://treaty.mfa.gov.cn/Treaty/web/index.jsp> accessed 31 December 2020.

(1985) as terminated by the China–Singapore FTA (2008), but both MOFCOM and the Ministry of Trade and Industry of Singapore list it as effective.[6] A similar inconsistency exists for China–Chile BIT (1994), as neither MOFCOM nor the MFA has recorded the replacement treaty as effective.

3.6 MOFCOM's statistics are not entirely accurate either. For example, China–Latvia BIT (2004), though omitted by MOFCOM, is recorded as in force since 1 February 2006 by both UNCTAD and the MFA. Three BITs marked as 'unilaterally terminated' by the other party in UNCTAD's records – China–Ecuador BIT (1994), China–Indonesia BIT (1994) and China–India BIT (2005) – are marked as effective by MOFCOM. This discrepancy is understandable because all three BITs contain a 'sunset clause', so that the provisions of the treaties may still protect foreign investors and investments for another 10 or 15 years after termination.[7] In contrast, the MFA has removed the date of entry into force of China–India BIT (2005) in response to the record published by the Department of Economic Affairs of India that the BIT with China has been terminated on 3 October 2018.[8] Taking together the three databases, one can surmise that China is a party to 101 BITs and 1 trilateral investment treaty that are in force to date.

3.7 It was not until the 1980s that China started to build its international investment treaty network. The first Chinese BIT was concluded with Sweden in 1982, followed by several BITs reached with European developed countries in the next few years, such as Germany (1983), France (1984), Finland (1984), Norway (1984),

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[6] For Singapore, see 'International Investment Agreement' (Ministry of Trade and Industry of Singapore) <www.mti.gov.sg/Improving-Trade/International-Investment-Agreements> assessed 31 December 2020.

[7] Agreement between the Government of the Republic of Ecuador and the Government of the People's Republic of China for the Reciprocal Development and Protection of Investments (signed 21 March 1994, entered into force 1 July 1997, terminated 19 May 2018) art 13.4; Agreement between the Government of the Republic of India and the Government of the People's Republic of China for the Promotion and Protection of Investment (signed 21 November 2006, entered into force 1 August 2007, terminated 3 October 2018) art 16.2; Agreement between the Government of the Republic of Indonesia and the Government of the People's Republic of China on the Promotion and Protection of Investments (signed 18 November 1994, entered into force 1 April 1995, terminated 31 March 2015) art 13.2.

[8] 'Bilateral Investment Treaties (BITs)/Agreements (Department of Economic Affairs of the Ministry of Finance of the Government of India) <www.dea.gov.in/bipa?page=5> accessed 31 December 2020.

Netherlands (1985) and the United Kingdom (1986). Some Asian-Pacific countries, including Thailand (1985), Singapore (1985), Australia (1988) and Japan (1988), also were among the first countries that concluded BITs with China. Ghana (1989) is the first and only African country to reach a BIT with China at that time.

3.8 In the 1990s, there was a series of new BITs after China signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the 'ICSID Convention' or the 'Washington Convention') on 9 February 1990. During this decade, China entered into 69 BITs, nearly half of its total BITs, with countries across the world, including Africa and America. Several BITs were signed with former Soviet Union members and satellites after the dissolution. In fact, BITs concluded during this era are arguably communist style to some extent.[9] One of the most significant features is the limited jurisdiction of international arbitration: only disputes of compensation for expropriation may be referred to an international arbitral tribunal. This limited jurisdiction has become a universal issue debated in most Chinese-related investment arbitration. However, as China gradually transformed into a capital exporting country, China changed its traditional position in the BITs concluded from the late 1990s. Those BITs started from China-Barbados BIT (1998) began to show characteristics of a greater emphasis on foreign investment protection.[10] In particular, the scope of international arbitration is extended to any disputes arising under the treaty.[11]

3.9 After 2000, China slowed down its signing of investment treaties. Instead, there was a trend of renegotiating old BITs from the 1980s to incorporate modern provisions

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9 Luke Eric Peterson, 'Mongolia Mining Arbitrations Proliferate; One of Three Known Treaty Claims Could See Debate as to Scope for Arbitration under Communist-Style Investment Treaty' (Investment Arbitration Reporter (IAReporter), 27 June 2010) <www.iareporter.com/articles/mongolia-mining-arbitrations-proliferate-one-of-three-known-treaty-claims-could-see-debate-as-to-scope-for-arbitration-under-communist-style-investment-treaty/> accessed 31 December 2020.

10 Wei Shen, 'Towards Liberalism and Multilateralism: Evolution of the Substantive Standards in China's Investment Treaties' (2015) Chinese Journal of Law 184, 206.

11 For example, see Agreement between the Government of Barbados and the Government of the People's Republic of China for the Promotion and Protection of Investments (signed 20 July 1998, entered into force 1 October 1999) (China-Barbados BIT (1998)) art 9 (2).

that conform with new needs in investment protection. To date, 13 old BITs have been renegotiated,[12] the majority of which are with the European countries that were the first to sign BITs with China, such as China–Netherlands BIT (2004), China–Germany BIT (2005) and China–France BIT (2010). Recent BITs, especially those concluded after 2010, incorporate many features of the Model BITs of Canada and the United States.[13] To date, China has entered into BITs with its major investment partner countries all over the world except for the United States. The negotiation of China–US BIT is ongoing and dates back to 1983.[14] China–EU BIT is the other major investment treaty that is under negotiation, and a treaty is reported to be reached by the end of 2020.[15]

3.10 Unless otherwise noted, English texts of investment treaties (including BITs, FTAs and other regional or international treaties) to which China is a party are extracted either from the original English version filed with the UNCTAD database or the database maintained by the MOFA. In the case where an official English version is not available, the treaty has been translated from the official Chinese version by the author of this thesis.

<u>China's Model BITs and generations</u>

3.11 Unlike the US, India and many other countries, China has not officially published any versions of Model BITs. However, some scholars may have opportunities to access the internal versions of current and previous Model BITs through their sources in the Chinese Ministry of Commerce. According to Norah Gallagher and Wenhua Shan's book *Chinese Investment Treaties: Policies and Practice* published in 2009, which is

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[12] There are 15 BITs being replaced by new BITs according to the UNCTAD statistics.

[13] Norah Gallagher, 'Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy' (2016) 31 ICSID Review 88.

[14] Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 33.

[15] 'China and EU Reached a Consensus to Complete Negotiations on China-EU Investment Agreement within This Year' (Economic and Commercial Office of the Embassy of the People's Republic of China in the Hellenic Republic) <http://gr.mofcom.gov.cn/article/jmxw/202007/20200702980808.shtm> accessed 10 December 2020.

believed to be the first study to provide a comprehensive review of Chinese BITs from the first China-Sweden BIT (1982) to China-Mexico BIT 008),[16] MOFCOM has maintained and updated three Model BITs up to 2008.

3.12 Gallagher and Shan also roughly divided the Chinese BITs signed between 1982 and 2008 into three generations based on the Model BITs. Those that followed Models I and II were categorised as first generation and largely concluded in 1982–1989. Most BITs concluded between 1990 and 1997 were labelled as second generation. BITs based on Model III were classified as third generation and covered nearly all BITs reached after 1998. This classification method has been endorsed and adopted by other scholars. In a recent book published on China's contemporary BITs, Matthew Levine follows Gallagher and Shan's approach by further classifying BITs concluded after 2008 as fourth generation.[17]

3.13 In 2011, Mr Wen Xiantao, director of the Administrative Law Division of MOFCOM, published a series of articles in a major Chinese journal illustrating every provision of a recently drafted Model BIT prepared by MOFCOM in April 2010. BITs concluded after 2010 have closely followed this draft Model BIT (the 'Model BIT 2010' or 'Model IV'), in particular, China–Uzbekistan BIT (2011) and China–Tanzania BIT (2013). For this thesis, the texts of Chinese Model BITs are extracted from either Wen or Gallagher and Shan.

<u>Treaties with investment provisions</u>

3.14 In addition to investment treaties, China has entered into several trade agreements that incorporate investment provisions. Most importantly, as of 2020, China has reached 17 FTAs with 13 countries in Asia, Latin America, Oceania and Europe, as

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[16] Gallagher and Shan (n 14) Acknowledgements page ix and chapter 1 page 3.

[17] Matthew Levine, 'Chapter 11 Towards a Fourth Generation of Chinese Treaty Practice' in Julien Chaisse (eds), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (OUP 2019)

well as the Association of Southeast Asian Nations (ASEAN),[18] Hong Kong, Macau and Taiwan according to MOFCOM's FTA database.[19] An FTA does not necessarily contain a detailed set of rules of investment. For example, China–Georgia FTA (2017) only mentions investment in article 12.2: '(t)he Parties shall further assess and, if necessary, endeavour to conduct negotiations with a view to revising [the current China–Georgia BIT]'. In contrast, some FTAs contain specific chapters on investment. For instance, chapter 9 of China–Australia FTA (2015) is a comprehensive chapter on investment. Its 27 pages resemble a modern BIT embedded with detailed provisions on ISDS. Apart from the existing FTAs, China is participating in negotiations for the Regional Comprehensive Economic Partnership (RCEP). Based on the existing ASEAN+1 FTAs between ASEAN and other ASEAN partners in the Asia-Pacific region, RCEP is expected to be the world's largest free trade area with approximately 30% of the world's population, GDP, export and foreign investment flow.[20] RCEP was signed by the 10 ASEAN countries and Australia, China, Japan, Korea and New Zealand on 15 November 2020.[21]

Other investment-related instruments

3.15 Other multilateral intergovernmental agreements and international instruments may also involve issues of international investment. The UNCTAD database lists a non-exclusive list of the investment-related instruments to which China is a signatory.[22]

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[18] ASEAN is a regional organisation composed by 10 countries in Southeast Asia, including Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

[19] 'China Free Trade Areas Service Website' (Ministry of Commerce of People's Republic of China) <http://fta.mofcom.gov.cn> accessed 30 December 2020.

[20] The RCEP negotiation was initiated by the 10 ASEAN countries in 2012, and 6 countries including Australia, China, India, Japan, South Korea and New Zealand were invited to participate. Shouwen Wang, 'The World's Largest Free Trade Zone is Just Around the Corner: 10 Q &A Help You Understand the RCEP' (*State Council of the People's Republic of China,* 7 November 2019) <www.gov.cn/xinwen/2019-11/07/content_5449605.htm> accessed 27 December 2020.

[21] 'Joint Leaders' Statement on The Regional Comprehensive Economic Partnership (RCEP)' (*ASEAN*, 15 November 2020) <https://asean.org/joint-leaders-statement-regional-comprehensive-economic-partnership-rcep-2/> accessed 30 December 2020.

[22] 'Investment Dispute Settlement Navigator-China' (UNCTAD) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china> accessed 31 December 2020.

For this thesis, the most notable treaties are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') and the ICSID Convention, although the World Trade Organization (WTO) agreements have significant importance for Chinese inbound and outbound investments. In addition, it is worth noting that China has yet to sign the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention on Transparency') that entered into force on 18 October 2017.[23]

a. New York Convention

3.16 China entered into the New York Convention with two reservations under article I (3) on 22 January 1987.[24] Accordingly, China would only apply the New York Convention on the basis of reciprocity and to differences arising out of commercial disputes determined under PRC law.[25] The New York Convention has been effective in China since 2 April 1987.[26] The Supreme People's Court (SPC) of China promulgated a judicial explanation on the implementation of the New York Convention in China on 10 April 1987, with a detailed illustration of the two reservations (the 'Judicial Explanation') discussed below.[27]

3.17 First, China will only apply the New York Convention to arbitration awards made in the territory of another contracting State.[28] If an arbitration award is made in a non-contracting State, then a competent Chinese court should decide the recognition and enforcement with reference to the relevant rules under the Civil Procedure Law.[29] According to the latest amendment to the Civil Procedure Law, a Chinese court will

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[23] 'Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)' (*UNCITRAL*) <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 30 December 2020.

[24] Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China (1987), Fa[Jing]Fa No 5 (Notice on Implementation of New York Convention).

[25] Decision of the Standing Committee of the National People's Congress of China on China Entering into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1986).

[26] Notice on Implementation of New York Convention (n 24)

[27] Ibid

[28] Ibid, art 1 para 1.

[29] Ibid, art 1 para 2.

rely on an applicable international treaty between China and the country where the arbitration award is made, or if there is no such a treaty, the principle of reciprocity when deciding the recognition and enforcement of an arbitration award.[30]

3.18 Second, China has claimed that it applies the New York Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under PRC law.[31] The SPC further detailed such legal relationships as 'economic rights and obligations arising from contracts, torts or relevant legal provisions', which include the sale of goods, lease of property, project contracting, processing, technology transfer, equity or contractual joint adventure, exploration and development of natural resources, insurance, credit, labour service, agency, consultation service, marine, civil aviation, railway or road passenger and cargo transportation, product liability, environment pollution, marine accident and ownership disputes.[32]

3.19 Though the list of applicable legal relationships is incomplete, the SPC particularly emphasised that disputes between foreign investors and the host government are excluded from the list. This exclusion means that arbitration awards of investor-State disputes, either made by institutional or ad hoc tribunals, cannot be recognised or enforced in China through the New York Convention. However, as an exceptional case, China-Czechoslovakia BIT (1991) provides that the arbitral award rendered by an ad hoc tribunal under UNCITRAL rules should be recognised and enforced by the New York Convention.[33]

b. Washington Convention

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[30] Civil Procedure Law of the People's Republic of China (2017 Amendment) art 283.
[31] 'Contracting States - List of Contracting States - Declarations and Reservations' (New York Arbitration Convention <http://www.newyorkconvention.org/list+of+contracting+states> accessed 21 January 2016.
[32] Notice on Implementation of New York Convention (n 24) art 2.
[33] Agreement between the Government of the People's Republic of China and the Government of the Czech and Slovak Federal Republic for the Promotion and Reciprocal Protection of Investments (signed 4 December 1991, entered into force 1 December 1992, terminated 1 September 2006) art 9.4.

3.20 On 1 July 1992, China ratified the ICSID Convention signed on 9 February 1990.[34] According to the ICSID database, the ICSID Convention finally entered into effect within the territory of China on 6 February 1993.[35] However, China indicated its willingness to participate in the ICSID as early as its 1980s BITs. In some BITs, China directly agreed that foreign investors would be able to settle investment disputes before the ICSID after the Washington Convention entered into force in China (e.g. China–Australia BIT (1988)[36] and China–Turkey BIT (1990)).[37] In other BITs, China and the contracting State only consent to further negotiations on the possibility of incorporating the ICSID arbitration when both parties have become member States of the Washington Convention (e.g. China–Kuwait BIT (1985)[38] and China–UK BIT (1986)).[39]

3.21 Like the New York Convention, China also made reservations on the application of the treaty for certain classes of disputes when accessing the Washington Convention. Before the Washington Convention came into force in China, China notified the ICSID secretary that the Chinese government would only consider submitting 'disputes over compensation resulting from expropriation and nationalisation' to the ICSID for settlement per article 25(4) of the Washington Convention.[40] As discussed in the

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[34] Decision of the Standing Committee of the National People's Congress on the Ratification of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement of Investment Disputes (1992)

[35] 'Search ICSID Membership – China' (International Centre for Settlement of Investment Disputes) <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST30&tab=desig> accessed 21 December 2020.

[36] Agreement Between the Government of the People's Republic of China and the Government of Australia on the Reciprocal Encouragement and Protection of Investments (signed 11 July 1988, entered into force 11 July 1988) art 12.4.

[37] Agreement Between the People's Republic of China and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments (signed 13 November 1990, entered into force 20 August 1994) art 7.3.

[38] Exchange of Notes between Yao Yilin the delegator of China and Jassim Mohamed A1-Kharafi the delegator of Kuwait for the Agreement Between the Government of the People's Republic of China and the Government of the State of Kuwait for the Promotion and Protection of Investments (signed 23 November 1985, entered into force 24 December 1986), 23 November 1985.

[39] Exchange of Notes between Zhen Tuobin the delegator of China and Geoffrey Howe the delegator of the United Kingdom, Agreement Between the Government of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Promotion and Reciprocal Protection of Investments (signed 15 May 1986, entered into force 15 May 1986), 15 May 1986.

[40] 'China' (ICSID) <https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST30> accessed 31 December 2020.

sections below, this reservation conformed to the majority of BITs concluded by the end of 1990s before it was removed by the third generation of Chinese Model BIT.

C. The Investor-State Dispute Resolution Clause

3.22 An ISDS provision is available in most Chinese BITs, except for two early BITs: China–Sweden BIT (1982), which is the first BIT that China signed,[41] and China–Thailand BIT (1985). China–Democratic Germany BIT (1983), which has been replaced by China–Germany BIT (2005), was the first BIT incorporating an ISDS provision that allowed investors to submit a dispute on the amount of compensation of expropriation to an international ad hoc arbitral tribunal after a 6-month amicable negotiation period.[42] Just like other early BITs, ISDS clauses at that stage offer limited access to international arbitration. China–Yemen BIT (1998) is the first BIT in which the ISDS clause grants investors full access to international arbitration.[43] The longest ISDS clause in the Chinese BITs appears in the China–Canada BIT (2012), which is also China's longest and most comprehensive BIT to date.

Features of ISDS provisions in previous Model BITs

3.23 According to the three previous versions provided by Gallagher and Shan, one of the key differences of the Model BITs lies in the features of the ISDS provisions.

3.24 The most significant feature that distinguishes the Model BIT Version III ('Model III') from the previous two versions is the scope of arbitration. Echoing the reservation that China made when ratifying the ICSID Convention in 1992, the first two Chinese

[41] Though China and Sweden have concluded an amendment protocol on 27 September 2004 that incorporates an ISDS provision granting investors full access to international arbitration.
[42] Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments (signed 1 December 2003, entered into force 11 November 2005) (China-Germany BIT (2003)), Protocol art 4.3.
[43] Agreement between the Government of the People's Republic of China and the Government of the Republic of Yemen Concerning the Encouragement and Reciprocal Protection of Investments (signed 16 February 1988, entered into force 10 April 2002) art 10.

Model BITs only provide restrictive access to international arbitration, as only 'a dispute involving the amount of compensation for expropriation' may be submitted to an international arbitration tribunal.[44] Under those BITs, foreign investors can only submit disputes over the amount of compensation arising from expropriation measures to international arbitration, and other investment disputes could only be settled by amicable negotiation or domestic remedies.[45] The restriction has been removed in Model III, whereby 'any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party' may be submitted to international arbitration upon the investor's choice.[46]

3.25 Nevertheless, China made concessions on the reservation in certain BITs before the adoption of Model III in the late 1990s. For example, in China–Peru BIT (1994), foreign investors may submit investor-State disputes concerning other matters to the ICSID for arbitration if 'the parties to the disputes so agree'.[47] In China–Chile BIT (1994), a similar provision has been adopted so that investors may submit disputes other than the amount of compensation of expropriation to an ad hoc arbitral tribunal upon mutual consent of the disputants.[48] In addition, some BITs require both contracting states to negotiate further the possibility of extending the scope of disputes that could be submitted to the ICSID or other international arbitral tribunals if there are any changes in the arbitration-related rules of China (and/or the other contracting State). For instance, in the exchange note of the China–Malaysia BIT (1988), both parties agree to further discussion after China entered the Washington

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[44] Model I, art 9.3; Model II, art 9.3. For the thesis, Chinese Model BIT Versions I–III are extracted from Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (OUP 2009) 421–437.
[45] Model I art 9.1; Model II, art 9.2.
[46] Model III, art 9.1.
[47] Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments (signed 9 June 1994, entered into force 1 February 1995) art 8.3.
[48] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile Concerning the Encouragement and the Reciprocal Protection of Investment (signed 23 March 1994, entered into force 1 August 1995, terminated 2 April 2014) art 9.3.

Convention, and the extended scope of jurisdiction of the ICSID between China and Malaysia would not be less favourable than that between China and any third State.[49]

3.26 Another significant difference between Model III and the two previous Models concerns the forum of international arbitration. International arbitration under the first two Model BITs refers to ad hoc arbitral tribunal only, though the tribunal may take the ICSID Arbitration Rules as guidance when determining the arbitration procedure.[50] That is to say, institutional arbitration, especially ICSID arbitration, is not available in these Models, probably because it was not until 1994 that China ratified the Washington Convention. Nevertheless, some BITs concluded before 1994 also grant ICISD arbitration as an alternative route to ad hoc arbitration after China ratified the Washington Convention. For example, article 8 of China–Turkmenistan BIT (1992) stipulates that the contracting parties can reach a supplementary agreement on the submission of disputes to the ICSID Centre after both parties join the ICSID Convention. In Model III, ICSID arbitration became a default international arbitration forum. However, ad hoc arbitration under the UNCITRAL Arbitration Rules or other rules is always available in many BITs as an alternative.[51]

3.27 Furthermore, Model III first imposes a prepositive procedure other than amicable negotiation for international arbitration, so that foreign investors must go through the domestic administrative process before submitting disputes to ICSID tribunals.[52]

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[49] Agreement Between the Government of the People's Republic of China and the Government of Malaysia Concerning the Reciprocal Encouragement and Protection of Investments (signed 21 November 1988, entered into force 31 March 1990), exchange of notes dated 21 November 1985; see also Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investment (signed 21 November 1985, entered into force 7 February 1986), exchange of notes dated 21 November 1985; Agreement Between the Government of the People's Republic of China and the Government of the Democratic Socialist Republic of the Sri Lanka on the Reciprocal Promotion and Protection of Investments (signed 13 March 1986, entered into force 25 March 1987), exchange of notes dated 13 March 1986.

[50] Model I art 9.3 and 9.5; Model II art 9.3 and 9.5.

[51] For example, China – Germany BIT (2003) (n 42); Agreement Between the Government of the Republic of Finland and the Government of the People's Republic of China on the Encouragement and Reciprocal Protection of Investments (signed 15 November 2004, entered into force 15 November 2006); Agreement Between the People's Republic of China and the Kingdom of Spain on the Promotion and Reciprocal Protection of Investments (signed 14 November 2005, entered into force 1 July 2008).

[52] Model art 9.2. (b).

The umbrella clause becomes available in Model III so that a breach of the State's contractual duties may be escalated to a breach of the treaty.[53] Finally, Model III deletes a provision allocating arbitration costs that appeared in Models I and II and instead grants arbitral tribunals discretion on the allocation of costs.[54]

The ISDS clause in the current version of Model BIT and the applications

3.28 Compared with the previous three models, the ISDS clause in Model IV, the latest draft version of Chinese Model BIT produced in 2010, is expanded from 4 sub-provisions to 10 comprising a more comprehensive dispute settlement mechanism.[55] The following paragraphs that follow, the texts and applications of all 10 sub-provisions under article 13 as well as other ISDS related provisions of Model IV will be discussed in terms of recent BITs and FTAs and in comparison with corresponding provisions in Model III.

a. Scope of arbitrability

3.29 Following the practice of Model III, the scope of arbitrability prescribed by Model IV is not restricted to the amount of compensation arising out of expropriation only. However, considering that the unrestrictive wording, namely 'any disputes', used in Model III is so broad it may potentially extend the jurisdiction of an investor-State arbitral tribunal to claims that would not intend to be included by contracting States, such as contractual claims, Model IV imposes certain restrictions on the jurisdiction

[53] Model III art 10 Other Obligation 2.
[54] Model I and Model II, art 9.8.
[55] Model IV art 13 Settlement of Disputes Between Investors and One Contracting Party. For the thesis, Model IV (Chinese version) is extracted from Xiantao Wen, 'Comments on the Draft of China's Model BIT (I)' (2011) 18 Journal of International Economic Law 169; Xiantao Wen, 'Comments on the Draft of China's Model BIT (II)' (2012) 19 Journal of International Economic Law 132; Xiantao Wen, 'Comments on the Draft of China's Model BIT (III)' (2012) 19 Journal of International Economic Law 57. Text of relevant clauses of the Model IV is translated from Chinese version with reference to the official English version of Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (signed 19 April 2011, entered into force 1 September 2011) (China-Uzbekistan BIT (2011)), the text of which is largely based on the Model IV.

resulting to only disputes arising out of certain provisions can be submitted to international arbitration.

3.30 In particular, though article 13.1 of Model IV mentions that 'any legal dispute between an investor of one Contracting Party and the other Contracting party in connection with an investment in the territory of the other Contract Party' shall be first settled via amicable negotiation, article 13.2 limits disputes that can be further submitted to confrontational dispute resolution mechanisms, whether court proceedings in the host State or international arbitration, to those arising from alleged breaches of obligations by the host State under articles 2–9 or article 14 of Model BIT IV. Only disputes regarding article 2 (Promotion and Protection of Investment), article 3 (National Treatment), article 4 (Most Favourable Nation Treatment), article 5 (Fair and Equitable Treatment), article 6 (Expropriation), article 7 (Compensation for Damages and Losses), article 8 (Transfer), article 9 (Subrogation) and article 14 (Other Obligations) are arbitrable. Given article 1 is the provision on the definition of terms and article 12 concerns State-State Dispute Resolution, an alleged breach of article 10 (Denial of Benefits) or article 11 (Taxation) is out of the jurisdiction of the court or an international arbitral tribunal set up under article 13 of Investor-State Dispute Resolution.

3.31 The restrictive scope of arbitrability has been adopted in the BITs and FTAs concluded around and after the formation of Model IV. Some treaties even impose tighter restrictions than the model clause. Take China–Canada BIT (2012) as an example. There is a complicated list of restrictions on arbitrability in article 20. A dispute on the denial of benefits is arbitrable, but an alleged violation of article 7.3 regarding the entry of non-citizens, article 14 on taxation (except article 14.4, which regulates expropriation-related taxation) or article 17 on the transparency of

legislation and policies cannot be submitted to international arbitration.[56] In addition, when the host State invokes the exception of financial prudential reasons provided in article 33.3 to defend the alleged violation of treaty duties, an arbitral tribunal does not have the competence to decide the validity of the defence; it shall be solely determined by a joint report by the contracting States.[57] The initial approval of investment and denial of entry of investment based on national security review are excluded from the scope of any dispute settlement mechanism under the treaty.[58] In China–Columbia BIT (2008), an international arbitral tribunal can decide whether a breach of the treaty is established and the amount of damages, but it is not competent to decide the legality of the disputed measure under domestic law.[59] As to the only trilateral investment treaty of China, China–Korea–Japan (2012) places investment disputes on measures relating to financial services for prudential reasons and transparent intellectual property rights regimes out of the jurisdiction of international investor-State arbitration.[60] China–Australia FTA (2015) expressly excludes measures related to trade in services and movement of natural persons, government procurement and subsidies or grants provided by a State including government-supported loans, guarantees and insurance from the scope of arbitration.[61]

b. Amicable negotiation and other ADRs

3.32 Article 13.1 of Model IV provides that an investment dispute between an investor and a host State shall, as far as possible, be settled amicably through negotiations between

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[56] Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (signed 9 September 2012, entered into force 1 October 2014) (China-Canada BIT (2012) art 20.1 (a).

[57] ibid art 20.2 (a).

[58] ibid Chapter 4 art 34 and Annex D.34.

[59] Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China (signed 22 November 2008, entered into force 2 July 2013) (China-Columbia BIT (2008)) art 9.13.

[60] Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (signed 13 May 2012, entered into force 17 May 2014) arts 15.12, 9.1 (b) and 20.

[61] Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (signed 17 June 2015, entered into force 20 December 2015) (China-Australia FTA (2015)) Chapter 9 Investment arts 9.2.2 and 9.2.3.

the disputants, including conciliation procedures. Compared with the corresponding provision in Model III, Model IV specifically adds the conciliation procedures in the compulsory negotiation stage, which is followed by China–Uzbekistan BIT (2011)[62] and China–Tanzania BIT (2013).[63] The minimum duration for the amicable stage before moving forward to any subsequent court proceedings or international arbitration under the BIT is 6 months from the date the negotiation is initiated per article 13.2 of Model IV.

3.33 Some BITs allow disputants to enter into alternative dispute resolution after the commencement of arbitration. In article 9.3 of China–Columbia BIT (2008), the parties to the investment dispute may refer their disputes, by mutual consent, to ad hoc or institutional mediation or conciliation before or during the arbitral proceeding.

3.34 Conciliation or other non-binding third-party procedures also occur in recent FTAs. Article 13 of China–Chile FTA Supplementary Agreement on Investments (2012) prescribes that the disputants of an investment dispute shall 'initially seek to resolve the dispute through consultations and negotiations, which may include the use of non-binding third-party procedures, where this is acceptable to both parties to the dispute'. Article 152 of China–New Zealand FTA (2008) provides a similar approach by suggesting disputing parties undergo alternative dispute resolution before confrontational proceedings.

c. A mandatory administrative review procedure

3.35 The last section of article 13.2 of Model IV grants the host State the right to require the investor concerned to exhaust the domestic administrative review procedures specified by the laws and regulations of the host State before submitting to international arbitration. As illustrated in the previous chapter, the administrative

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[62] China-Uzbekistan BIT (2011) (n 55) art 12.1.

[63] Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments (signed 24 March 2013, entered into force 17 April 2014) (China-Tanzania BIT (2013)) art 13.1.

review procedure by nature is an internal correction mechanism of the Chinese governmental administration. It is one of the three available domestic dispute resolution mechanisms for a foreign investor against an administrative act of a Chinese government authority. An administrative review decision is not binding in most cases, so an applicant who is unsatisfied with the decision may seek further remedies before a national court or international arbitral tribunal. Though this is a new pre-condition of arbitration which is not incorporated in the Model III, it has been a common treaty practice on the Chinese side since it is first regulated in China–Barbados BIT (1998) and the Administrative Review Law takes effect on 1 October 1999.[64]

3.36 According to article 31 of the Administrative Review Law, an administrative review decision shall be issued within 60 days from the date of applications and could be extended by 30 days at most. Though the model clause does not provide a time limit for the administrative review procedure, some BITs or FTAs agree that the domestic administrative review procedure shall be deemed completed after a prescribed period starting from the date an application for the review is first filed. For example, China–Columbia BIT (2008)[65] provides that the administrative review procedure shall not exceed 6 months. In contrast, the maximum period is 4 months in China–Mexico BIT (2008)[66] and 3 months in China–Switzerland BIT (2009).[67] In China–Chile FTA (2012), the administrative review procedure shall not exceed 3 months, but it may be prolonged according to the proposed amendment to the Administrative Review Law.[68]

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[64] China-Barbados BIT (1998) (n 11) art 9.3: 'Notwithstanding paragraph 2, the Contracting Party may require the investor to exhaust the local administrative review procedure before the submission of the dispute to international arbitration. …'

[65] China-Columbia BIT (2008) (n 59), art 9.1.

[66] Agreement Between Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (signed 11 July 2008, entered into force 6 June 2009) Annex C Annex to Article 13 paragraph 5

[67] Agreement Between the Swiss Federal Council and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (signed 27 January 2009, entered into force 13 April 2010) (China-Switzerland BIT (2009)) Protocol, Ad art 11 para (2) (a).

[68] The Supplementary Agreement on Investments of the Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Chile (2012) Footnote 14 for art 14.3.

3.37 Despite the mandatory requirement of exhaustion of administrative review, most Chinese BITs do not require investors, especially when China is the host State,[69] to exhaust local remedies before submitting the dispute to international arbitration. The exception is China–Costa Rica BIT (2007), where investors from both Contracting States must exhaust domestic proceedings prescribed by laws and regulations before the ICSID arbitration.[70]

d. Options for the forum of international arbitration

3.38 After the mandatory cooling period for amicable settlement and the administrative review procedure, an investor who is unsatisfied with the results of previous proceedings may submit a claim to a competent court of the host State or an international arbitral tribunal per article 13.2 of Model IV. Article 13.2 provides investors with three options for international arbitration:

- the ICSID arbitration provides that both contracting States are parties to the ICSID Convention;
- an ad hoc arbitral tribunal to be established under the UNCITRAL Arbitration Rules; or
- any other arbitration institution or ad-hoc arbitral tribunal agreed to by the disputing parties.

3.39 Compared with Model III, where the host State only grants investors consent to the ICISD arbitration, ad hoc arbitration under the UNCITRAL Arbitration Rules or occasionally under other arbitration rules has been an established custom in Chinese

[69] Some BITs the other Contracting Party may require investors from China to exhaust local remedies which is a corresponding provision to the mandatory administrative review procedure required by China. For example, see Agreement Between the Government of the People's Republic of China and the Government of Malta on the Promotion and Protection of Investment (signed 22 February 2009, entered into force 1 April 2009) art 9.3.

[70] Agreement between the Government of the People's Republic of China and the Government of the Republic of Costa Rica on the Promotion and Protection of Investments (signed 1 April 2010, entered into force 1 August 2011) art 9.2.(2).

BITs since the 2000s.[71] The remarkable innovation in Model IV is the third option, which makes other institutional arbitration, especially a China-based arbitration institution, an available choice in theory.

3.40 This model clause is strictly followed by China–Uzbekistan BIT (2011)[72] and China–Tanzania BIT (2013).[73] In addition, some recent Chinese FTAs also open up opportunities to other arbitration institutions apart from the ICSID. China–Peru FTA (2009) explicitly grants parties a right to choose 'any other binding dispute settlement mechanism' of the host Country in addition to local courts and international arbitration, where a 'binding dispute settlement mechanism' is defined as 'those binding local dispute settlement mechanisms that are voluntarily chosen by the disputants to solve the dispute'.[74] However, more FTAs do not mention the local dispute settlement mechanism, though parties may choose local arbitration centres by consent. For instance, article 14.3 (d) of the Supplementary Agreement on Investments of the China–Chile FTA (2012) allows an investor to submit a claim 'to if agreed with the Disputing Party, any arbitration under other arbitration rules.' Article 9.12.4 (d) of China–Australia FTA (2015) provides that an investor may submit a claim, if the investor and the respondent State agree, 'to any other arbitration institution or under any other arbitration rules'. China–ASEAN Investment Agreement (2009) takes a similar approach,[75] which may be followed by the new RCEP.

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[71] In fact, UNCITRAL ad hoc arbitration is available in nearly every Chinese BITs concluded after 2000 in addition to ICSID arbitration. An exception is the Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments (signed 7 September 2007, entered into force 1 December 2007) art 9.3 (b): 'the dispute shall be submitted, at the option of the investor, to: (b) an ad hoc arbitration tribunal established under UNCITRAL Arbitration Rules or any other arbitration rules agreed upon by both parties.'

[72] China-Uzbekistan BIT (2011) (n 55) art 12.2.

[73] China-Tanzania BIT (2013) (n 63) art 13.2.

[74] Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Peru (signed 28 April 2009, entered into force 1 March 2010) Chapter 10 Investment art 139.2 and footnote 17.

[75] Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations (signed 15 August 2009, entered into force 1 January 2010) (China-ASEAN IA (2009)) art14.4 (e).

e. Fork-in-the-road

3.41 Following the established rule from the previous Models since the Model I, article 13.3 of the Model IV provides that if the investor has submitted the dispute to the competent court of the host State or international arbitration, the choice of one of the four abovementioned procedures, namely the court proceedings or arbitration before one of the three international fora, shall be final. This fork-in-the-road provision has been adopted in most recent Chinese BITs after the formation of Model IV, such as China–Chad BIT (2010),[76] China–Libya BIT (2010),[77] China–Uzbekistan BIT (2011)[78] and China–Tanzania BIT (2013).[79]

3.42 Nevertheless, China–Canada BIT (2012) takes a different approach by allowing investors to submit a dispute to international arbitration in case the same claim has been submitted to a competent domestic court, as long as the investor has withdrawn the case from domestic court before a final judgment has been made on the dispute.[80] The variation of fork-in-the-road has also been widely used in Chinese investment treaties especially those concluded before the formation of Model IV, such as China–ASEAN International Agreement (2009),[81] China–New Zealand FTA (2008)[82] and China–Switzerland BIT (2009).[83]

3.43 Compared with the model fork-in-the-road clause, the variation may lead to concurrent procedures of international arbitration and domestic litigation in China. However, an international arbitration may only occur after the investor who has launched a domestic litigation has withdrawn the case before a domestic court.

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[76] Agreement between the Government of the People's Republic of China and the Government of the Republic of Chad on the Promotion and Protection of Investments (signed 26 April 2010) (China-Chad BIT (2010)) art 12.3.
[77] Agreement between the Government of the People's Republic of China and the Government of the State of Libra on the Promotion and Protection of Investments (signed 4 August 2010) art 9.2.
[78] China-Uzbekistan BIT (2011) (n 55) art 12.3.
[79] China-Tanzania BIT (2013) (n 63) art 13.3.
[80] China-Canada BIT (2012) (n 56) Annex C.21.2.
[81] China-ASEAN IA (2009) (n 75) art 14.5 5, with exception in the case of Indonesia, Philippines, Thailand, and Viet Nam, against which the investor's choice is final.
[82] Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China (signed 7 April 2008, entered into force 2008) art 153.3.
[83] China-Switzerland BIT (2009) (n 67) art 11.4.

Whether a withdrawal of litigation before a Chinese court can be granted is subject to the court's direction per article 51 of the Administrative Litigation Law of China. The court may deny the withdrawal while an international arbitral tribunal still has jurisdiction over the same dispute, given the variated provision fails to specify the consequence of an unsuccessful withdrawal prior to domestic proceedings. Wen points out that a more likely scenario for parallel proceedings is when a foreign shareholder directly raises an international arbitration against China and its domestic entity simultaneously files an administrative lawsuit before a local Chinese court against a Chinese local authority based on the same facts.[84] This strategy is not explicitly prohibited in a Chinese BIT. In fact, in *Heilongjiang and others v Mongolia*, the three Chinese investors launched an international arbitration against Mongolia for alleged expropriation actions after the Mongolian entity, in which all of them had interests, failed to challenge before Mongolian courts the revocation of a mining licence by relevant Mongolian governmental authorities. This situation occurred despite the fork-in-the-road provision in China–Mongolia BIT (1991).[85] However, in China–Canada BIT, Canada follows the North American Free Trade Agreement (NAFTA). It requires both a Chinese investor and its local entity in Canada to waive their right to initiate or continue local proceedings before the Chinese investor may submit the claim to an international arbitral tribunal.[86]

3.44 As an interim measure can only be ordered by a Chinese court under the Civil Procedure Law of China, article 9.7 of China–Columbia BIT (2008) clarifies that the finality of choice of forum shall not prevent an investor from seeking injunction reliefs before a national court if it has already chosen to submit the investment dispute to an international arbitral tribunal. The BIT provides that:

[84] Xiantao Wen, 'Who is the South and Who is the North? Compromise or Consensus? – Comment on China-Canada Bilateral Investment Agreement' (2014)16 Wuhan University International Law Review 303.

[85] *China Heilongjiang International & Technical Cooperative Corp, Qinhuangdaoshi Qinlong International Industrial, and Beijing Shougang Mining Investment v. Republic of Mongolia*, PCA Case No.2010-20, Request for Arbitration (12 February 2010) para 45.

[86] China-Canada BIT (2012) (n 56) Annex C.21.3; NAFTA Chapter 11 Article 1121.1(b)

> The investor may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent provided that the action is brought for the sole purpose of preserving the investor's rights and interests during the pendency of the arbitration. The initiation or continuation of such an action shall not be deemed a final choice of one of the two procedures stated under this paragraph.

A similar clause appears in China–Mexico BIT's (2008) article 13.4 (b).

f. Time bar

3.45 Article 13.4 of Model IV imposes a limitation period on an investment claim so that a dispute cannot be submitted to arbitration 3 years 'from the date that the investor first acquired or should have first acquired knowledge of the events which gave rise to the dispute'. This new model clause has been adopted by some recent investment treaties such as China–Uzbekistan BIT (2011),[87] China–Canada BIT (2012)[88] and China–Tanzania BIT (2013).[89] Apart from the 3-year limitation, China–Australia FTA (2015) article 9.14.1 further provides a maximum limitation period under which a dispute is barred after 4 years 'since the occurrence of the measures and/or events giving rise to the breach' of treaty obligations.

3.46 The limitation period clause was the key issue in *Ansung Housing v China.*[90] Ansung Housing, a South Korean investor, claimed that the local government had indirectly expropriated its investment in a golf course and condominium development project.[91] According to article 9.7 of China–Republic of Korea BIT (2007), an investor may not make a claim to international arbitration if more than 3 years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the incurred loss or damage. The Claimant sent the Notice of Intent of

[87] China-Uzbekistan BIT (2011) (n 55) art 12.4.
[88] China-Canada BIT (2012) (n 56) art 21.2 (f).
[89] China-Tanzania BIT (2013) (n 63) art 13.4.
[90] Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25)
[91] ibid Award (9 March 2017) paras 43 and 44.

arbitration on 19 May 2014 to President Xi of China.[92] The Request of Arbitration was filed with the ICSID on 7 October 2014, and the registered date was 4 November 2014.[93] The ICSID tribunal determined based on evidence that Ansung Housing knew that it had incurred loss or damages before October 2011,[94] and a plain reading on the most favourable nation (MFN) clause does not extend to MFN treatment for a State's consent to arbitrate with investors and not to the time limitation.[95] Therefore, the tribunal decided that the claims manifestly lacked legal merit as time-barred necessarily meant that the claims should not have been brought. Additionally, the tribunal China should not bear the reasonable costs for successfully defending the claim at the ICSID Arbitration Rule 41(5) stage.[96]

g. Choice of law

3.47 Article 13.5 of Model IV regulates the applicable law of arbitration procedures by confirming stipulations in the BIT shall prevail if the stipulations conflict with applicable arbitration rules. Article 13.6 regulates the applicable law to the merits of the dispute. The arbitral tribunal shall decide a dispute according to such rules of law as may be agreed by the disputing parties or the law of the host State (including its rules on the conflict of laws) and applicable rules of international law, in particular the BIT itself, in the absence of an agreement on the choice of law.

h. Restriction on the types of arbitral award

3.48 Article 13.7 of Model IV restricts the types of arbitral award so that a tribunal may only award the investor who has suffered losses or damages arising from the host State's violation of duties under the treaty, separately or in combination, monetary damages and any applicable interest, or restitution of property. However, the award may specify monetary damages and interest in lieu of restitution.

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[92] ibid para 5
[93] ibid paras 6 and 8.
[94] ibid para 107.
[95] ibid para 140.
[96] ibid para 159.

i. Finality and enforcement of final award

3.49 Article 13.8 of Model IV confirms the principle of finality of the arbitral award, emphasising 'the arbitration award shall be final and binding upon both parties to the dispute' and both parties shall 'commit themselves to the enforcement of the award'. This provision rules out the possibility of appellate review of the arbitral award either by another arbitral tribunal or domestic proceedings. Nevertheless, China–Australia FTA (2015) leaves a window for appellate review on the arbitral awards in the future.

3.50 According to article 9.23 of China–Australia FTA (2015), China and Australia shall, within 3 years after the date of entry into force of the FTA, commence negotiations 'with a view to establishing an appellate mechanism to review awards' in arbitrations commenced after any such appellate mechanism is established. However, both parties further limit the scope of appellate review to questions of law only. Any merits of dispute shall be determined solely by the original arbitral tribunal.

3.51 After a final arbitral award is rendered, article 13.9 of Model IV grants a disputing party, usually the investor, to seek enforcement of the award after some time has elapsed from the date the award was rendered[97] and no disputing party has requested to revise, set aside or annul the award, or the revision or annulment proceedings have been completed. The Model BIT does not give further details on the procedure of enforcement. Although awards made under the ICSID Convention can be enforced under articles 53 and 54 of the Convention, other arbitral awards against China may be hard to enforce in China given the country has made reservations on investor-State arbitration when ratifying the New York Convention. Investors may have to seek diplomatic channels when enforcing the award. To avoid the overuse of diplomatic channels, China–Switzerland BIT (2009) disallows a State from pursuing through diplomatic channels a dispute submitted to international arbitration unless

[97] 120 days for a final award made under the ICSID Convention and 90 days for an award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other arbitration rules.

the other State does not abide by and comply with the arbitration award.[98] This rule is also seen in China–Columbia BIT (2009) article 9.9, where both States may only pursue through diplomatic channels when the host State of a dispute fails to comply with a court decision or arbitral award.

j. Allocation of costs

3.52 Article 13.10 is the final sub-clause of the provision on the settlement between a contracting party and an investor of the other contracting party. It provides general rules on the allocation of arbitration costs between disputants. First, the principal rule succeeds from article 9.8 of Model III that each party shall bear the costs of its appointed arbitrator and any legal representation in proceedings and share the half of the costs of the presiding arbitrator and other expenses associated with the conduct of the arbitration. Second, the tribunal may determine that one disputing party shall bear a higher proportion of the costs and provide an explanation for this decision. Third, for frivolous claims, the tribunal may determine with reasonable cause that the losing party shall bear the reasonable costs and attorney's fees of the prevailing party incurred in opposing the objection.

3.53 These rules have been adopted in recent BITs and FTAs such as China–Chad BIT (2010),[99] China–Tanzania BIT (2013)[100] and China–Australia FTA (2015).[101] Even in the BITs that do not have a specific section on costs allocation, such as China–South Korea BIT (2007), an ICSID tribunal has the discretion to allocate costs and expenses between parties pursuant to article 61(2) of the ICSID Convention. In *Ansung Housing v China*, the tribunal decided China was entitled to reasonable costs given the claims manifestly lacked legal merit due to time limitation so that China would not have been dragged into the arbitral proceedings.[102] The tribunal apportioned 75% of China's

[98] China-Switzerland BIT (2009) (n 67) art 11.6.
[99] China-Chad BIT (2010) (n 76) art 12.8.
[100] China-Tanzania BIT (2013) (n 63) art 13.10.
[101] China-Australia FTA (2015) (n 61) art 9.16.7.
[102] Award (n 91) para 159.

claimed legal fees and disbursement to the investor given that the tribunal considered the legal costs claimed by China were disproportionate to the extent of the Rule 41(5) Objection submissions and one-day hearing.[103]

k. Other provisions related to the ISDS clause

3.54 Apart from article 13 on the specific provision on the ISDS, some other provisions in the China Model BIT VI may be relevant to investment disputes as well. In particular, the umbrella clause (article 14) and the MFN clause (article 4) arguably extend the jurisdiction of an international tribunal.

3.55 Article 14.2 of Model IV is a typical umbrella clause that requires each contracting state to observe any written commitments in the form of agreement or contract it may have entered into with investors of the other contracting state regarding their investments. Nevertheless, it is followed by article 14.3, which further clarifies that the breach of the State of the obligation under a commercial contract is not a breach of the BIT. It is believed that article 14.3 could avoid discussions in *SGS v Pakistan* and *SGS v Philippine* about whether pure commercial contractual claims would be covered by the umbrella clause (i.e. whether the state had to observe duties under pure commercial contracts as obligations under treaties). In practice, recent Chinese BITs are diverse in whether to opt-out article 14.3 in their final texts. For instance, China–Uzbekistan BIT (2011)[104] and China–Chad BIT (2010)[105] choose to reserve both model provisions, but China–Tanzania BIT (2013) intentionally omit the latter part so that investors theoretically may seek treaty remedies for commercial contractual claims under China–Tanzania BIT. [106]

3.56 Article 4 of Model IV provides most-favourable-treatment to investors of the other contracting state so that the latter would not be treated less favourably than that it

[103] ibid para 163.
[104] China-Uzbekistan BIT (2011) (n 55) arts 13.2 and 13.3.
[105] China-Chad BIT (2010) (n 76) art 14.2 and 14.3.
[106] China-Tanzania BIT (2013) (n 63) art 14.2.

accords in like circumstances to investors and investments there of any third State. To avoid controversy on whether the MFN could be extended to the dispute settlement clause, which has been heatedly debated before many international investment arbitral tribunals, article 4.3 stipulates that the MFN treatment does not apply to dispute settlement provisions laid down by the BIT and other similar international agreement to which one of the contracting States is a signatory. This model clause has been widely used in recent Chinese investment treaties, such as Uzbekistan,[107] Canada,[108] Tanzania[109] and Australia.[110] In the exchange of letters of China–Singapore BIT (1985), China is committed to treating Singapore no less favourably in the same circumstances as any other State on expanding the 'area of investment disputes which may be submitted for conciliation and arbitration by the ICSID' after China entering into the ICSID Convention.[111]

l. State-State dispute settlement

3.57 Apart from the investor-State dispute resolution, settlement of disputes via meetings between representatives of the two contracting States has been available since the first version of the Model BIT, where article 12.1 requires the representatives of the two States to 'hold meetings from time to time for the purpose of: (c) resolving dispute arising out of investments'. It has been a common practice for Chinese BITs to incorporate a State-State dispute settlement (SSDS) provision to solve disputes concerning the interpretation or application of the treaty via diplomatic channels or international ad hoc arbitration. Article 11 of Model IV is a typical SSDS clause in this regard.

3.58 Understandably, states may exercise diplomatic protection when their nationals have encountered unfair treatment in a foreign state. However, some BITs state that States

[107] China-Uzbekistan BIT (2011) (n 55) art 4.3.
[108] China-Canada BIT (2012) (n 56) art 5.3.
[109] China-Tanzania BIT (2013) (n 63) art 4.3.
[110] China-Australia FTA (2015) (n 61) art 9.4.2.
[111] n 49.

shall refrain from pursuing diplomatic channels for investor-State investment disputes, such as China–Columbia BIT (2009).[112] In contrast, other states are prone to expanding the use of SSDS in investor-State disputes. For example, in China–Australia FTA (2015), as one of the planned future work programmes, both States shall negotiate the inclusion of articles addressing the ISSDS in the treaty.[113]

D. Conclusion

3.59 It is shown from the above treaty practice that recent IIAs of China, which is based on the latest draft of the Chinese model BIT around 2010, further loosens restrictions on the ISDS system. Most importantly, it allows foreign investors to submit any disputes arising from a BIT to any international arbitration forum other than the ICSID and ad hoc tribunals. It is also indicated by China-Australia FTA (2015) that an appeal system is foreseeable in the new or amended IIAs in the future. However, despite the continuous reform on the ISDS clause, both Chinese government and Chinese investors has suffered from the current ISDS system when encountering disputes, which will be discussed in the next chapter.

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[112] China-Columbia BIT (2009) (n 59) art 9.9.
[113] China-Australia FTA (2015) (n 61) art 9.9.3 (b) (vi).

Chapter 4: Practical Issues of International Investor-State Dispute Settlement of China

A. Introduction

4.1 Chapter 3 has examined the evolution of the investor-State dispute settlement (ISDS) clause in the past and current drafts of Chinese model bilateral investment treaty (BIT) and relevant treaty practice. A typical BIT entered into by China allows foreign investors to file investor-State arbitration against China for alleged breach of treaty obligations. Historically, investor-State arbitration was not a favourable route for investors, especially given the limited scope of jurisdiction in the older generation of Chinese BITs. In recent years, recorded investor-State arbitration cases where China is either the home State or the host State have increased significantly, which has led to China's growing concerns about the ISDS system.

4.2 It is understood from the model BITs that the forum of international arbitration provided in the majority of Chinese BITs or other investment treaties is either the International Centre for Settlement of Investment Disputes (ICSID) or ad hoc arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. According to the databases maintained by the ICSID,[1] Permanent Court of Arbitration (PCA)[2] and the Investment Policy Hub under the United Nations Conference on Trade and Development (UNCTAD),[3] six officially recorded investor-State arbitration cases have been registered against China[4] and 12

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[1] 'ICSID Cases'<https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> accessed 31 December 2020.

[2] 'PCA Cases' <https://pca-cpa.org/en/cases/> accessed 31 December 2020.

[3] 'Investment Dispute Settlement Navigator-China' (UNCTAD) <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/42/china> accessed 31 December 2020.

[4] As reported by the Investment Arbitration Reporter (IAReporter), there is an unrecorded investor-State arbitration raised by Surfeit Harvest Investment Holding Pte Ltd, a Singaporean investor, against Taiwan Province of China. See Jarrod Hepburn, 'Taiwan Facing Its First Known Investment Treaty Arbitration over Alleged Interferences with Bank Management Rights' (*IAReporter,* 2017) <www.iareporter.com/articles/taiwan-facing-its-first-known-investment-treaty-arbitration-over-alleged-interferences-with-bank-management-rights/> accessed 28 December 2020.

officially recorded investment disputes between a Chinese national (including those from Hong Kong and Macao) and a foreign State have been registered by September 2020.[5]

4.3 This chapter will first provide a summary of recorded cases involving Chinese parties. It then illustrates Chinese concerns on the ISDS, which is going to be discussed in combination with cases and statistics specifically concerning China. Issues in related with domestic proceedings that have been discussed in detail in Chapter 2, such as administrative review and domestic administrative litigation procedures, will not be repeated in this chapter although these proceedings also serve as integral parts of the ISDS clauses in Chinese BITs.

B. Chinese international investment disputes

China as a host country

4.4 There are six officially recorded investor-State arbitration cases being registered against China. As shown in the below discussion, China was not sued before an international arbitral tribunal until 2011, but in the last year or two, there is a boost in the number of cases. Although public information is limited, it could be inferred from the available information that most cases, if not all, concern expropriation measures taken by local governments of China.

4.5 *Ekran Berhad v People's Republic of China* ('*Ekran*') is the first recorded investor-State arbitration against China.[6] Ekran Berhad was a Malaysian construction and development company, who launched the arbitration before ISCID under the China–

[5] It is reported another concluded but confidential investment arbitration initiated by a Chinese investor, *StarTimes v Ghana*. See Damien Charlotin, 'Chinese Investor Fails to Persuade ICC Tribunal that Telecoms Contract was Improperly Terminated - Or That Chinese Investment Treaty Should Colour Interpretation of Contract' (*IAReporter,* 2018) <www.iareporter.com/articles/chinese-investor-fails-to-persuade-icc-tribunal-that-telecoms-contract-was-improperly-terminated-or-that-chinese-investment-treaty-should-color-interpretation-of-contract/> accessed 28 December 2020.

[6] ICSID Case No ARB/11/15.

Malaysia BIT (1988) and China–Israel BIT (1995). Being registered on 24 May 2011, the dispute was about the local government's revocation of the leasehold rights of land totalling 900 hectares initially granted to a Chinese subsidiary of Ekran Berhad.[7] As with other BITs concluded at that time, an investors is only allowed to submit a dispute on the amount of compensation for the expropriated investment before an international arbitration tribunal under China-Malaysia BIT (1988).[8] The arbitral proceeding was concluded based on the parties' request to discontinue the proceeding on 16 May 2013 pursuant to ICSID Arbitration Rule 43(1). No case materials were made available online because the proceeding was suspended 2 months after the case registration.[9]

4.6 *Ansung Housing Co., Ltd v People's Republic of China* ('*Ausung*') is the first investment arbitration case against China with a public award.[10] It could be learnt from the ICSID award that the claims were raised by a Korean developer out of the provincial government's alleged actions relating to the Claimant's investment, which was over USD 15 million in the form of capital expenditure, in the construction of a golf and country club and condominiums in China.[11] The critical issue of the case was on the temporal limitation period. Article 9.7 of China–Republic of Korea BIT (2007) provides that an investor is barred from making a claim to international arbitration if more than three years have elapsed from the date on which the investor first know, or should have first know, that the investor had incurred loss or damages. Given the investor had knowledge that it had incurred loss or damages before October 2011 and the Request for Arbitration was issued on 7 October 2014, the tribunal dismissed the

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[7] Luke Eric Peterson, 'China is Sued for the First Time in and ICSID Arbitration; Malaysian Investor, Ekran, Had Rights to 900 Hectares of Land for Development in China' (*Investment Arbitration Reporter,* 2011) <www.iareporter.com/articles/china-is-sued-for-the-first-time-in-an-icsid-arbitration-malaysian-investor-ekran-had-rights-to-900-hectares-of-land-for-development-in-china/> accessed 28 December 2020.
[8] Agreement between the Government of the People's Republic of China and the Government of Malaysia Concerning the Reciprocal Encouragement and Protection of Investments (signed 21 November 1988, entered into force 31 March 1990) (China-Malaysia BIT (1988)), art 7 (1).
[9] Cases details can be seen at Cases Database of ICSID at <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/11/15> accessed 28 December 2020.
[10] ICSD Case No ARB/14/25.
[11] *Ansung Housing Co., Ltd v People's Republic of China*, ICSD Case No ARB/14/25, Award (9 March 2017), paras 43 and 44.

claims based on ICSID Arbitration Rule 41.5 (manifestly lacks legal merit) on 9 March 2017 because the claim was time-barred.[12] The tribunal also rejected the Claimant's intention to invoke the Most Favourable Nation (MFN) clause to save the claim being time-barred.[13] China was awarded share of direct costs of the proceeding, 75% of its legal fees and expenses and post award interests for successfully defending the claim.[14]

4.7 Another noteworthy point in the *Ansung* case was the proviso provision of the arbitration agreement. Article 9.3 of China–Republic of Korea BIT (2007) requires an investor to go through the domestic administrative procedure upon the requirement of the host State before the submission to international arbitration. However, according to the only published case document, the final award, no evidence suggested the investor had gone through the complaint procedure, administrative review or administrative litigation procedure before launching international arbitration. China did not invoke this provision or challenge the jurisdiction of the tribunal based on this proviso provision during the hearing.

4.8 In contrast, the Claimant of the next case, *Hela Schwarz GmbH v People's Republic of China* ('*Hela*'),[15] seems to have gone through domestic proceedings before launching the ICSID arbitration against China as demanded by China-Germany BIT (2003).[16] Detailed case background has been illustrated in the Introduction chapter of the thesis, which will not be repeated here.[17] In summary, the right of use of land held by a

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[12] ibid para 143.
[13] ibid para 141.
[14] ibid paras 159 and 163.
[15] ICSID Case No ARB/17/19 (*Hela*)
[16] Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments (signed 1 December 2003, entered into force 11 November 2005) (China-Germany BIT (2003)), art 9. Protocol to the Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments (signed 1 December 2003, entered into force 11 November 2005) (Protocol to China-Germany BIT Protocol (2003)), art 6.
[17] For case background information see *Hela*, Procedure Order 1 to 5; *Jinan Hela Schwarz Food Co., Ltd v Jinan Municipal Government*, (2016) Lu01XingChu No 296, Shandong Province Jinan Municipal Intermediate People's Court; *Jinan Hela Schwarz Food Co., Ltd v Jinan Municipal Government*, (2016) LuXingZhong No 1491, Shandong Province High People's Court; *Jinan Municipal Government v Jinan Hela Schwarz Food Co., Ltd*, (2017) Lu0112XingShen No.74, Shandong Province Jinan Municipal Licheng District People's Court.

subsidiary of the Claimant in China was expropriated by the local government to improve environmental and living conditions along the local river.[18] Despite failed challenges in the decision of expropriation in the domestic administrative review procedure and administrative litigation, the Claimant's subsidiary was granted compensation for the expropriation that the Claimant regarded as 'wholly insufficient'.[19] The Claimant refused to vacate the premises nor accept the compensation and instead filed an application to ICSID on the alleged expropriation and the compensation.[20]

4.9 However, the jurisdiction of *Hela* tribunal may be challenged because the alleged expropriation has already been heard before domestic courts and a final judgment has been rendered after the appeal instance of administrative litigation.[21] Article 6 of the Protocol to China-Germany BIT (2003) specifies that a German investor may submit a dispute for arbitration under the following conditions only:

> (a) the investor has referred the issue to an administrative review procedure according to Chinese law,
> (b) the dispute still exists three months after he has brought the issue to the review procedure, and
> (c) in case the issue has been brought to a Chinese court, it can be withdrawn by the investor according to Chinese law.[22]

4.10 The domestic final judgment had been rendered by the court of the second instance on 6 December 2016 before the Claimant filing a Request for Arbitration with ICSID on 2 May 2017. After the final judgment was made, the claimant to the domestic proceeding, namely the subsidiary of the Claimant to the arbitration, could no longer withdraw the case before a Chinese court according to article 62 of Administrative Procedure Law of China. Therefore, the pre-conditions of arbitration do not seem to

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[18] *Hela*, Procedural Order No 2: Decision on the Claimant's Request for Provisional Measures (10 August 2018) paras 36 and 106.
[19] ibid, para 39.
[20] ibid, paras 34-48.
[21] Tao Du, 'Hela Schwarz v China and the Concurrency of Litigation and Arbitration in ISDS' (2019) Business and Economic Law Review 130.
[22] Emphasis added.

be met, although one may argue that claimants to the domestic proceedings and international proceedings are different entities. Given the arbitration is pending, whether the prior domestic administrative litigation will trigger issue estoppel is to be determined by the tribunal.

4.11 The remaining three cases were registered either in 2019 or 2020 with little information being disclosed. *Jason Yu Song v People's Republic of* China is the first recorded ad hoc investor-State arbitration against China that is under the administration of the PCA.[23] Mr Song was disclosed by the PCA as a United Kingdom national, so the arbitration was probably raised under China–UK BIT (1986). Only a dispute concerning an amount of compensation could be referred to an international arbitrator or an ad hoc arbitral tribunal.[24] Similarly, *Macro Trading Co., Ltd v People's Republic of China* was raised by a Japanese investor under the China–Japan BIT (1988),[25] where only a dispute concerning the amount of compensation of expropriation could be submitted to the ICSID arbitration or conciliation.[26] Both cases are pending and no case material of the two cases is available at this stage.

4.12 *Mr Goh Chin Soon v People's Republic of China* is the most recent investor-State arbitration against China that registered with the ICSID on 16 September 2020.[27] Goh Chin Soon is a Singaporean investor who raised the claims under the China–Singapore BIT (1985), which, again, provides that only a dispute involving the amount of compensation resulting from direct or indirect expropriation could be referred to

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[23] PCA Case No 2019-39. The case was registered in 2019.

[24] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Promotion and Reciprocal Protection of Investments (signed 15 May 1986, entered into force 15 May 1986) arts 9.1 and 9.2.

[25] ICSID Case No ARB/20/22. The case was registered on 29 June 2020; See also Damien Charlotin, 'Japanese Investor Loges ICSID Arbitration Against China' (IAReporter, 30 June 2020) www.iareporter.com/articles/japanese-investor-lodges-icsid-arbitration-against-china/ accessed 31 December 2020.

[26] Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment (signed 17 August 1988, entered into for 14 May 1989), art 11.2.

[27] ICSID Case No ARB/20/34.

international arbitration.[28] Though the ICSID has not released any case documents at this stage and no relevant domestic decisions or judgments have been found, it is reported that Goh, who had invested in several property developments in China in the 1990s, claimed that local authorities illegally expropriated his USD 1,500 million of assets and took him in custody for several months. Though he has reached a USD 120 million settlement agreement with local authorities on the part of his investment, only half of the settlement has been fulfilled.[29] The case is pending.

China as a home country

4.13 Among all the 12 recorded investment arbitration raised by Chinese investors, seven cases are ICSID arbitration conducted under either ICSID Arbitration Rules or ICSID Additional Facilities Rules, four are ad hoc arbitration and one is an ICSID conciliation case. From the claimants' aspect, six cases were initiated by investors from Hong Kong or Macau under treaties or investment contracts, among which five were raised by frequenters of investor-State arbitration. For the remaining cases where the claimants came from Mainland China, four of the six cases involved large state-own enterprises (SOE) of China. The following paragraphs will brief the background and key issues of the cases grouped by types of claimants.

a. Cases raised by investors from Hong Kong and Macau

4.14 Being registered on 12 February 2007 by ICSID, *Tza Yap Shum v Republic of Peru* ('*Tza Yap Shum*') is the first recorded investor-State arbitration involving a Chinese party.[30] The Claimant was a Hong Kong citizen and majority shareholder of a Peruvian

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[28] Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments (signed 21 November 1985, entered into force 7 February 1986), art 16.3.

[29] Lisa Bohmer 'Singaporean Real Estate Development Launches Treaty-Based Arbitration Against China' (*IAReporter*, 17 September 2020) <www.iareporter.com/articles/singaporean-real-estate-developer-launches-treaty-based-arbitration-against-china/> accessed 31 December 2020.

[30] ICSID Case No ARB/07/6 (*Tza Yap Shum*).

company engaged in the purchase and export of fish flour to Asian markets.[31] Claims were raised out of the seizure of the bank account of the Claimant's enterprise due to tax debt and other alleged actions undertaken by Peruvian tax authorities that resulted in the substantive deprivation of Claimant's investment.[32] Peru challenged the jurisdiction on the grounds that, among others, the invoked China–Peru BIT (1994) was not applied to investors from Hong Kong. The tribunal satisfied itself that it had jurisdiction for the reason that Mr Tza held the nationality of China and China-Peru BIT (1994) did not exclude those Chinese nationals residing in Hong Kong from the scope of applicability of the treaty.[33]

4.15 The most critical objection of Peru on the jurisdiction was based on the restrictive jurisdiction clause where only disputes on 'the amount of compensation for expropriation' could be referred to international arbitration. The tribunal first issued a Decision on Jurisdiction and Competence responding to Peru's challenge to confirm its jurisdiction on the dispute on 19 June 2009.[34] The final award was rendered on 7 July 2011 in favour of the Claimant.[35] Peru launched an ICSID annulment proceeding against the award, but the application for annulment was dismissed in its entirety by the ad hoc Committee on 12 February 2015.[36]

4.16 The two objections also appeared in *Sanum Investments Limited v Lao People's Democratic Republic* ('*Sanum I*').[37] Sanum, an investment firm incorporated in Macao, initiated an ad hoc arbitration against Laos pursuant to China–Laos BIT (1993) on 14 August 2012. The firm alleged various breaches of treaty related to its investment in casino projects and other gaming facilities in Laos.[38] The arbitration was administrated by the PCA and seated in Singapore. Sanum's parent company, Lao

[31] *Tza Yap Shum*, Decision on Annulment (12 February 2015) (*Tza Yap Shum* Decision on Annulment) para 44.
[32] ibid paras 45-49.
[33] *Tza Yap Shum*, Decision on Jurisdiction and Competence (19 June 2009) paras 58, 69 and 71.
[34] ibid paras 221.
[35] *Tza Yap Shum,* Award (7 July 2011) VIII.
[36] *Tza Yap Shum* Decision on Annulment (n 31) para 210.
[37] PCA Case No 2013-130 (*Sanum I*)
[38] *Sanum I*, Award (6 August 2019) (*Sanum I* Award) paras 1, 62 and 67.

Holding NV (LHNV), was simultaneously pursuing its own ICSID arbitration under the Netherlands-Laos BIT (2003) based on the same facts.[39] On 13 December 2013, the ad hoc tribunal rendered an award on jurisdiction and decided that, among other things, China–Laos BIT (1993) applied to investors from Macao and the tribunal had jurisdiction to arbitrate expropriation claims (and not claims only concern the amount of compensation for expropriation.[40] Laos then launched court proceedings before the Singapore High Court to set aside the tribunal's jurisdiction, which was granted and then reversed by the Court of Appeal of Singapore.[41] All parties settled on 15 June 2014, but both two arbitration proceedings were revived in December 2017.[42] On 6 August 2019, the tribunal rendered the final award dismissing all claims and awarding Laos costs for arbitration.[43]

4.17 During *Sanum I,* Sanum and LHNV launched two new ad hoc arbitration against Laos concerning their other gambling projects in Laos under China–Laos BIT (1993) and Netherlands-Laos BIT (2003) in 2016 and 2017, respectively.[44] On 27 April 2017, an ad hoc tribunal for Sanum's new case was constituted pursuant to the ICSID Arbitration (Additional Facility) Rules ('*Sanum II*').[45] On 16 May 2017, both Sanum and Laos agreed to consolidate this case with the concurrent arbitration between LHNV and Laos,[46] which also followed the ICSID Additional Facility Rules.[47] The consolidated arbitration proceedings are pending.

4.18 In contrast to *Tza Yum Shum* and *Sanums*, two arbitration cases initiated by Standard Chartered Bank (Hong Kong) Limited were based on arbitration agreements under investment contracts rather than treaties. *Standard Chartered Bank (Hong Kong)*

[39] Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6) (*Lao I*)
[40] *Sanum I*, Award on Jurisdiction (13 December 2013) para 370.
[41] *Sanum I*, Judgment of the Court of Appeal of the Republic of Singapore [2016] SGCA 57 (29 September 2016) (*Sanum I* Judgment of the Appeal Court of Singapore) paras 152 and 153.
[42] *Sanum I* Award (n 38) para 6.
[43] ibid paras 264 and 265.
[44] *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/16/2) (*LHNV II*); *Sanum Investment Ltd v Laos People's Democratic Republic* (ICSID Case No ADHOC/17/1) (*Sanum II*).
[45] *Sanum II*, Procedure Order No 1(16 May 2017) s 3.1.
[46] ibid s 1.1.
[47] ibid s 25.1.

Limited v Tanzania Electric Supply Company Limited ('*SCB I*')[48] and *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania* ('*SCB II*')[49] are the third and fourth of a series of ICSID arbitration cases related to the power project of Independent Power Tanzania Limited (IPTL) in Tanzania. The Claimant, a Hong Kong company, was the assignee of IPTL that was the original party to a Power Purchase Agreement (PPA) concluded between IPTL and the Respondent, a Tanzanian state-owned entity designated as an agent of Tanzania.

4.19 In *SCB I*, the Claimant claimed various tariff payments and other sums owed to IPTL by the Respondent before ICSID based on an arbitration agreement in the PPA.[50] The ICSID arbitration was registered on 1 October 2010 and awarded on 12 September 2016 in favour of the Claimant.[51] On 22 August 2018, the ad hoc Committee denied the Respondent's application for annulment in its entirety.[52]

4.20 In *SCB II*, the Claimant claimed for, among other things, compensation and damages arising from the Respondent's breach of contract, including expropriation and discrimination.[53] The tribunal rendered the award in favour of the investor on 11 October 2019, demanding that the Respondent pay compensation totalling USD 185,449,440.04 plus interest and the Claimant's costs for the arbitration.[54]

4.21 Finally, *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*[55] ('*Philip Morris*') was commenced pursuant to the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments dated 15 September 1993, which was not a treaty concluded by the central government of China. The Claimant is a Hong Kong shareholder whose Australian subsidiaries were engaged in the manufacturing, import, market and

48 ICSID Case No ARB/10/20 (*SCB I*).
49 ICSID Case No ARB/15/41 (*SCB II*).
50 *SCB I*, Decision on Jurisdiction and Liability (12 February 2014) para 2.
51 *SCB I*, Award (12 September 2016) para 414.
52 *SCB I*, Decision on the Application for Annulment (22 August 2018) para 758.
53 *SCB II*, Award (11 October 2019) paras 49 and 50.
54 ibid para 540 and IX.
55 PCA Case No 2012-12 (*Philip Morris*).

distribution of tobacco products. Claims were raised out of the Australian government's enactment and enforcement of the Tobacco Plain Packaging Act 2011, which was alleged to negatively affect its investments in Australia owned or controlled by the Claimant. The PCA-administrated ad hoc arbitration under the UNCITRAL Arbitration Rules (2010) commenced on 22 June 2011.[56] The tribunal determined on 17 December 2015 that the claims were inadmissible due to the Claimant's abuse of rights and rendered the final award on costs on 8 March 2017.[57]

b. Cases raised by SOEs of China

4.22 *China Heilongjiang International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Ltd, and Qinhuangdaoshi Qinlong International Industrial Co. Ltd, v Republic of Mongolia* ('*Heilongjiang and others*') is the first investment arbitration commenced by investors from Mainland China.[58] This PCA-administrated ad hoc arbitration was jointly raised by two state-owned entities and one private Chinese company against Mongolia based on China–Mongolia BIT (1991). Claimants were shareholders of a Mongolian company that held a mining license via a transfer from its local shareholder. Claims were raised out of the cancellation of the mining license in 2006 and claimed to be an illegal expropriation of Claimants' investments. The Request for Arbitration was sent on 12 February 2010. After 7 years of proceedings, the tribunal finally denied its jurisdiction on the ground that the jurisdiction of the tribunal was limited by the treaty to the quantum of compensation for expropriation only on 30 June 2017.[59] On 19 November 2019, the Southern District of New York denied the Claimant's petition to vacate the award and confirm arbitration.[60]

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[56] ibid, 'Additional Notes' <https://pca-cpa.org/en/cases/5/> 31 December 2020.
[57] ibid, Final Award Regarding Costs (8 March 2017) para 6.
[58] PCA Case No 2010-20 (*Heilongjiang and others*).
[59] ibid, Award (30 June 2017) para 452.
[60] Ibid, Opinion & Order of the United States District Court for the Southern District of New York 17 Civ. 7436 (ER) (19 November 2019) (*Heilongjiang and others*, Judgment on Petition).

4.23 In *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* ('*Ping An*'),[61] the two Claimants were Chinese insurance giants who invested an aggregate sum of more than euro 2 billion in 2007 and 2008 and became the largest shareholder in the Belgian-Dutch financial institution, Fortis.[62] Claims came from the Belgium government's bailout and subsequent nationalisation and sale to a third party of one branch of Fortis in which the Claimants had invested during the 2008 financial crisis.[63] The Claimants had sent a notice of arbitration pursuant to China–Belgium–Luxembourg Economic Union (BLEU) BIT (1984) on 14 October 2009 before the new China–BLEU BIT (2005) came into force on 1 December 2009.[64] The Claimants relied on the China–BLEU (1984) for the substance of the claims and requested an ICSID arbitration under the jurisdiction clause of the China–BLEU BIT (2005) on 7 September 2012.[65] On 30 April 2015, the ICSID tribunal decided to dismiss the claims for lack of jurisdiction.[66]

4.24 After two unsuccessful attempts of Chinese SOEs in investment arbitration, the Claimant in *Beijing Urban Construction Group v Republic of Yemen* ('*BUCG*')[67] finally gained benefits from the proceedings. The BUCG was a Chinese state-owned construction company that won a tender for the construction of an airport terminal in Sana'a and concluded a contract with Yemen civil aviation and meteorology authority in February 2006.[68] The claims were raised out of the alleged forced deprivation of Claimant's assets by military forces and access on-site, leading to the termination of the contract.[69] The Claimant launched the ICSID arbitration against Yemen on the ground of indirect expropriation under China–Yemen BIT (1996). The case was registered on 3 December 2014. On 31 May 2017, the tribunal denied Yemen's challenge to jurisdiction by, among other things, adopting a broad

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61 ICSID ARB/12/29 (*Ping An*).
62 ibid, Award (30 April 2015) para 57.
63 ibid, paras 60-65.
64 Ibid, para 108.
65 ibid, para 38.
66 ibid, para 240.
67 ICSID Case No ARB/14/30 (*BUCG*).
68 BUCG, Decision on Jurisdiction (31 May 2017) paras 22 and 23.
69 ibid, para 25.

explanation of the restrictive arbitration agreement commonly seen in old Chinese BITs.[70] The arbitral proceedings were requested to be discontinued, and both parties settled the claim in June 2018.[71]

4.25 *Barrick (Niugini) Limited (Papua New Guinea) v Independent State of Papua New Guinea (Papua New Guinea)* is the first reported ICSID conciliation case involving the interests of a Chinese party.[72] As disclosed in an announcement of a Chinese public company, Zijin Mining Group Ltd (Zijin),[73] Zijin is a 50% shareholder of the Claimant who owns 95% of the equity of Porgera Gold Mine in Papua New Guinea. After the Papuan government rejected the application of extension of mining rights, the Claimant launched an ICSID conciliation procedure against the state under the conciliation agreement in the contract. The ICSID registered the case on 22 July 2020. The Claimant is pursuing the domestic judicial review proceedings before a Papuan domestic court simultaneously.[74]

c. Cases raised by other Chinese investors

4.26 *Wuxi T Hertz Technologies Co. Ltd., and Jetion Solar Co. Ltd v Hellenic Republic* is an ad hoc arbitration under the UNCITRAL Arbitration rules with no administrating institution.[75] The Claimants, two Chinese manufacturers of modules for solar plants, faced difficulties in the development of a photovoltaic project in northern Greece due to the financial crisis. The Claimants sent a notice of arbitration under China–Greece

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[70] ibid, para 147.

[71] Jarrod Hepburn, 'Chinese State-owned Investor Settles Treaty Claim after 2017 Jurisdictional Ruling that Took Generous View of Treaty's Scope for Arbitration of Claims; Recent Ruling in Libya Case Adopted Differing Approach to Similar Clause' (*IAReporter*, 12 June 2018) <www.iareporter.com/articles/chinese-state-owned-investor-settles-treaty-claim-after-2017-jurisdictional-ruling-that-took-generous-view-of-treatys-scope-for-arbitration-of-claims-recent-ruling-in-libya-case-adopted-differing-a/> accessed 31 December 2020.

[72] ICSID Case No CONC/20/10.

[73] The Board of Zijin Mining Group Ltd, '*Zijin Mining Group Ltd's Announcement on Matters Related to the Mining Rights of the Progera Gold Mine in Papua New Guinea*' (11 July 2020). Zijin is a SOE and the largest gold mining enterprise in China.

[74] ibid.

[75] 'Jetion and T-Hertz v Greece' (Investment Policy Hub) <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/975/jetion-and-t-hertz-v-greece> accessed 31 December 2020.

BIT (1992) to the Greek government on 29 May 2019, requesting an UNCITRAL ad hoc arbitration deciding on the dispute of the amount of compensation for expropriation. Arbitration notice was soon withdrawn by the investors based on the understanding that Greece would pass legislation which could 'open a path for licensing of the project'.[76]

4.27 The most recent treaty arbitration raised by a Chinses national is *Fengzhen Min v Republic of Korea* under ICSID Arbitration Rules.[77] Mr Min as a businessman seeking compensation for the alleged expropriation of his real estate company and imprisonment in South Korea under China–Republic of Korea BIT (2007).[78] The case was registered on 3 August 2020, and no case materials have been released at this stage.

C. Concerns of China towards the current ISDS system

Concerns from UNCITRAL Working Group III

4.28 Since 2017, UNCITRAL has entrusted a working group (Working Group III) of delegates from all member States of the commission and observers from other States and international organisations to work on possible reforms to the ISDS system. As of October 2020, Working Group III has had seven sessions (34th session to 39th session) in Vienna or New York.[79] The Secretariat of Working Group III and member States have produced dozens of papers addressing concerns about the current ISDS system and proposals for future reforms.

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[76] IAreporter, 'Chinese Solar Investors Withdraw Investment Treaty Arbitration Against Greece' (*IAReporter*, 3 December 2019) <www.iareporter.com/articles/chinese-solar-investors-withdraw-investment-treaty-arbitration-against-greece/> accessed 31 December 2020.
[77] ICSID Case No ARB/20/26.
[78] Cosmo Sandeson, 'Imprisoned Chinese businessman files claims against South Korea, Cosmo Sanderson' (*Global Arbitration Review*, 30 July 2020) <https://globalarbitrationreview.com/article/1229494/imprisoned-chinese-businessman-files-claim-against-south-korea> accessed 31 December 2020.
[79] 'Working Group III: Investor-State Dispute Settlement Reform' (United Nations Commission on International Trade Law) <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 31 December 2020.

4.29 As summarised by the Secretariat, there is a list of main concerns raised by delegates in the first few sessions, which has been categorised into four groups:

(1) Concerns regarding the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals, which causes divergent interpretations of substantive standards, jurisdiction and admissibility, and procedural inconsistency;[80]

(2) Concerns related to arbitrators and decision-makers, in particular, the standards of impartibility and independence of individual arbitrators and approaches to the constitution of tribunals;[81]

(3) Concerns about the cost and duration of ISDS cases, especially lengthy and costly ISDS proceedings, allocation of costs, recovery of costs, and frivolous or unmeritorious claims;[82]

(4) Other concerns, such as third-party funding (TPF), where delegates have shared their anxieties on conflicts of interest and disclosure, third-party control and influence, confidentiality and legal privilege, costs and security for costs, and impact on frivolous claims.[83]

<u>Concerns of China</u>

4.30 As one of the State members of UNCITRAL, China has actively participated in the sessions. Generally, China has appreciated the positive impact of the current investor-State dispute mechanism and international investment agreements on the protection of investors and the development of international investment. Both developed and developing countries, including China, have taken advantage of this legal system by

[80] United Nations Commission on International Trade Law Working Group III (WG III), *Possible reform of investor-State dispute settlement (ISDS)* (2018) A/CN 9/WG III/WP 149, para 9.
[81] ibid paras 12 and 13.
[82] ibid paras 15 and 16.
[83] WG III, *Possible reform of investor-State dispute settlement (ISDS) Third-party funding* (2019) A/CN 9/WG III/WP 157.

settling investment disputes peacefully.[84] In the sessions, however, Chinese representatives, including those representing the Chinese government and those coming from top Chinese arbitration centres, expressed concerns about the current ISDS system and concluded that reform is necessary.

4.31 The major concerns of China are the inconsistency and incoherence of investor-State arbitral awards and the independence and impartiality of arbitrators. In addition, China also expresses concerns about other issues, including the lengthy and costly arbitrations, concurrent proceedings and third-party findings. All concerns that China has expressed in the UNCITRAL Working Group III on ISDS related to treaty-based investor-State arbitration rather than other types of investment arbitration. China has viewed treaty-based and contract-based arbitration as distinct from each other with respect to procedural rules and applicable law.[85]

4.32 The following paragraphs will focus on the concerns expressed by China in its submission to the Working Group III dated 19 July 2019[86] and via Chinese delegates' speeches in the sessions. Other common concerns of State members will be touched upon for supplementary purposes. All of these concerns will be illustrated with reference to the above-listed cases that involve a Chinese party. Past cases may not only reveal defects of the current system but also exert significant impact on the revision of treaties. For example, as previously mentioned, Australia spent 6 years and much money on arbitration defending the *Philip Morris*, brought by a Hong Kong tobacco company against Australia. After Australia won the case, Australia and Hong Kong concluded a new bilateral investment agreement on 26 March 2019. The new agreement expressly terminated the old bilateral investment agreement under which

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[84] The China's Delegate, Audio recording 28/11/2017 14:00:00 - 28/11/2017 17:00:00 of 34th session, Working Group III (Investor-State Dispute Settlement Reform) 27 November – 1 December 2017, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.
[85] The China's Delegate, Audio recording 30/11/2017 09:30:00 - 30/11/2017 12:30:00 of 34th session, Working Group III (Investor-State Dispute Settlement Reform) 27 November – 1 December 2017, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.
[86] WG III, Possible reform of investor-State dispute settlement - Submission from the Government of China (2019) A/CN 9/WG III/WP 177.

the claims were brought and precluded any future claims ‘in respect of a Party’s control measures of tobacco products’.[87]

a. Inconsistency and incoherence of arbitral awards

4.33 Chinese delegates expressed a serious concern about the inconsistency and incoherence of ISDS arbitral awards. Such awards would damage the fairness of arbitration and lead to a loss of confidence in the ISDS system as a whole. It is a crucial concern to both investors and host states because it relates to the certainty and predictability of rules. When encountering a specific issue, the government of the host State must be able to ascertain whether the policy at issue conforms with the investment treaty, and the investor will need to evaluate whether the host State has breached the treaty obligations.[88]

4.34 Though China has experienced a limited number of ISDS cases, the country and its investors have suffered from inconsistent and incoherent awards rendered by international tribunals.[89] There are diverse opinions interpreting the jurisdiction clauses of international arbitration commonly seen in early Chinese BITs. Just like other socialism investment treaties, the majority of the second generation of Chinese BITs concluded in the 1990s allow a limited entrance of international arbitration. Only disputes ‘relating to’ or ‘involving’ the amount of compensation for expropriation were allowed to be submitted to an international arbitration tribunal. This practice was in line with the position of China when ratifying the Washington Convention in 1993. As noted by the ICSID Secretary, China would only consider to submit itself to

[87] Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China (signed 26 March 2019, entered into force 17 January 2020) footnote 14.
[88] The China’s Delegate, Audio recording 23/04/2018 15:00:00 - 23/04/2018 18:00:00 of 35th session, Working Group III (Investor-State Dispute Settlement Reform) 23-27 April 2018, New York (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.
[89] The Observer from Beijing International Arbitration Centre (BIAC), Audio recording 30/11/2017 14:00:00 - 30/11/2017 17:00:00 of 34th session, Working Group III (Investor-State Dispute Settlement Reform) 27 November – 1 December 2017, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

the jurisdiction of the ICSID 'with respect to disputes arising in relation to the compensation that results from expropriation and nationalization'.[90] Several years later, China changed this restrictive approach by concluding more BITs with full access to international arbitration. Those early BITs with restrictive wording are still in force, leading to ambiguity and debate.

4.35 There are two ways to interpret such a clause: narrow or wide. The narrow understanding strictly follows the plain meaning of the phrase. Only a dispute over the amount of compensation of a lawful expropriation will fall within the jurisdiction of international arbitration. However, if interpreted widely, any other disputes in related to the act of expropriation can also be heard by an international tribunal, which may expend the jurisdiction of a tribunal to the legitimacy of expropriation. Respondents in at least four investment arbitration cases where China was a home State or a host country of challenged the jurisdiction of a tribunal based on, inter alias, the limited jurisdiction clause. Three out of four tribunals –*Tza Yap Shum*, *Sanum I* and *BUCG*– took a wider view by granting jurisdiction of international arbitration tribunals, but the ad hoc tribunal of *China Heilongjiang and others* considered completely the opposite and dismissed its jurisdiction.

4.36 In *Tza Yap Shum*, the jurisdiction provision at issue was cited as follows:

> If a dispute involving *the amount of compensation for expropriation* cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this article, it may be submitted at the request of either party to the international arbitration of the International Centre for Settlement of Investment Disputes (ICSID) . . ..[91]

[90] 'China' (ICSID) <https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST30> accessed 31 December 2020.

[91] Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments (signed 9 June 1994, entered into force 1 February 1995) art 8.3.

4.37 The original tribunal interpreted that the word 'involving' to mean 'include' based on a faith interpretation rather than 'be restricted to' this element. Other formulations were available, such as 'limited to' or 'exclusively'.[92] The tribunal concluded the words 'involving the amount of compensation for expropriation' must be interpreted to 'include not only the mere determination of the amount but also other issues that are normally inherent in an expropriation including whether the standards and requirements of the BIT, and the determination of the amount of compensation due' so as to 'give meaning to all elements of' the jurisdiction provision, in particular the 'fork-in-the-road' provision by the principle of *effet utile*.[93] Although Peru presented testimonies of negotiators from China and Peru for the Peru–China BIT and other evidence showing the intention of the parties had been to limit the scope of international arbitration to the quantum of compensation only,[94] the tribunal considered they were not conclusive evidence of the scope of the jurisdiction provision.[95]

4.38 In *Sanum I*, the disputed article was read as follows:

> If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this article, it may be submitted at the request of either party to an ad hoc arbitral tribunal . . . .[96]

4.39 The ad hoc tribunal administrated by the PCA followed the path of the tribunal in *Tza Yap Shum* with respect to its interpretation of the clause: the notification deposited before the ICSID was only informative rather than binding to the BITs.[97] The ordinary meaning of 'involving' was broader than other possible forms, such as 'limited to' if

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92 *Tza Yum Shum*, Decision on Jurisdiction and Competence (n 33) para 151.
93 ibid para 188.
94 ibid paras 167, 168 and 170.
95 ibid para 171.
96 Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments (signed 31 January 1993, entered into force 1 June 1993) art 8.3.
97 *Sanum I* Award on Jurisdiction (n 40) para 328.

the real intention of States was to limited the jurisdiction;[98] and interpretation of the provision should be in the context and purposive.[99] In comparison with the *Tza Yap Shum*'s tribunal, the *Sanum I*'s tribunal further clarified that the existence or absence of a 'fork-in-the-road' provision was a decisive factor to support its broad interpretation. In other words, if adopting a restrictive approach, an investor who requested a competent court to determine the existence or legality of an expropriation would be precluded from submitting the amount of compensation to international arbitration when there was a 'fork-in-the-road' clause.[100] The court would have already determined the existence and amount of compensation given an 'appropriate and effective compensation' was one of the four mandatory conditions to justify the legality of expropriation.[101]

4.40 After the *Sanum I* 's tribunal made the award on jurisdiction, the Laotian government challenged the jurisdiction before the High Court of Singapore, located at the seat of arbitration. The judge of the High Court found in favour of Laos that, among other things, the phrase 'a dispute involving the amount of compensation' should be given a restrictive meaning, which was in line with the intention of the parties to the treaty.[102] The judge also rejected the view that a restrictive interpretation would potentially bar investors from international arbitration because the State may also invoke the provision to initiate international arbitration.[103] However, the Court of Appeal of Singapore reversed the judgment of the High Court. The appellate judges found that the word 'involve' could be interpreted widely or narrowly, so the interpretation of the phrase can only be understood within the context.[104] The judges upheld the original ad hoc tribunal that a narrow interpretation in the context of a fork-in-the-

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[98] ibid para 329.
[99] ibid paras 330-342.
[100] ibid para 340.
[101] ibid paras 332, 333, 340.
[102] *Sanum I*, Judgment of Singapore High Court, [2015] SGHC 15 (20 January 2015) (*Sanum I* Judgment of Singapore High Court) para 121
[103] ibid para 122.
[104] *Sanum I* Judgment of the Appeal Court of Singapore (n 41) para 126

road clause would leave investors with no access to international arbitration, and the high court judge's conclusion ignored practical difficulties to investors.[105]

4.41 In *BUCG,* the jurisdiction clause at issue was 'either Contracting Party shall give its irrevocable consent to the submission of any dispute *relating to* the amount of compensation for expropriation for resolution under such arbitration procedure . . . .'[106] Here the word at issue was 'relating to' ('有关' in Chinese), which differed from the word 'involving' ('涉及' in Chinese) in the China–Peru BIT and China–Laos BIT.[107] The tribunal nevertheless did not consider the difference as a real concern and agreed with the Claimant that these two words were used interchangeably in Chinese BITs.[108] It then made a detailed analysis, emphasising the context, purpose and objective of the treaty, to conclude that the investment tribunal had jurisdiction to hear both the liability and compensation of expropriation.[109]

4.42 Just like the previous tribunals, the key issue again lay in the 'fork-in-the-road' provision. By giving weight to the provision, the *BUCG* tribunal pointed out that a narrow interpretation would lead to a paradox: an investor who seeks compensation of an alleged expropriation cannot go to international arbitration for settlement unless the State concedes liabilities of unlawful expropriation, and these disputes can only be submitted to the courts of the host State.[110] As stated by the Singapore Court of Appeal in *Sanum I*, an investor is compelled to bring a dispute on expropriation to a national court for ruling that the State is liable for an expropriatory act, but consequently the investor would be barred from bring a dispute on compensation to international arbitration because of the fork-in-the-road clause.[111] Therefore, the

[105] ibid para 133.
[106] Agreement between the Government of the People's Republic of China and the Government of the Republic of Yemen Concerning the Encouragement and Reciprocal Protection of Investments (signed 16 February 1988, entered into force 10 April 2002) art 10.2.
[107] The English version of clause cited here was neither the original treaty text nor the official translated one – the treaty was concluded in Chinese and Arabian only. This unofficial English-translated version was provided by the Claimant. See *BUCG*, Decision on Jurisdiction (n 68) para 64.
[108] ibid para 68.
[109] ibid paras 69-109.
[110] ibid paras 78-81.
[111] ibid para 133.

tribunal concluded that if interpreted narrowly, this clause only provides investors 'an illusory choice' of dispute resolution fora.[112] The wording 'any dispute relating to the amount of compensation for expropriation' must not only refer to disputes on quantum but also include disputes relating to whether an expropriatory act has occurred.[113]

4.43 These three awards seemed to have established a precedent that such a clause should be interpreted broadly on the grounds of *effet utile*. This interpretation arguably goes against the true intention of the State when concluding treaties. A latest arbitral award addressing on a similar jurisdiction clause overturned the practice by sticking to the narrow explanation and denying the jurisdiction of the international tribunal. This award is rendered by the PCA tribunal of *Heilongjiang and others* in June 2017.[114] Article 8.3 of the China–Mongolia BIT (1991) says '(i)f a dispute *involving (涉及) the amount of compensation for expropriation* cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal'. The tribunal agreed with the Court of Appeal of Singapore in *Sanum I* that the word 'involving' could be interpreted either broadly or narrowly but could only be understood by context.[115] However, the tribunal then linked the phrase 'a dispute involving the amount of compensation for expropriation' to article 4.2 where provided that the compensation shall 'be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed', leading to a conclusion that the phrase only described a particular cetology of disputes that may fall into the jurisdiction of international tribunal.[116] The tribunal noted other previous awards and judgments that supported a broad approach but insisted that article 8.3 should retain its legal effect rather than be interpreted in a way to facilitate the *effet utile* interpretation of other provisions.

[112] ibid para 87.
[113] Ibid.
[114] *Heilongjiang and others* (n 58) Award (30 June 2017).
[115] ibid para 439.
[116] ibid para 445.

Indeed, international arbitration 'would be available in cases where an expropriation has been formally proclaimed and what is disputed is the amount to be paid by the State to the investor for its expropriated investment'.[117] In response to the concern that an investor would be left without an opportunity to arbitrate internationally on due to a fork-in-the-road provision, the tribunal rebutted that access to arbitration would not be deprived if an investor reserved the issue of compensation for a decision in arbitration in the prior court proceedings.[118]

4.44 In summary, so far 6 tribunals and courts have expressed views on the interpretation of the phrase. Four panels interpreted the phrase broadly so that an international tribunal may hear both the liability and the amount of compensation of expropriation. Two panels, including the latest one, limited the jurisdiction to the amount of compensation only based on the literal meaning of the phrase.

4.45 It is hard to predict the view of future tribunals on the issue, although one can foresee that disputes on the jurisdiction clause will continue long term. Indeed, as illustrated in the above sections, almost all Chinese BITs concluded before 2000, which occupying more than half of the total, include a restrictive jurisdiction clause. As pointed by the judge of the High Court of Singapore in *Sanum I*, almost every investment dispute is likely to include a dispute over the amount of compensation payable.[119] A broader approach supported by the majority of panels may potentially expand the jurisdiction of international arbitration to an extent that the original parties to the treaties have not foreseen. Nevertheless, even this approach may contradict the original intention of the States. Claimants in both *BCUG* and *Heilongjiang and others* were State-owned Chinese entities that were eager to benefit from broad jurisdiction. The real concern of China and Chinese investors is the inconsistency of the awards, which results not only in confusion but also large losses for the disputing parties. For example, in the

[117] ibid para 448.
[118] ibid para 449.
[119] *Sanum I* Judgment of Singapore High Court (n 102) para 125.

Heilongjiang and others case, the Claimants would have never expected that, after 7 years of proceedings, the tribunal would make a decision distinct from other prior awards on the same issue.

b. Correctness

4.46 China raised in the written submission that it was concerned about the correctness of investment arbitral awards, which closely related to the issue of inconsistency and incoherence. In particular, China regarded current investment arbitration as lacking an appropriate error-correcting mechanism.[120] Chinese delegates criticised that both the ICSID arbitration and the UNCITRAL ad hoc arbitration – the two main ISDS arbitration mechanisms – lacked effective correction systems.[121] The correction available under the ICSID Convention is the annulment proceeding, which only serves as a limited correction to the awards of tribunals because the review of the Annulment Committee is restricted to legal review and annulment can only be rendered based on five procedure grounds.[122] Moreover, the negotiation history of the Washington Convention showed that the annulment proceeding was not deemed as an appellate body. The Annulment Committee has repeatedly reiterated that the annulment should not be regarded as a remedy against wrong awards.[123] On the other hand, the ad hoc arbitration under the UNCITRAL rules, the correction of an arbitral award is usually done by a domestic court when the investor seeks to either enforce or set aside the award in accordance with the New York Convention. However, correction may not be achieved through the process because different States have different applicable laws. These differences have the potential to cause diverse conclusions and interpretation rules and evidence rules adopted by different jurisdictions. This correction process not only fails to resolve inconsistency and unpredictability of awards but also may aggravate it.

[120] WG III (n 86) s II.1.
[121] The China's Delegate (n 88).
[122] ICSID Convention Arbitration Rules (2006) rule 50 (1)(c)(iii).
[123] *Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No ARB/84/4), Decision of the ad hoc Committee (22 December 1989) para 4.04.

4.47 Two of the four cases that involve the interpretation of the restrictive jurisdiction clause mentioned were brought into corresponding correction stages upon a party's application. In *Heilongjiang and others*, the ad hoc tribunal constituted under the UNCITRAL Arbitration Rules denied its jurisdiction of the claims submitted by the three Chinese investors who requested the tribunal, among other things, to determine Mongolia was in breach of China–Mongolia BIT (1991) by unlawfully expropriating investor's investments. After the tribunal rendered the final award, the Claimants filed a petition before the US District Court for the Southern District of New York, the court of seat, to vacate the award and direct the parties to submit to arbitration.[124] Nevertheless, the Court refused to exercise a de novo review of questions of arbitrability and denied the petition in its entity. It is worth noting that, when responding to the Claimants' arguments concerning the accuracy of the arbitrators' decision, the Court imposed a high burden of proof on the Claimants, requesting them to show that 'the tribunal's award did not "draw its essence" from the argument to arbitrate', or otherwise 'the Court will uphold the award so long as it offers a "barely colourable justification for the outcome reached"'.[125]

4.48 The ad hoc Committee in *Tza Yap Shum* annulment proceeding shared a similar view on the review of the award. There, Peru requested to annul the Decision on Jurisdiction and Competence which had confirmed the ICSID tribunal's jurisdiction over the Claimant's indirect expropriation claims by broadly interpreting the jurisdiction clause, or alternatively the final award,[126] based on three of the five grounds of annulment under article 52(1) of the ICSID Convention. Peru argued that the Tribunal had manifestly exceeded its power, that there had been a serious departure from a fundamental rule of procedure, and that the award had failed to state

[124] *Heilongjiang and others* (n 58) Petition to Vacate Arbitral Award Declining to Exercise Arbitral Jurisdiction and Compel Arbitration (28 September 2017).
[125] *Heilongjiang and others*, Judgment on Petition (n 60).
[126] *Tza Yap Shum* Decision on Annulment (n 31) para 1.

the reasons on which it is based.[127] The ad hoc Committee rejected the Respondent's application in its entirety for reasons, among others, that misinterpretation of the arbitration clause does not amount to a manifest excess of powers[128] and the decision reached by the original tribunal was reasoned and in light of evidence submitted by both parties.[129] The ad hoc Committee reiterated that it would act as a court of appeal.[130] Indeed, one of the principles of ICISD arbitration is that an award shall not be subject to any appeal,[131] either within the ICSID mechanism or before a national court.

4.49 Lack of effective correction system to final investment awards may not only put States in loose ends when promulgating policies and treaties but may also result to a worst scenario for investors. In *Ping An*, the key issue was whether the new treaty can be interpreted to mean that the expanded subject-matter jurisdiction under the new treaty would apply to existing disputes which were based on breach of old treaty and which had already been notified under that old treaty.[132] If not, there was a real risk that disputes arising prior to the effective date of the new treaty but not the subject of judicial or arbitral process might fall into some 'black hole' or 'arbitration gap' between the two treaties.[133] Nevertheless, the Chinese investors' claims were dismissed by the tribunal on the grounds of lack of jurisdiction, leaving them with no alternative remedies. Considering that the ICSID tribunal did give their reasons in due course, it would have been hard for the Claimants to annul the award – and they did not apply to do so.

4.50 As pointed by the delegate from China International Economic and Trade Arbitration Commission (CIETAC), a correction process is neither equal to an appeal procedure

[127] ibid para 4.
[128] ibid para 80
[129] ibid para 113
[130] ibid paras 156, 172, 179 and 190.
[131] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 53(1).
[132] *Ping An* (n 61) Award (30 April 2015) (*Ping An* Award) para 206.
[133] ibid para 207.

nor does it necessarily lead to a correct result.[134] Indeed, appeal to the final award of commercial arbitration seldom exists in the commercial arbitration rules though inconsistent awards exist in commercial arbitration. One would not expect that each tribunal would only make correct decisions. How to ensure consistent and predictable application of treaties through correction or other methods requires further discussion.

4.51 Some States have argued that third-party written submissions may help correct an award, but the Chinese delegate was sceptical about the impact of these submissions in practice.[135] *Sanum I* served an example on the admission and weight of third-party submissions. Parties and expert witnesses heatedly debated whether the letters submitted by Chinese officials were admissible and to what extent could the tribunal rely upon the submissions on the interpretation of the China–Laos BIT (1993). In this case, after the ad hoc arbitral tribunal confirmed its jurisdiction over the dispute, it determined that China–Laos BIT should apply to the Macao SAR of China. The ministry of foreign affairs of Laos sent a letter to the Chinese embassy seeking a view of the Chinese government regarding the status of China–Laos BIT (1993) in relation to Macau and stating from the perspective of Laos, the BIT did not apply to Macau.[136] The Chinese embassy replied confirming that China–Laos BIT (1993) was not applicable to Macao unless both China and Laos made separate arrangements in the future.[137] Laos submitted these two notes orally as evidence before the High Court of Singapore to set aside the award on jurisdiction, arguing that the diplomatic letters proving the true intention of both States when concluding the BIT.[138] The High Court admitted the two letters as new evidence and concluded that China–Laos BIT does not

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[134] The China's Delegate, Audio recording 24/04/2018 10:00:00 - 24/04/2018 13:00:00 of 35th session, Working Group III (Investor-State Dispute Settlement Reform) 23-27 April 2018, New York (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

[135] The China's Delegate, Audio recording 30/10/2018 14:00:00 - 30/10/2018 17:00:00 of 36th session, Working Group III (Investor-State Dispute Settlement Reform) 29 October - 2 November 2018, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

[136] Ministry of Foreign Affairs of Laos, *Letter from Laos to China*, No 00058/AE TD 4 (7 January 2014)

[137] Ministry of Foreign Affairs of Laos to the Embassy of the People's Republic of China, *Reply from China to Laos*, No 003/14 (9 January 2014)

[138] *Sanum I* Judgment of Singapore High Court (n 102) para 15.

apply to Macao mainly on account of letters[139]. However, the judgment was overturned by the Court of Appeal, for the reasons that, among others, the letters of China, include the second letter issued after the judgment of High Court, merely reflected a position based on the domestic law of China which was irrelevant and inadmissible as a consideration in international law.[140] This final judgment of appeal was openly criticised by the spokeswoman of the Ministry of Foreign Affairs of China in a regular press conference declaring that 'the geographical scope of application of China–Laos investment agreement is a question of fact concerning acts of state, which is up to the contracting parties to decide'.[141] Given that the judgment made by the Court of Appeal was the final decision on the challenge of the award of jurisdiction, the Laotian government exhausted its remedies with the international tribunal, leaving itself with no choice but to accept the consequence.

c. Arbitrator's professionalism and independence

4.52 In the 35th session, the Chinese delegate stressed that the independence and impartiality of arbitrators were of serious concerns of China. To ensure the impartiality of arbitrators, China insisted that only those who have a background in international public law or international investment law could be an arbitrator of international investment arbitration.[142] An arbitrator with proper knowledge and background will be more likely to act independently and impartially and solve a dispute in accordance with the treaty.

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[139] ibid para 111.
[140] *Sanum I* Judgment of the Appeal Court of Singapore (n 41) paras 112, 113 and 114.
[141] 'Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on October 21, 2016' (Ministry of Foreign Affairs of the People's Republic of China, 26 October 2016) <www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml> accessed 31 December 2020.
[142] The China's Delegate, Audio recording 25/04/2018 10:00:00 - 25/04/2018 13:00:00 of 35th session, Working Group III (Investor-State Dispute Settlement Reform) 23-27 April 2018, New York (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

4.53 According to the Chinese delegate, there is a fundamental difference between investment arbitration and commercial arbitration: investment arbitration involves public power, while commercial arbitration is merely between private parties. A commercial contract also differs from an investment treaty in that the former stipulates both the rights and duties of both parties. The latter is normally unbalanced with respect to investors and host States: the overwhelming majority of a treaty provides the rights of investors and duties of host States. Furthermore, an investment treaty is concluded between two governments based on the negotiations conducted by government officials who know the objectives of policies and public interests very well.[143]

4.54 Therefore, arbitrators who hear and adjudicate investment disputes should comprehend how governments act and the reasonableness of public power. Otherwise, a treaty may not be interpreted truly as to the intentions of the parties, and the interests of host States may be undermined. However, in practice, investors may tend to choose those who are well known for their commercial arbitration experiences because they believe arbitrators with private law backgrounds may better understand investors' positions. Moreover, the chairman of the tribunal may also be someone who lacks a proper background, resulting in an arbitral award that departs from the real meaning of the investment treaty.

4.55 Apart from the concern that arbitrators with insufficient knowledge of investment law may cause prejudice against the States and lead to incorrect awards, other issues related to arbitrators also occurred in the cases. For example, parties may tend to select arbitrators from a limited group of experts, which may result in an arbitrator too engaged to commit himself or herself. In *Tza Yap Shum,* the hearing on annulment was initially scheduled in February 2013[144] but was postponed at least 5 times and

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[143] The China's Delegate, Audio recording 26/04/2018 10:00:00 - 26/04/2018 13:00:00 of 35th session, Working Group III (Investor-State Dispute Settlement Reform) 23-27 April 2018, New York (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

[144] *Tza Yap Shum* Decision on Annulment (n 31) para 25.

finally to 22 March 2014 due to unavailability or health issues of committee members.[145] Some arbitrators who are repeatedly appointed may also wear 'double hats', meaning they act as the adjudicators in some cases but as legal counsels in others. In *Ping An*, Claimant's co-counsel, Professor James Crawford, and the respondent-nominated arbitrator, Professor Philippe Sands, were disclosed to be practising at the same barristers' chamber[146] and acting as co-counsels in several cases. The parties did not raise any objections to Professor Sands' disclosure.[147] Furthermore, popular arbitrators come from a few specific regions, speak a few specific languages and are familiar with a few specific cultures, languages and cultural differences that could be obstacles for arbitrators to understand the backgrounds of the cases.[148] In the arbitral tribunals of the abovementioned four cases that argued the scope of arising from the ambiguous jurisdiction clauses in the Chinse BITs, none of the arbitrators came from a Chinese-speaking country or an East Asian country that may share a culture similar to China.

4.56 China has made moves in response to its concerns about arbitrators in recent bilateral treaties, in particular, China–Canada BIT (2012) and China–Australia FTA (2015). First, specific professional requirements have been imposed on arbitrators. Article 24.2 (a) of China–Canada BIT (2012) provides that 'arbitrators shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements'. Similarly, arbitrators who hear disputes under article 9.15.8 of China–Australia FTA (2015) are required to have 'expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements'. Furthermore, there are requirements for financial disputes in articles

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145 ibid paras 26-32.
146 *Ping An* Award (n 132) para 26.
147 ibid, para 27.
148 The China's Delegate, Audio recording 29/11/2017 09:30:00 - 29/11/2017 12:30:00 of 34th session, Working Group III (Investor-State Dispute Settlement Reform) 27 November – 1 December 2017, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

24.2 (b) and (c) of China–Canada BIT (2012), where arbitrators shall also 'have expertise or experience in financial services law or practice, which may include the regulation of financial institutions'.

4.57 Second, China and Australia decided to set up a Committee on Investment whose duties include establishing and maintaining a list of at least 20 individuals who are willing and able to serve as arbitrators to investment disputes under the FTA. Though disputants are not obliged to choose arbitrators from the list, the Committee on Investment will appoint arbitrators from the roster if a tribunal cannot be constituted within 90 days.[149] Finally, China–Australia FTA (2015) promulgated a Code of Conduct for arbitration, which contains 20 provisions in total (exclude a clause 21 of definitions) in six aspects of conducts, covering responsibilities in the process, disclosure obligations, performance of duties by arbitrators, independence and impartiality of arbitrators, duties in certain situations and maintenance of confidentiality.[150]

4.58 However, as the Chinese delegate mentioned in his speech, the lack of independence and impartiality of arbitrators was a systemic problem that should be settled by comprehensive measures.[151] UNCITRAL Working Group III has drafted two working papers on the selection and appointment of ISDS tribunal members and the code of conduct for adjudicators in ISDS for comments recently. There were also calls for arbitral institutions to play a greater role in the selection of arbitrators.[152] Indeed, even an ad hoc arbitral tribunal may be under the administration of an arbitral institution to facilitate the proceedings. Therefore, a revision of the arbitration institution rules could be a part of the systemic reform, along with reforms at national and international levels.

[149] Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (signed 17 June 2015, entered into force 20 December 2015) (China-Australia FTA) arts 9.15.4, 9.15.5 and 9.15.6.
[150] ibid Annex 9-A Code of Conduct.
[151] The China's Delegate (n 142)
[152] WG III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session* (2018) A/CN 9/935, para. 66.

d. Duration and Costs

4.59 China is concerned that the costs to settle an investment dispute through ISDS would be too high for developing countries. As mentioned in the discussion of the Working Group III, costs incurred in a typical investor-State arbitration case include party costs paid to legal counsels and experts, administrative costs paid to arbitration institutions, and the tribunal costs paid to the arbitrators and secretaries.[153] The Organisation for Economic Co-Operation and Development (OECD) and PCA suggest that party costs are the largest outgoings among the three portions, which occupy 80-90 per cent of the total costs.[154] The average party costs in a single case is USD 8 million, as found by OECD in 2012.[155] More costs will originate from both pre-arbitration period, such as negotiations and domestic procedures, and post-arbitration procedures, such as enforcement or annulment of arbitration awards. The accumulative expenses of an ISDS case will be a huge burden not only to SMEs (small and medium-sized enterprises) but also to developing countries and LDCs (less-developed countries). An average investor-State arbitration takes approximately 3–4 years from filling an arbitration request to rendering a final award.[156]

4.60 A typical example for extremely lengthy and expensive arbitration is the ongoing *Perenco Ecuador Limited v Ecuador*,[157] which has cost both parties 11 years and more than USD 89 million in legal and other costs.[158] Some cases involving a Chinese party were also unduly prolonged with or without proper reasons. For example, *Heilongjiang and others* lasted for seven years from January 2010 to June 2017. The arbitral proceedings of *Philip Morris* were commenced from June 2011 but the final

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153 WG III, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration* (2018) A/CN 9/WG III/WP 153, C1 para 18.
154 ibid, C1 para 19.
155 ibid, D2 para 42.
156 Ibid, D3 paras 54-56.
157 ICSID Case No ARB/08/6.
158 ibid, Petition to Enforce Arbitral Award (1 October 2019).

award was not rendered until March 2017. The ad hoc tribunal of *Sanum I* spent 7 years reaching the final award, though the delay in this case may be attributed to the parties because the arbitral proceedings were suspended by an unsuccessful settlement plan. In terms of the ICSID cases, *Tza Yep Shum* took 4 years for the arbitral award and a further 4 years in the annulment proceedings. Reasons for the lengthy proceedings could be attributed to the complexity of the international treaty dispute,[159] party activities,[160] tribunal conducts,[161] and/or the inherent systemic flaws of the ISDS system.[162]

4.61 China pointed out in the 34th session that language could be a barrier for the efficiency of arbitration.[163] Take China as an example. In the current ISDS system arbitration languages are always limited to a certain number of languages, which would hardly be Chinese, Chinese parties must translate a bundle of case documents and evidence from the original Chinese version into the agreed arbitration language. This process would not only be costly and time-consuming but may also cause confusion or even disputes arising from the subtle inconsistency of wording due to the translation.

4.62 When considering issues of costs, a balanced view should be taken regarding the positive function of the current ISDS system in the development of international investment.[164] Rather than cutting remunerations of arbitrators and legal counsels, the more practical solution is to improve the efficiency of arbitral proceedings by mitigating delays and undue procedures. Various approaches have been taken by parties and tribunals in Chinese-related cases.

4.63 First, some tribunals managed to consolidate arbitral proceedings with relevant arbitrations so as to reduce repetitive hearings and procedures. In *Sanum I*, when

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159 WG III (n 153) E1 paras 78-81.
160 ibid paras 82-86.
161 ibid paras 87-91.
162 ibid para 92.
163 The China's Delegate (n 148)
164 The China's Delegate (n 84)

Sanum sent the notice of arbitration to the Laos under China–Laos BIT (1993) and the UNCITRAL Arbitration Rules 2010, Sanum's parent company, LHNV filed an arbitration request against Laos before the ICISD under the Netherlands–Laos BIT and the ICSID Additional Facility rules on the same day. As the arbitral claims raised by Sanum and LHNV were based on the same facts, Laos applied for consolidation of the two cases during the arbitration.[165] Though the tribunal denied the application for consolidation on the grounds that it was not 'practical or necessary' at the time of application, hearings on merits of disputes were conducted jointly by the PCA-administrated ad hoc tribunal and the ICSID tribunal because the tribunals considered it was necessary to address the totality of the facts on account of the defence raised by Laos involved the same controller of the two claimants.[166] Sanum chose to submit its claims before the ICSID after LHNV initiated the second ICSID arbitration against Laos under the ICSID Arbitration (Additional Facility) Rules in 2016.[167] All three parties agreed to consolidate the two ICSID arbitration (*Sanum II* and *LHNV II*) and appointed the same tribunal to hear the cases in parallel. Accordingly, the consolidated tribunal has been able to run the proceedings in tandem, if not formally consolidated, for reasons of efficiency and costs from the issuance of the very first procedure order.[168]

4.64 Second, tribunals may impose adverse costs awards against claimants who raise frivolous claims or any party who deliberately delays the proceedings. In *Philip Morris*, the ad hoc tribunal concluded that the Claimant's initiation of the arbitration constituted an abuse of rights.[169] After taking into account the allocation of costs under the applicable arbitration rules, which was the UNCITRAL Arbitration Rules (2010),[170] the tribunal demanded the Claimant pay Australia reasonable arbitration

[165] *Sanum I* Award (n 38) para 32.
[166] ibid paras 32, 54, 66, 72.
[167] See n 44.
[168] *Sanum II*, Procedure Order No 1 (16 May 2017) (*Sanum II* PO 1) s 25.1.
[169] *Philip Morris,* Award on Jurisdiction and Admissibility (17 December 2015) para 588.
[170] Article 42(1): The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

costs, which was said to be 50% of the total legal costs claimed by Australia.[171] Third, to mitigate delays that may be attributed to the arbitrators, it has been disclosed from the procedure orders in *SCB II* and *Sanum II* that arbitrators have confirmed their availability in the next 24 months and committed themselves to the cases.[172]

e. Third-party funding

4.65 Parties may seek financial assistance from third-party funders as another way to share the burden of costs. However, China raised its concerns about TPF both in written submissions and speeches in the sessions. In addition to concerns about the potential conflict of interests and lack of transparency, China also is concerned about the rules of conduct of the TPF. The respondent of arbitration, usually the host State, often lacks relevant information about the TPF and whether it has jurisdiction over the TPF contract.[173] Investors may unduly promote arbitration proceedings or make unreasonable claims because of the existence of TPF.[174] However, although the Chinese delegate indicated that China had suffered from TPF in the previous cases, no information on the TPF was available from published case materials, even though a Singaporean phosphate mining company was reported as talking with litigation funders about the future investment arbitration against China under China–Singapore BIT (1985).[175]

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[171] *Philip Morris,* Final Award Regarding Costs (8 March 2017) paras 70 and 105. The exact amounts or percentage of Australia's costs that shall be borne by the Claimant is redacted. But IAReportor said the investor was ordered to bear only 50% of those costs for defence, amounting to A$11,522,621,17, and 50% of Australia's half-share of the arbitrators' fees, totalled €1,329,202.14. See Jarrod Hepburn, 'Final Costs Details Are Released in Philip Morris V. Australia Following Request by IAReporter (IAReporter, Mar 21, 2019) <www.iareporter.com/articles/final-costs-details-are-released-in-philip-morris-v-australia-following-request-by-iareporter/> accessed 30 December 2020.

[172] *SCB II,* Procedure Order No 2 (11 October 2016) s 2.3; *Sanum II PO 1* (n 168), s 3.3.

[173] The China's Delegate, Audio recording 01/04/2019 10:00:00 - 01/04/2019 13:00:00 of 37th session, Working Group III (Investor-State Dispute Settlement Reform) 1-5 April 2019, New York (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

[174] The China's Delegate, Audio recording 17/10/2019 09:30:00 - 17/10/2019 12:30:00 of 38th session, Working Group III (Investor-State Dispute Settlement Reform) 14-18 October 2019, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

[175] Jarrod Hepburn and Luke Eric Peterson, 'China Warned of Possible Investment Treaty Arbitration' (IAReporter, 6 March 2018) <www.iareporter.com/articles/china-warned-of-possible-investment-treaty-arbitration/> accessed 30 December 2020.

4.66 Currently, laws of Mainland China are still silent on the TPFs, possibly due to the comparative low arbitration costs in China.[176] Provisions on the TPRs are also rarely seen in bilateral investment treaties. The only provision that may be relevant to the financial assistance of investment arbitration is in China–Australia FTA (2015), where any person who has directly or indirectly provided or will provide any financial or other assistance in preparing an amicus curiae submission has to be disclosed.[177] Nevertheless, China is considering imposing limitation or at least duties of disclosure on the TPF. This can be seen from the newly published investment arbitration rules of the CIETAC and Beijing Arbitration Centre (BAC). As illustrated in the following chapter, TPFs for arbitration under these arbitration rules are permissible as long as a burden of disclosure is fulfilled.[178] Besides, since 1 February 2019, Hong Kong has permitted TPF for arbitration subject to duties of disclosure, which means the existence of TPF, the name of the funder and the end of TPF must be notified to each other party to the arbitration and the arbitral body.[179]

f. Transparency

4.67 Lack of transparency of investment arbitration is one of the major concerns of some States. However, China took a different view on the issue. In the UNCITRAL Working Group II meetings for transparency, China regarded that publicity and transparency of an ISDS case would be inappropriate given the confidentiality of arbitration.[180] Though the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the following Mauritius Convention was eventually approved by the UNCITRAL, China still prefers not to apply the Transparency Rules in the treaties

[176] Xian Hu, 'The Rise and Observation of Dispute Resolutions of Third-Party Funding in Mainland China' (2019) China Law 63.
[177] China-Australia FTA (n 149) art 9.16.4.
[178] China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation) (2017) art 27; BAC Investment Arbitration Rules (2019) art 39.
[179] Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, Ord No 6 of 2017, A137, arts 98U and 98V.
[180] UNCITRAL Working Group II (Arbitration and Conciliation), *Settlement of commercial disputes Transparency in treaty-based investor-State arbitration - Compilation of comments by Governments* (2010) A/CN.9/WG II/WP.159/Add.1, page 12.

concluded after the presentation of the Convention. For example, in the China–Australia FTA (2015), both China and Australia consented in the exchanges of letter that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration would not apply to investment arbitration initiated under the FTA unless otherwise agreed by the Parties.[181] The China–Turkey BIT signed in 2015 is believed to be the only investment treaty where Mainland China is a party and the UNCITRAL Transparency Rules are applicable in some instance,[182] though it has yet taken effect.

4.68 In the new working group for ISDS, China watered down the language by arguing that transparency was an independent issue and whether the working group should focus on depends on facts rather than perception.[183] It is notable that China's negative attitude toward the Transparency Convention does not mean that China opposes a transparent arbitration procedure in investment arbitration. In fact, some Chinese BITs explicitly state that investor-State arbitration under the treaty has to be open to the public. For example, article 28 Public Access to Hearings and Document of the China–Canada BIT (2012) generally agrees on the compulsory disclosure of arbitration awards except for confidential information and alternative disclosure of other arbitration documents for public interest.[184] Additionally, hearings under China–Canada BIT can be open to the public upon parties' consent for public interest.[185] China and New Zealand also consent to ensure public availability of all tribunal documents except for any confidential information when the state party to the arbitration considers appropriate.[186]

[181] China-Australia FTA (n 149) Annex IV: Side Letters, Side Letter on Transparency Rules Applicable to Investor-State Dispute Settlement (17 June 2015)
[182] 'Status: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective date: 1 April 2014)' (UNCITRAL) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status> 1 June 2020.
[183] The China's Delegate, Audio recording 29/11/2017 14:00:00 - 29/11/2017 17:00:00 of 34th session, Working Group III (Investor-State Dispute Settlement Reform) 27 November – 1 December 2017, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.
[184] Article 28.1
[185] Article 28.2
[186] Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China (signed 7 April 2008, entered into force 1 October 2008) art 157.

4.69 As to China–Australia FTA, though parties preclude the application of the UNCITRAL Transparency Rules, China and Australia agree on a set of bespoke transparency rules in article 9.17. Accordingly, except for protected information,

(1) the request for consultation, the notice of arbitration and orders, awards and decision of the tribunal are mandatorily disclosed to the public;

(2) the pleadings, memorials, briefs, written submissions of consolidation, minutes or transcripts of hearings may be open to the public at the discretion of the host country;

(3) the submission of non-disputing parties can be published by the respondent State subject to the prior approval of the non-disputing parties;

(4) hearings can be open to the public with the agreement of the respondent State.

4.70 Nevertheless, transparency is not merely a requirement for the disclosure of arbitration documents. The lack of transparency has also been questioned in other steps of arbitration proceedings, such as the appointment mechanism of arbitrators and TPF. Whether and how to enhance the transparency rules may need a systemic review across the whole arbitration procedure due to the public interests involved in the ISDS system and confidentiality, the long-cherished feature of arbitration.

D. Conclusion

4.71 It has been a decade since the latest draft of China model BIT known to the public, but nearly all international investment arbitration involving a Chinese party have emerged in this time. Though China endorses the current ISDS system in general, both the Chinese government and Chinese investors have encountered challenges with international investment treaties during arbitration proceedings. China has taken steps to ease these concerns in its recent treaties and, as illustrated in the previous chapter, in its domestic legislation as well. On the other hand, it is understood that the UNCITRAL Working Group III is dedicated to a comprehensive plan for the reform of the ISDS comprising options tailored for each major concern of States. As China stated

in the discussion of the working group, China is opened to reform, whether incremental or systematic, as long as it covers issues and concerns arising from the current ISDS system.[187] Indeed, the Chinese government has made proposals in the written submissions to the working group, indicating its preferences and recommendations on reform. At the same time, some Chinese arbitration centres have presented their solutions for future investment dispute settlement in China, whose pros and cons will be discussed in the next chapter.

[187] The China's Delegate, Audio recording 14/10/2019 14:00:00 - 14/10/2019 17:00:00 of 38th session, Working Group III (Investor-State Dispute Settlement Reform) 14-18 October 2019, Vienna (*UNCITRAL*)< https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

Chapter 5: New proposals from Chinese permanent arbitration centres

A. Introduction

5.1 As mentioned in Chapter 2, foreign investors are not allowed to file requests for arbitration to solve investment disputes against the Chinese government under the current Chinese domestic legal system. According to the newly enacted Foreign Investment Law (2019), the three primary dispute resolution mechanisms for foreign investors and foreign-invested enterprises are the complaint procedure for foreign investors, the administrative review procedure and administrative litigation. Despite the advantages and disadvantages of each mechanism, all three are more or less susceptible to influence exerted by administrative agencies that may share common interests with the counterparty of the foreign investor.

5.2 On the other hand, most of the Chinese international investment treaties provide foreign investors with a range of dispute resolution mechanisms against the host State, such as amicable negotiation and international arbitration, including both institutional arbitration of the International Centre for Settlement of Investment Disputes (ICSID) and ad hoc arbitration under the United National Commission on International Trade Law (UNCITIAL) Arbitration Rules. However, China has expressed concerns about the current international Investor-State Dispute Settlement (ISDS) system, especially the international investment arbitration, based on its experiences with the treaty practices and cases involving China, as illustrated in Chapter 4.

5.3 As none of the routes are satisfactory to foreign investors or the host State, the delegate of China and representatives from other States and international institutions have proposed reforming the ISDS system during the ongoing meetings

of UNCITRAL Working Group III. For example, in the written recommendation to the working group, China suggested that it supported establishing a multinational permanent appellate mechanism, regulating the appointment and code of conduct of arbitrators, strengthening the functions of the conciliation mechanism and pre-arbitration consultation procedures in the ISDS system, and formulating transparency rules for third-party funding.[1] Indeed, some Chinese investment treaties have already attempted to reform the customary ISDS provisions. A typical example is the China-Australia FTA (2015), where both States consented to set up a roster and a code of conduct for arbitrators[2] and establish an appellate mechanism to review investment arbitral awards in the future.[3] In terms of the domestic legislation, China has promulgated or planned to promulgate several laws and regulations to facilitate domestic proceedings in dealing with foreign investment disputes. The recent achievement is the publication of the formal regulation of the complaint procedures for foreign-invested enterprises and a set of related rules, which have come into effect since 1 October 2020.

5.4 In addition to the attempts and efforts of the Chinese government, some Chinese arbitration centres have also taken steps in the trend of reshaping via new arbitration rules. The China International Economic and Trade Arbitration Commission (CIETAC) was the first Chinese arbitration centre to publish a specific set of investor-State arbitration rules in 2017, followed by the Beijing Arbitration Commission (BAC) and the Shenzhen Court of International Arbitration (SCIA) in 2019. In particular, the BAC has introduced a set of more innovative rules, including an appellate procedure after the rendering of a final award by an arbitral tribunal. However, as illustrated in this chapter, the implementation of the new rules may face many challenges and require a thorough reform of the Chinese arbitration system.

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[1] United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WGIII), *Possible reform of investor-State dispute settlement - Submission from the Government of China* (2019) A/CN 9/WG III/WP 177 (Submission of China).

[2] Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (signed 17 June 2015, entered into force 20 December 2015) (China-Australia FTA) art 9.15, annex 9-A Code of Conduct.

[3] ibid art 9.23.

5.5 This chapter will first give a brief overview of the Chinese arbitration system with respect to foreign disputes. It will then discuss the new investment arbitration rules promulgated by the three China-based arbitration centres and address how these rules tackle significant concerns of the current ISDS system. The final section will examine the challenges of implementing investment arbitration rules under the current Chinese legal framework.

B. <u>Arbitration in China</u>

<u>Origin of arbitration in China</u>

5.6 The arbitration law of the People's Republic of China (PRC) emerged from foreign-related arbitration. In 1956, the new central government of China established a Foreign Trade Arbitration Commission (FTAC) to solve possible disputes in foreign trade, in particular those between foreign firms, companies or other economic entities and Chinese firms, companies or other economic entities.[4] The Decision of the Government Administrative Council Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade was short in length (only 12 articles), but it covered plenty of elements of modern arbitration. For example,

a. Arbitrators: each party was entitled to nominate one arbitrator from members of the Commission who were of special expertise and experience in foreign trade, commerce, industry, agriculture, transport, insurance and law.[5]
b. Interim measures were allowed on materials and property rights of parties.[6]

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[4] Decision of the Government Administrative Council Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (1954), 6 May 1954 (Decision on FTAC) art 1.
[5] ibid arts 3 and 5.
[6] ibid art 8.

c. The administration fee of each arbitration case should not exceed 1/100 of the disputed amount.[7]

d. Arbitral awards of the Committee should be final.[8]

e. Parties must enforce awards of the Committee within the prescriptive time frame; otherwise, the award would be enforceable before a Chinese domestic court.[9]

5.7 Nevertheless, there was a different picture of domestic arbitration. The most obvious issue was the lack of a uniform law or regulation to govern domestic arbitration. Before the promulgation of the Arbitration Law in 1994, more than 14 national laws, 82 administration regulations and 190 local/provincial laws had contained provisions on arbitration.[10] More importantly, domestic arbitration at that time had strong administrative characteristics compared with foreign arbitration. Taking the most typical national legal document, Provision for Arbitration of Disputes on Economic Contracts,[11] as an example, some provisions clearly contradicted modern practices, for instance:

a. Both national and local administrative commissions that heard disputes on economic contracts were set up by the departments of commerce of the corresponding governments;[12]

b. Arbitration commissions were not independent of each other, as an arbitration commission established by a government at a higher level had authority over an arbitration commission at a lower level;[13]

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7 ibid art 9.

8 ibid art 10.

9 ibid art 11.

10 Angran Gu, *Explanation of Arbitration Law (Draft) of the People's Republic of China* (National People's Congress of the Republic of China, 28 June 1994). Mr Gu was the Chairman of Legal Affair Committee of the Standing Committee of the National People's Congress.

11 GuoFa [1983] No 119. This regulation was replaced by the Arbitration Law of the People's Republic of China in 1994.

12 ibid art 2.

13 ibid arts 11, 13 and 34.

c. The jurisdictions of administration commissions were determined by the rules of territory and the amount involved rather than the arbitration agreements between the parties;[14]

d. An arbitral award was not final, which meant either party had the right to appeal an award before a competent court.[15]

Current national law on arbitration – Arbitration Law (1994)

5.8 In August 1991, the National Congress drew up a uniform national arbitration law to regulate the arbitration system.[16] The current Arbitration Law of the People's Republic of China was promulgated in August 1994 and amended in 2004, 2009 and 2017 (the 2017 Amendment hereinafter referred to as the 'Arbitration Law'). In addition to the Arbitration Law, which mainly focuses on general commercial affairs, two special arbitration laws deal with labour disputes and rural land disputes, respectively.[17] Despite the arbitration laws, legislation and regulations on the civil court procedures are also critical to the arbitration process, particularly to the interim measures and enforcement proceedings. Foreign-related arbitration is subject to a particular chapter (Chapter 26) of the Civil Procedure Law. The current Civil Procedure Law in force is the Civil Procedure Law of the Peoples' Republic of China (2017 Amendment), based on the original version promulgated in 1991.

5.9 The auxiliary decree to national law, or the 'judicial explanation' in Chinese, is another primary legal resource. For this chapter, the most critical judicial explanation, inter alia, is the Interpretation Concerning Some Issues on the Application of the Arbitration Law (the 'Judicial Explanation of the Arbitration Law') promulgated by

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[14] ibid arts 9 and 10.
[15] ibid art 33.
[16] Gu (n 10).
[17] Law on Mediation and Arbitration of Labour Dispute of the People's Republic of China (2007); Law on Mediation and Arbitration of Rural Land Contract Dispute of the People's Republic of China (2009).

the Supreme People's Court (SPC) in 2006.[18] As the highest court in China, the SPC is entitled by the National People's Congress (NPC),[19] the national legislative body, to issue judicial interpretations on the specific topics concerning the application of the law for court's practice.[20] As an integrated part of the law, judicial interpretations have the same legal force as national law and should be cited as legal references for judgments when applicable.[21] There are various types of judicial interpretations. The SPC circulates to all courts judicial explanations on the application of a specific branch of law or a specific problem.[22] It also replies to requests for instructions on specific cases from lower courts.[23]

5.10 Although China is a civil law country, guiding cases published by the SPC have a binding effect on future similar cases and should be cited as a legal basis in the judgments.[24] Historically, the judgments of a superior court in Mainland China have never served as precedents to its inferior courts, although parties may cite to them as supporting documents. However, to ensure the consistent application of law throughout the nation, one of the recent reforms of the SPC confers on an inferior court the duty to check judgments made by a superior court on similar facts, issues or application of law and may refer to these judgments when deciding a dispute since 31 July 2020.[25] Therefore, for this chapter, typical cases will be discussed in addition to the laws and regulations.

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[18] Interpretation of the Supreme People's Court on Application of the Administrative Procedure Law of the People's Republic of China (2006), FaShi [2006] No 7 (Interpretation of Arbitration Law).
[19] Law on Structure of the People's Courts of the People's Republic of China (2018 Revision), art 29.
[20] Regulation of the Supreme People's Court on Judicial Interpretation Work, FaFa [2007] No 12 (Regulation on Judicial Interpretation) arts 2 and 3. See also Resolution of the Standing Committee of the National People's Congress on Improving Interpretation of Law (1981) art 2.
[21] Regulation on Judicial Interpretation (n 20) arts 5 and 27.
[22] ibid, art 2.
[23] ibid, art 6.
[24] Notice of the Supreme People's Court on Issuing Regulation on Case Guidance, FaFa [2010] No 51, art 7.
[25] Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search of Types of Cases (For Trial Implementation) (2020), 27 July 2020, art 9.2.

International treaties

5.11 As detailed in the previous chapters, China has entered various international treaties related to arbitration. Most importantly, China entered into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') with two reservations under article I (3) in 1987.[26] Accordingly, China would only apply the New York Convention based on reciprocity and to the differences arising out of commercial disputes determined under PRC law.[27] In addition, China ratified the Convention on the Settlement of Investment Dispute Between States and Nationals of Other States (the 'ICSID Convention' or the 'Washington Convention') in 1992. Foreign investors may launch investment arbitration before the ICSID against China in accordance with relevant investment treaties to which China is a party, especially those bilateral investment treaties after 2000.

5.12 In particular, some recent BITs, such as China–Uzbekistan BIT (2011) and China–Tanzania BIT (2013),[28] have followed the wording of the latest draft version of China's model BIT offering foreign investors a choice of investor-State arbitration forums other than the ICSID arbitration or ad hoc arbitration under the UNCITRAL Arbitration Rules. Other arbitration centres, including those based in China, may have the opportunity to hear investor-State arbitration upon the consent of disputing parties.

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[26] Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China (1987), Fa[Jing]Fa [1987] No 5; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June1959) 330 UNTS 3 (New York Convention).

[27] Decision of the Standing Committee of the National People's Congress of China on China Entering into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1986).

[28] Agreement Between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (signed 19 April 2011, entered into force 01 September 2011) art 12.2; Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments (signed 24 March 2013, entered into force 17 April 2014) (China-Tanzania BIT) art 13.2.

Features of arbitration in China

5.13 Similar to arbitration laws in most states, the Arbitration Law of China does not define an arbitration.[29] One can hardly find it in the international agreements or treaties to which China is a member state as well. For example, both the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (the 'UNCITRAL Model Law') leave 'arbitration' undefined. However, the United Nations Conference on Trade and Development ('UNCTAD') lists four principal characteristics of arbitration, according to which arbitration can be roughly defined as (i) a mechanism for the settlement of disputes (ii) based on the consent of disputants (iii) through a private procedure (iv) leading to a final and binding determination of the rights and obligations of the disputants.[30]

5.14 Arbitration under the Arbitration Law of China has all the characteristics mentioned above but is subject to special rules and limitations. For example, arbitration cases in China are divided into two categories based on whether foreign elements are involved; a valid arbitration agreement under the Arbitration Law must be written and specify the arbitration institution, which means ad hoc arbitration is not permitted; and arbitration must be between parties with equal status so that administrative disputes against the government cannot be arbitrated. Accordingly, if using the format of UNCTAD, arbitration in China can be defined as (i) a domestic or foreign-related dispute settlement mechanism (ii) based on a written arbitration agreement between equal parties to the dispute over a contract or other property benefits (iii) heard by an arbitration tribunal of an arbitration institution selected by the parties (iv) leading to a final and binding arbitration award. These specific features will be discussed in turn in the following paragraphs.

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[29] Eric E. Bergsten, 'Dispute settlement. international commercial arbitration. 5.1, International commercial arbitration' (*United Nation* 2005) 4.
[30] ibid.

C. New investment arbitration rules

5.15 Traditionally, international investment arbitration rules are either standalone rules specifically designed for international investment disputes, such as the ICSID Arbitration Rules used by the ISCID tribunals, or general commercial arbitration rules that are applied to investment disputes with or without modifications, such as the UNCITRAL Arbitration Rules that are commonly used in international investment arbitration, especially by ad hoc tribunals.

5.16 In recent years, there is a trend among major international arbitration centres to promulgate specific international investment arbitration rules. The pilot was the Singapore International Arbitration Centre (SIAC), which released its first edition of investment arbitration rules (SIAC Investment Arbitration Rules) on 30 December 2016 after releasing the draft version in February 2016.[31] The new rule, comprising 40 provisions and two schedules, has been in force since 1 January 2017. In contrast, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), although it does not have a separate set of investment arbitration rules, adopted another approach by adding an appendix on investment treaty disputes that contains only four articles (article 1 Scope of Arbitration, article 2 Number of Arbitrators, article 3 Submission of a Third Person, and article 4 Submission of a Non-disputing Party to the Treaty) as Appendix III of its (most recent) 2017 rules.[32]

5.17 Two Chinese arbitration centres, the CIETAC and the BAC, followed the path of SIAC by formulating a separate set of investment arbitration rules in addition to their normal arbitration rules for commercial arbitration in 2017 and 2019, respectively. The SCIA, on the other hand, now accepts investor-State arbitration to be administrated in accordance with the UNCITRAL Arbitration Rules under its most recent version of general arbitration rules published in 2019. In the following

[31] Investment Arbitration Rules of the Singapore International Arbitration Centre (2017) (SIAC Rules).
[32] Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017).

paragraphs, all three sets of rules will be presented in detail and compared with other investment arbitration rules, especially SIAC and ICSID. There will be an emphasis on the CIETAC and BAC rules, where more innovative approaches are taken, such as the emergency arbitrators, expedited procedures and the appeal phase.

5.18 The following paragraphs will present an overview of the three sets of arbitration rules and their specific application rules. Competitive edges over other arbitration rules and practical challenges in the context of current Chinese legal will be discussed in Sections D and E, respectively.

CIETAC Investment Arbitration Rules (2017)

5.19 The CIETAC is the first permanent arbitration institution established after the founding of the PRC in 1949. In April 1956, the China Council for the Promotion of International Trade (CCPIT), a national governmental agency for foreign trade and investment promotion,[33] set up the FTAC, the predecessor of the CIETAC, following the direction of the Government Administrative Council of the PRC to meet the needs of Chinese foreign trade.[34] As the name suggested, the FTAC's jurisdiction was limited to disputes arising from contracts and transaction of foreign trade, especially between a foreign party and a domestic party.[35] In 1980, the State Council changed the name of the arbitration institution to the Foreign Economic and Trade Arbitration Commission. The scope of jurisdiction was extended to disputes arising out of various foreign economic cooperation such as Chinese–foreign joint ventures, foreign investments in building factories in China, and credit transactions between Chinese and foreign banks.[36] In 1988, the State Council renamed the institution CIETAC and further extended its jurisdiction to any and all disputes arising from international

[33] 'About CCPIT' (*China Council for the Promotion of International Trade*, 24 March 2016) <http://en.ccpit.org/info/info_40288117521acbb80153a75e0133021e.html> accessed 31 December 2020.
[34] Decision on FTAC (n 4) art 1.
[35] ibid.
[36] Notice of the State Council Concerning the Conversion of Foreign Trade Arbitration Commission into Foreign Economic and Trade Arbitration Commission (1980), 26 February 1980.

economic and trade.[37] Since then, the CIETAC has been allowed to promulgate arbitration rules. The current (general) arbitration rules were implemented on 1 January 2015.

5.20 Since 2012, the CIETAC has become the arbitration institution accepting the largest number of new cases each year globally.[38] However, the majority of cases are domestic arbitration, and the percentage of international cases, namely cases involving at least a foreign party, comprise a small portion – merely 18.5% of the total number in 2019. Compared with its major competitors Hong Kong International Arbitration Centre (HKIAC) and SIAC, although more than 80% of cases accepted by HKIAC and SIAC are international, the CIETAC still has an overwhelming advantage in the total numbers of international arbitration cases. For instance, the total number of new international cases accepted by SIAC and HKIAC in 2019 was 416 and 249, respectively, while the CIETAC accepted 617 new international cases.[39]

5.21 The CIETAC laid down its first investment arbitration rules, the China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation) (the 'CIETAC IA Rules'), in 2017. These were also the first investment arbitration rules of Chinese permanent arbitration centres. Since the investment arbitration rules became effective on 1 October 2017, there have been no public cases applying the rules or being submitted to the CIETAC for settlement. In addition, the CIETAC has been appointed by the government of Mainland China as one of the investment dispute settlement bodies to solve investment disputes

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[37] Reply of the State Council Concerning the Renaming of the Foreign Economic and Trade Arbitration Commission as the China International Trade and Economic Arbitration Commission and the Amendment of the Arbitration Rules (1988), 21 June 1988.

[38] Markus Altenkirch and Brigitta John, 'Arbitration Statistics 2019 – How did arbitration institutions fare in 2019?' (*Global Arbitration News*, 15 July 2020) <globalarbitrationnews.com/how-did-arbitration-institutions-fare-in-2019/> accessed 30 December 2020.

[39] For SIAC's caseload see 'SIAC Annual Report 2019' (SIAC, 30 June 2020) < www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report> accessed 30 December 2020. For HKIAC's caseload see '2019 Statistics' (HKIAC) <www.hkiac.org/about-us/statistics#:~:text=Total%20new%20cases%3A%20A%20total,disputes%20and%20one%20was%20adjudication.&text=35%25%20of%20all%20arbitrations%20submitted,3.6%25%20involved%20no%20Asian%20parties> accessed 30 December 2020. For CIETAC's caseload see 'Statistics' (CIETAC) <www.cietac.org/index.php?m=Page&a=index&id=24> accessed 30 December 2020.

between the investors from Hong Kong, Macau and Taiwan and the Mainland government through mediation in accordance with article 13.4 of the Cross-Strait Investment Protection and Promotion Agreement (2012) and article 19.1(5) of both the Mainland and Hong Kong Closer Economic Partnership Arrangement Investment Agreement (2017) and Mainland and Macao Closer Economic Partnership Arrangement Investment Agreement (2017).[40] On 30 October 2018, the CIETAC further published the CIETAC Mediation Rules for Investment Disputes under the CEPA Investment Agreements, which is the first specialised investment mediation rules in China. However, no records are publicly available on whether and how these provisions have been implemented.

5.22 The CIETAC IA Rules, as described by the secretary of the CIETAC in a press release, are based on international practice but 'with Chinese characteristics'.[41] Although the CIETAC IA Rules contain provisions that have been well-practised in other investment arbitration rules and some provisions even closely resemble the new SIAC Rules as illustrated below, the CIETAC IA Rules have certain exclusive features designed to relieve the concerns of China, such as the roster of arbitrators, mandatory disclosure of third-party funding and conciliation by the arbitral tribunal. Moreover, it is worth noting at an early stage that as a general principle, the CIETAC IA Rules or other arbitration rules in CIETAC-administrated cases may not override mandatory laws and regulations applicable to the arbitration procedure.[42]

a. Application of the CIETAC IA Rules

5.23 Article 3.3 provides that the CIETAC IA Rules shall be applied in default, but parties are allowed to amend the rules or choose another set of arbitration rules for cases

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[40] 'Investment Dispute Conciliation' (CIETAC) <www.cietac.org/index.php?m=Page&a=index&id=104>accessed 30 December 2002.

[41] 'CIETAC Investment Arbitration Rules Press Release' (*CIETAC*, 19 September 2017) <www.cietac.org/index.php?m=Article&a=show&id=14450> accessed 30 December 2020.

[42] China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation) (2017) (CIETAC Rules) arts 3.3 and 3.5.

CIETAC-administrated cases. By adopting the CIETAC IA Rules, CIETAC can accept international investment disputes between an investor and a state or intergovernmental organisation, other organisation, department or entity that is either authorised by or whose act is attributed to the government.[43] The CIETAC IA Rules do not define the term 'investor' or 'investment'.

5.24 As pointed out earlier, the CIETAC IA Rules specify that the application of arbitration rules, whether the CIETAC IA Rules or other arbitration rules, shall be without prejudice to any mandatory provisions of the applicable law.[44] Though it is commonly accepted that any arbitration should be subject to the mandatory rules of *lex arbitri*,[45] the reason the CIETAC emphasises the principle may be due to the major obstacle for implementing the CIETAC IA Rules in China: the arbitrability of administrative disputes. In other words, as administrative disputes are precluded from the scope of arbitration in China, the CIETAC IA Rules cannot be applied to arbitration seated in China until the restriction is lifted by law.

b. Seat of arbitration

5.25 To evade the restriction of arbitrability at this stage and facilitate its future application after the law is changed, the CIETAC plans to accept arbitration applications in two centres: the CIETAC Investment Dispute Settlement Centre located in Beijing as the default centre and the CIETAC Hong Kong Arbitration Centre located in Hong Kong.[46] Parties are free to choose either centre to file the application and accept the administration of the selected centre, but the choice has to be prudent. The location of the application centre will be the seat of arbitration if the arbitration agreement is silent on the matter.[47] It is arguably an advantage for investors to

[43] ibid art 2.1.
[44] ibid arts 3.3 and 3.5.
[45] Nigel Blackaby, Constantine Partasides, et al, 'Chapter 1. An Overview of International Arbitration' in *Redfern and Hunter on International Arbitration (6th Edition)* (Kluwer Law International; OUP 2015)1.
[46] CIETAC Rules (n 42) art 4.3.
[47] ibid art 28.2.

choose Hong Kong as the seat given that Hong Kong is among the top five preferred and widely used arbitral seats in the world, according to the 2015 Queen Mary International Arbitration Survey.[48] More importantly, Hong Kong is a place where administrative disputes are arbitrable. Parties can also agree on an arbitral seat other than these two locations. However, the seat should be in the territory of signatories of the New York Convention in consideration of the recognition and enforcement of an arbitral award given it is deemed to be made in the seat of arbitration.[49] One must consider that some states, including China, have made reservations to only recognise and enforce commercial arbitration awards when ratifying the New York Convention.

BAC Investment Arbitration Rules (2019)

5.26 The BAC, also known as the Beijing International Arbitration Centre (BIAC), was established in 1995 by the Beijing Municipal Government in response to State Council's call to reorganise arbitration institutions according to the newly promulgated Arbitration Law.[50] After years of development, the BAC has received global reputation and is recognised as 'the only local arbitration commission which meets or surpasses global standards' in China by the Economist Intelligence Unit,[51] In 2019, the BAC accepted 6,732 arbitration applications, of which 163 cases involved at least one foreign party.[52]

5.27 It is worth noting that since November 2017, UNCITRAL Working Group III has launched a series of meetings on the ISDS reform. Representatives of member states

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[48] Paul Friedland and Loukas Mistelis, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (White & Case LLP, 6 October 2015)2

[49] CIETAC Rules (n 42) arts 28.2 and 28.3.

[50] Notice of the General Office of the Beijing Municipal People's Government on the Establishment of Beijing Arbitration Commission (1995), JingZhengBanFa [1995] No 84; See also Plan for Reorganisation of Arbitration Institutions (1995), GuoBanFa [1995] No 44 (Plan for Reorganisation).

[51] 'Beijing Arbitration Commission' (*BAC*) <www.bjac.org.cn/english/page/gybh/introduce_index.html> accessed 31 December 2020.

[52] Beijing Arbitration Commission (BAC)/Beijing International Arbitration Centre (BIAC), 'BAC/BIAC Annual Work Summary 2019' (*BAC*, 31 March 2020) <www.bjac.org.cn/news/view?id=3687>accessed 31 December 2020.

and other interested organisations have presented their concerns on the ISDS system and proposals on future reform. A BAC representative attended the 34th session of the meeting in November 2017 and presented the BAC's suggestions on tackling the high costs and lengthy proceedings of the ISDS system.[53]

5.28 In February 2019, the BAC published a Draft Investment Arbitration Rules, Beijing Arbitration Commission/Beijing International Arbitration Centre International Investment Arbitration Rules (Draft for Comment), for public consultation. This is the second Chinese arbitration centre to promulgate a specific set of arbitration rules for investor-State disputes following the CIETAC's attempt in 2017. The formal set of Rules for International Investment Arbitration of the BAC (the 'BAC IA Rules'), which consists of 54 provisions and six annexes, has been in effect since 1 October 2019, though it has yet to be used.

5.29 Just like the CIETAC, the BAC can administrate arbitration in accordance with arbitration rules chosen by parties other than the BAC IA Rules.[54] Moreover, article 2.4 further specifies that the parties can designate BAC to host ad hoc arbitration under the UNCITRAL Arbitration Rules in accordance with procedures guidelines set forth in Appendix F of the BAC IA Rules. The UNCITRAL Arbitration Rules may be applied in two circumstances: (1) where the parties have agreed to submit the dispute to BAC for arbitration in accordance with UNCITRAL Arbitration Rules rather than the BAC IA Rules or (2) where the parties have agreed to arbitrate the dispute according to the UNCITRAL Arbitration Rules for ad hoc arbitration and requested BAC to provide administration services. In each scenario, Appendix F shall be applied in priority to the general rules in other parts of the BAC IA Rules.[55]

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[53] The Delegate of BAC, Audio recording 27/11/2017 10:00:00 – 27/11/2017 12:30:00, 34th session, Working Group III (Investor-State Dispute Settlement Reform) 27 November – 1 December 2017, Vienna (*UNCITRAL*) < https://uncitral.un.org/en/audio#03> accessed 31 December 2020.

[54] BAC Rules for International Investment Arbitration (2019) (BAC Rules) art 2.4.

[55] ibid Appendix F rule 1.1.

5.30 Compared with the CIETAC IA Rules and other investment arbitration rules published years ago, the BAC IA Rules have largely taken into major concerns on the ISDS by introducing several innovative provisions and pilot mechanisms,[56] such as an appeal procedure and expedited proceedings. However, as a senior council of the BAC pointed out, these provisions, especially in the appeal mechanism, are 'more of a research attempt' to put forward a solution to reform the ISDS system.

SCIA Arbitration Rules (2019)

5.31 In addition to the CIETAC and BAC, other China-based arbitration centres have revised or will revise their arbitration rules to conform with the increasing trend of investor-State arbitration cases. The SCIA, also known as the Shenzhen Arbitration Commission, is another first-tier arbitration centre located in one of the four largest metropolises of Mainland China.[57] It promulgated a new set of arbitration rules (the 'SCIA Arbitration Rules') in December 2018, which are effective 21 February 2019. These rules make the SCIA one of the first arbitration centres capable of accepting international investor-State arbitration cases in Mainland China other than the CIETAC and BAC.

5.32 Unlike the CIETAC IA Rules and BAC IA Rules, the new SCIA Arbitration Rules are not tailored to international investor-State disputes. In China, it is generally acceptable to arbitrate cases normally within the scope of arbitrability under Chinese law, meaning cases related to contractual disputes and other disputes over property rights and interests.[58] More specifically, most provisions of the SCIA Arbitration Rules may only supplement investor-State disputes. Article 3.5 of the SCIA Arbitration Rules state that when the parties submit an investment dispute between a state and a national of

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[56] 'Public Consultation on Draft BAC Investment Arbitration Rules' (*Beijing Arbitration Commission*, 12 February 2019) <www.bjac.org.cn/english/news/view?id=3370> accessed 31 December 2020.
[57] The SAIC is merged by two international arbitration centres in China, the South China International Economic and Trade Arbitration Commission (SCIA) and the (former) Shenzhen Arbitration Commission (SAC) in the end of 2017.
[58] SCIA Arbitration Rules (2019) (SCIA Rules) art 1.1.

another state to the SCIA for arbitration, the SCIA shall administrate the case in accordance with the UNCITRAL Arbitration Rules and the SCIA Guidelines for the Administrative of Arbitration under the UNCITRAL Arbitration Rules (the 'Guidelines'). Article 3.6 further clarifies that the Guidelines will prevail where there is any inconsistency between them and the SCIA Arbitration Rules. The SCIA Arbitration Rules will only be applied to matters not covered by the Guidelines.

5.33 To avoid the limitation of arbitrability in Mainland China, article 3 of the Guidelines stipulates that the place of arbitration shall default to Hong Kong if the parties have not agreed on it. Any future enforcement of an interim measure or an arbitral award in Mainland China would likely be governed by special arrangements between the Mainland and Hong Kong, though currently there is no such arrangement on investment arbitration.

5.34 Finally, it is worthwhile to note that the new SCIA Arbitration Rules set a milestone for China-based arbitration institutions. It is the first set of arbitration rules that incorporate an optional appeal phase as provided in the SCIA Guidelines for the Optional Appellate Arbitration Procedure. However, the appellate procedure is unlikely to be applied to investor-State arbitration under the UNCITRAL Arbitration Rules as only arbitration awards made in accordance with Chapter 8 of the SCIA Arbitration Rules can be appealed with the parties' consent.[59]

D. <u>Competitive edges of the new arbitration rules</u>

5.35 The above section illustrates that all three arbitration centres (i.e. the CIETAC, BAC and SCIA) have presented solutions in their new arbitration rules addressing the global concerns about the current ISDS system. In particular, they had addressed concerns that China has expressed in its submission and speeches to the UNCITRAL

[59] ibid art 68.1.

Working Group III. As discussed in detail in Chapter 4, Section C of this thesis, China's concerns primarily focus on the inconsistency and incoherence of arbitral awards, lack of correctness and correction mechanism, lack of professionality and independence of arbitrators, long durations and high costs of arbitral proceedings, and lack of regulations on third-party funding. The three centres have also addressed other highly debated issues, such as transparency rules, third-party submissions and conciliation procedure. The following paragraphs focus on the remarkable features in the CIETAC IA Rules and the BAC IA Rules that benefit disputing parties compared with the existing investment arbitration rules of other arbitration centres, in particular the SICA in Singapore and the ICSID.

The correction procedures – the BAC innovative appeal mechanism

5.36 The lack of a correction mechanism is arguably the core concern of China, especially considering the lack of consistent and coherent arbitral awards.[60] The only remedies provided under ICSID arbitration are the interpretation of the scope and meaning of an award,[61] revision based on decisive but unknown facts[62] and the annulment proceeding.[63] However, it is commonly accepted that the annulment proceedings under the ICSID Convention are not appellate proceedings to cure a wrong arbitral award.[64] The ad hoc committee is unable to review the merits of the dispute. Indeed, the five prescribed grounds for annulment in article 52(1) of the ICSID Convention merely involve procedural defects in the original arbitral proceedings.

5.37 In contrast, China is keen to have a real appellate phase to the current arbitral tribunal proceeding. China's written submission to UNCITRAL Working Group III in 2019

[60] Submission of China (n 1), s II.1.
[61] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 50.
[62] ibid art 51.
[63] ibid art 52.
[64] 'Updated Background Paper on Annulment For the Administrative Council of ICSID' (ICSID, 5 May 2016) (ICISD Annulment Background) para 74

specifically states that the government supports setting up a multinational permanent appeal court that may resemble the Appellate Body of the World Trade Organization.[65] In fact, China had considered a bilateral appellate mechanism several years before the UNCITRAL meetings. China and Australia consented in article 9.23 of the China-Australia FTA (2015) to commence negotiations on the possible appellate mechanism to review investor-State arbitral awards. The scope of appeal was planned to be limited to questions of law only. However, China now intends to expand the scope of appeal to manifest errors of facts in addition to all issues of law, as investment arbitration usually involves complex factual issues, including the determination of domestic laws of the host state and compensations of losses.[66]

5.38 The CIETAC and BAC took distinctive approaches in terms of the correction mechanism, in particular the appeal procedure. The CIETAC IA Rules, promulgated in 2017, still follow the conservative path precluding the possibility to appeal an arbitration award. Article 47.4 of the CIETAC IA Rules specifies that an arbitral award made under the rules is final and binding upon all parties and cannot be revised by any court or organisation upon the parties' application. No annulment proceedings or appellate phase are available under the CIETAC IA Rules. To ensure the correctness of the award, a tribunal has to submit draft award to the CIETAC for scrutiny before rendering the final award, by which the CIETAC may raise issues but cannot mitigate the independence of the tribunal.[67] After rendering the final award, a tribunal may on its own initiative or upon requests of parties make additional awards on matters omitted in the original award.[68]

5.39 On the other hand, the BAC designs multiple provisions to enhance the correctness and consistency of investment arbitral awards. For example, the parties will have

[65] Submission of China (n 1) s III.1.
[66] The China's Delegate, Audio recording 20/1/2020 10:00:00 – 20/1/2020 12:30:00, Resumed 38th session, Working Group III (Investor-State Dispute Settlement Reform) 20 – 24 January 2020, Vienna (*UNCITRAL*) < https://uncitral.un.org/en/audio#03> accessed 31 December 2020.
[67] CIETAC Rules (n 42) art 49.
[68] ibid art 51.

opportunities to review and comment on the draft of an award within a specific time frame before it is finalised by the tribunals. Although those comments of parties will not bind the tribunal, the tribunal may give appropriate considerations to the comments when deemed necessary.[69] The BAC may also have the power to draw the tribunal's attention to any matters in the award without prejudice to the tribunal's discretion.[70] Furthermore, even after the issuance of an award, a tribunal can make supplementary awards voluntarily or upon request of a party within 30 days after the final award if a claim has been presented in the arbitration but not yet determined in the award.[71]

5.40 However, the most innovative mechanism of the BAC IA Rules is the incorporation of an appeal mechanism, which is formulated in the Appendix E Rules of Appeal Proceedings for International Investment Arbitration of the BAC IA Rules. Although article 42.8 of the BAC IA Rules provides that the award shall be final and binding upon the parties, it further permits the award to be appealed in accordance with the appeal mechanism under the BAC. The mechanism offers a full review examining both the procedures and merits of the first instance, as illustrated below. Like an appellate court, the BAC appeal committee has the power to make a new award to replace the original award so that the award of appeal becomes the final award binding on the parties.[72]

5.41 As the first set of investment arbitration rules that allows appealing an arbitral award, one may recall the annulment proceedings under the ICSID Arbitration Rules that have been invoked by parties as a remedy to correct unsatisfactory arbitral awards. The fundamental difference between the BAC appeal procedure and the ICSID annulment proceedings is the nature of the mechanisms. As specified in article 53.1 of the ICSID Convention, an ICISD award shall be binding on the parties and shall not

69 BAC Rules (n 54) art 42.4.
70 ibid art 42.5.
71 Ibid art 45.
72 BAC Rules (n 54) Appendix E rule 8.7.

be subject to any appeal. The ICSID annulment is a limited remedy provided by the ICSID Convention to safeguard procedural errors in the decision process.[73] As the Annulment Committee stated in its Decision of Annulment in *Klöckner Industrie-Anlagen GmbH et al v United Republic of Cameroon and Société Camerounaise des Engrais*, an ad hoc committee 'in principle has no jurisdiction to review the arbitrators' findings of fact or law' and has 'no power to correct a mistaken application of law or "error in judicando" beyond the strict limits of Article 52'.[74] Though most ad hoc committees stuck to the fundamental principle of the annulment procedure, some committees were criticised for re-examining the merits of awards when determining possible errors in fact or law in the original awards.[75]

5.42 The distinctive nature of the two mechanisms also presents in the consequences of the commencement of proceedings. Under the BAC IA Rules, the original award becomes pending so that neither party can seek performance nor enforcement of, or apply to set aside, the original awards during the appeal proceedings.[76] On the contrary, the stay of enforcement of the original awards made by the ICSID tribunal is not automatically granted. Rather, it can only be allowed by the annulment committee when it considers that the circumstances so require or upon request of either party.[77]

a. Commencement of appeal proceedings

5.43 In contrast to the ICSID arbitration where either party has the right to request annulment by a written application,[78] parties to the BAC investment arbitration do not automatically have the right to appeal, even when they have agreed to apply the

[73] ICSID Annulment Background (n 64) para 71.
[74] *Klöckner Industrie-Anlagen GmbH et al. v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision on Annulment (3 May 1985) para 128.
[75] Meg Kinnear, Geraldine R. Fischer and others, *Building International Investment Law - The First 50 Years of ICSID* (Wolters Kluwer 2015)700.
[76] BAC Rules (n 54) Appendix E rule 1.6.
[77] ICSID Convention (n 61) art 52.5; ICSID Convention Arbitration Rules (2006) (ICSID Rules) rule 54.1.
[78] ICSID Convention (n 61) art 52.1.

BAC IA Rules to the arbitration. An appeal must be based on a separate written consent of parties reached no later than the expiration of the time limit set for comments on an award.[79] A party that is dissatisfied with the award shall submit the Notice of Appeal that illustrates, among other things, the appeal agreement, grounds of appeal and decision sought from the BAC within 60 days of the final award.[80] As Rule 1.5 states, the appeal proceedings shall be deemed to commence upon the valid submission of the Notice of Appeal. In other words, a party that lodges an appeal based on a valid appeal agreement does not need to seek prior leave to appeal from the BAC or original tribunal.

b. Grounds for appeal

5.44 The grounds for appeal under Rule 3 of Appendix E of the BAC IA Rules are limited to three scenarios covering aspects of applicable law, merits and procedural rules, in particular: (1) where the arbitral award contains errors in the application or interpretation of the applicable law or rules of law; (2) where the arbitral award contains manifest and material errors of fact; and (3) where the BAC or the tribunal lacked jurisdiction, or the tribunal exceeded its power. Nevertheless, article 46.4 of the BAC IA Rules allows parties to agree on other grounds for appeal that differ from the three grounds prescribed by the rules. Whether such an appeal could be considered will depend on the discretion of the BAC to avoid any difficulties in the enforcement of an award arising from potential conflicts between the stipulated grounds and the law of the seat.[81]

5.45 Compared with the BAC rules, the grounds for annulment of the award under article 52.1 of the ICSID Convention are limited to procedural issues, including: (1) the tribunal was not properly constituted; (2) the tribunal manifestly exceeded its power;

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[79] BAC Rules (n 54) art 46.2.
[80] ibid art 46.3 and Appendix E rule 1.1
[81] Xi Zhang, 'Focus on BAC/BIAC Rules Appeal Mechanism' (BAC 3 July 2020) <www.bjac.org.cn/news/view?id=3749> accessed 31 December 2020.

(3) there was corruption on the part of a member of the tribunal; (4) there was a serious departure from a fundamental rule of procedure; and (5) the award failed to state the reasons on which it is based. It seems that the grounds for appealing the BAC cover all the grounds for annulment, except the corruption of the tribunal, although statistics suggest parties have rarely invoked this reason.[82]

c. Members of the appellate tribunal

5.46 The nomination process for a BAC appellate tribunal is similar to that of a tribunal of the first instance: each party shall nominate an arbitrator, and a third arbitrator will be nominated by consent of the parties. Furthermore, in each case, the chairman of the BAC can be entrusted by the parties or the chairman can act on initiative if the parties fail to exercise their right to appoint arbitrators.[83] However, members of an appellate tribunal must be those on the roster of arbitrators set up and maintained by the BAC. In no case should the appellate tribunal consist of the same arbitrators who sat in the first instance.[84] Similarly, an ad hoc committee of annulment under the ICSID Rules must consist of three persons from the Panel of Arbitrators, though all three must be nominated by the chairman of the Administrative Council upon request of the secretary-general of the ICSID.[85]

d. Consequences of appeal

5.47 The appellate tribunal shall make its decision based on one or more hearings so that the parties can orally present their cases and answer questions. In rare instances, the appellate tribunal may solely rely, by agreement of the parties, on written submissions without any hearing.[86] Normally, the appeal award will be rendered

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[82] 0 - updated current to 15 Apr 2016, See ICSID Annulment Background (n 64) 56.
[83] BAC Rules (n 54) Appendix E rules 2.2 and 2.3.
[84] BAC Rules (n 54) Appendix E rule 2.1.
[85] ICSID Convention (n 61) art 52; ICSID Rules (n 77) rule 52.1.
[86] BAC Rules (n 54) Appendix E rule 5.3.

within 90 days from the constitution of the appellate tribunal. While an extension of 30 days can be allowed upon request of the appellate tribunal, any further extension will be subject to parties' consent.[87]

5.48 The appeal award will be the final award substituting the original award.[88] There are three forms of appeal awards: (a) upholding the original award; (b) making material modifications to the original award; or (c) making a new award.[89] In contrast, a decision made by the ICSID annulment committee cannot simply replace the original tribunal's determination with its own given it is not authorised to review the merits of cases.[90] The annulment committee may only decide to annul all or any part of the award on one of the grounds for annulment.[91] Either party may resubmit a dispute to the ICSID if a committee later annuls part or all of an award.[92]

5.49 One should bear in mind that neither the BAC appellate rules nor the appellate proceedings under the SCIA for commercial arbitration have been used yet. In other words, how an appeal award will be recognised or enforced within China is far from clear, so that disputant parties may be reluctant to opt in an appellate procedure even if the result of the original arbitral proceeding is unsatisfactory. Nevertheless, compared with the pilot and indeed experiential appellate mechanism, a more accessible remedy for curing a decision of an arbitral tribunal seated in China is the verification procedure before Chinese courts, which will be discussed later.[93]

Qualification of arbitrators and the Roster

a. CIETAC

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87 ibid Appendix E rule 8.1.
88 ibid Appendix E rule 8.7.
89 ibid Appendix E rule 8.2.
90 Meg Kinnear (n 75) 700
91 ICSID Convention (n 61) art 52.3.
92 ibid art 52.6; ICSID Rules (n 77) rule 55.1.
93 See paras 4.157-4.172.

5.50 The arbitrators are the second group of concern for China. In the meetings of UNCITRAL Working Group III, Chinese representatives expressed concern about the professionality of some arbitrators because they may lack abundant knowledge or experiences in the international public law. To maintain the professional standard of arbitrators, the CIETAC keeps a roster of eligible arbitrators who are of good moral character and recognised professional abilities in law, investment or other fields and are proficient in exercising independent judgement.[94] Parties are generally required to choose arbitrators from the roster, but they can appoint other arbitrators subject to the same moral and professional standards and the approval of the chairman of the CIETAC.[95] In September 2018, the CIETAC announced its first International Investment Panel of Arbitrators, which is a list of arbitrators who can hear investment treaty arbitration in the CIETAC. The roster has a diverse selection of members: of the 79 arbitrators, 21 come from Mainland China, five from Hong Kong and 53 from 34 foreign countries (including 13 European, eight Asian, three African, two Northern American, four Southern American and two Oceanian countries).[96]

5.51 Another safeguard to ensure the independence and impartiality of the arbitrators is challenging the arbitrators. ICSID Rule 9(4) provides that the success of a challenge will be decided by other members of the tribunal not subject to the challenge. In contrast, under the CIETAC IA Rules, it is the chairman of the CIETAC rather than the tribunal who decides the challenges to arbitrators.[97] The chairman may consider all relevant circumstances and shall state reasons for the decision unless otherwise agreed.[98] Such a decision is final and non-appealable. This provision follows SIAC Rule 13.1 and 13.4 and SCC Rules article 19(5).

[94] CIETAC Rules (n 42) art 11.2; CIETAC International Investment Panel of Arbitrators (2018).
[95] ibid art 11.1.
[96] Turkey is temporally noted as an Asian country.
[97] CIETAC Rules (n 42) art 17.4.
[98] ibid.

b. BAC

5.52 Article 8 of the BAC IA Rules imposes more requirements on arbitrators than the CIETAC IA Rules. Accordingly, a competent arbitrator should have knowledge of public international law in addition to other moral, professional and language requirements.[99] Some arbitrators with global reputations have overcommitted themselves because they are repeatedly designated in various proceedings and duties. Therefore, the BAC reminds parties to choose arbitrators who have sufficient availability to deal with the dispute. In addition, although the BAC does not publish its own code of conduct for arbitrators, it requests that all arbitrators ensure their conduct conforms with internationally recognised codes of ethics.[100] Such a request may be a reference to the Code of Conduct for Adjudicators in Investor-State Dispute Settlement, which is scheduled for joint publication by the ICSID and UNCITRAL in the near future.

5.53 Like the CIETAC, the BAC also plans to maintain a roster for arbitrators, namely the BAC/BIAC Panel of Arbitrators for International Investment Disputes, which has not been published at this time.[101]

5.54 Finally, it is worth noting that article 13 of the Arbitration Law of China also contains mandatory qualification requirements for arbitrators in China. In particular, a competent arbitrator shall be a professional with one of the four following qualifications: (1) possess work experience in arbitration for at least eight years; or (2) have been a lawyer or judge for at least eight years; or (3) have been engaged in legal research or education and possess a senior professional title; or (4) have legal knowledge and been engaged in professional work, such as economics and trade, and possess a senior title or has an equivalent professional title. In other words, for arbitration seated in China, arbitrators must meet both the qualification

[99] BAC Rules (n 54) art 8.1.
[100] ibid art 8.2.
[101] ibid art 9.

requirements under the selected arbitration rules and the mandatory requirements under Chinese law.

Measures related to costs and duration of arbitration

5.55 In response to universal concerns that investor-State arbitration could be too lengthy and expensive for parties, both the CIETAC and the BAC formulate a series of rules to mitigate costs and control time frames. Common measures adopted by both institutions include allowing the engagement of emergency arbitrators to impose interim measures as early remedies, permitting a tribunal to dismiss a claim at an early stage of the proceeding, and promulgating flexible schemes of remuneration of arbitrators. Moreover, the BAC introduces an indictive timetable to guide the time management of arbitral tribunals and a set of rules on expedited arbitration, which is another innovation in international investment arbitration rules.

a. Emergency arbitrators and interim measures

i. CIETAC

5.56 The CIETAC IA Rules permit a party to apply for emergency relief based on the parties' agreement or applicable law by requesting that the arbitration centre appoint an emergency arbitrator within 1 business day before the constitution of a tribunal in accordance with the procedural rules listed in Appendix II of the CIETAC IA Rules. An emergency arbitrator has the power to decide whether to allow any necessary or proper interim measures upon the party's application.[102] After a tribunal is constituted, it can issue interim measures when it deems necessary or proper upon a party's application with or without appropriate security deposits.[103] Unlike article 24 of the SIAC Investment Rules, which lists types of interim measures that a tribunal

[102] CIETAC Rules (n 42) art 40.1 and Appendix II.
[103] ibid art 40.2.

or an emergency arbitrator is empowered to take, the CIETAC IA Rules only roughly grant the tribunal or emergency arbitrator a general right to impose interim measures. The range and strength of interim measures are largely subject to applicable procedural laws and regulations of the arbitral seat.

ii. BAC

5.57 Similarly, article 35.7 of the BAC IA Rules permits a party to apply for emergency interim relief prior to the constitution of the arbitral tribunal if the parties have expressly agreed on the application of the Appendix D Rules for Emergency Arbitrator in International Investment Arbitration. The rules for emergency arbitrators and emergency interim reliefs under the BAC IA Rules, in general, are similar to those under the CIETAC IA Rules.

b. Early dismissal

i. CIETAC

5.58 Article 26 of the CIETAC IA Rules resembles article 26 of the SIAC Investment Rules: a party may file an application for early dismissal if the claim or counterclaim is manifestly without legal merits or manifestly out of the jurisdiction of the tribunal.[104] However, there are three major differences between the two sets of arbitration rules. Most importantly, the SIAC Investment Rules provide not only the respondent with rights to dismiss a claim at an early stage but also provide the applicant a chance to early object to a defence raised by the respondent. In contrast, an applicant to an arbitration case under the CIETAC IA Rules cannot. The second difference concerns the number of grounds for early dismissal. A party can raise an early objection on the grounds that the claim is manifestly inadmissible under the SIAC Investment Rules

[104] ibid art 26.1.

while the CIETAC IA Rules only provides the former two grounds as mentioned. Third, the SIAC does not provide guidance on the time limit for the applications of early dismissal. In contrast, article 26.3 of the CIETAC IA Rules provides that an application shall be proposed as soon as possible and cannot be raised after the submission of the defence of claims/counterclaims if the defending party intends to rely on the grounds that the claims/counterclaims are 'manifestly without legal merits'. As to the time limit, both the CIETAC IA Rules and SIAC Investment Rules require the tribunal to make a decision on early dismissal within 90 days except in exceptional cases.[105]

ii. BAC

5.59 Early dismissal of any claim or counterclaim that is manifestly without legal merit or manifestly outside the jurisdiction of the tribunal is also allowed under the BAC IA Rules.[106] Compared with the CIETAC IA Rules, the BAC imposes a tighter time limitation for both parties to file applications and the tribunals to reach decisions about early dismissal. Specifically, a party shall file a written application for the early dismissal of a claim or counterclaim no later than 30 days after the constitution of the arbitral tribunal unless otherwise agreed by parties.[107] The tribunal shall decide the application within 45 days after the later date of either the constitution of the tribunal or the last submission on the application.[108]

c. Duration

i. CIETAC

5.60 Under the CIETAC, an award should be made within 6 months after the close of the hearing, subject to an extension granted by the chairman of the CIETAC.[109] It may

[105] ibid art 26.5; SIAC Rules (n 31) art 26.4.
[106] BAC Rules (n 54) art 34.
[107] ibid art 34.2 (a).
[108] ibid art 34.2 (c).
[109] CIETAC Rules (n 42) art 45.

take a longer time for an award in comparison with the SIAC rules where a tribunal shall issue a draft award to the Registrar for correction and approval within 90 days from the close of the arbitral proceedings.[110] However, the SIAC does not provide a specific time limit for the following correction and approval procedure, so that how the time frame for a final award to be rendered is not guaranteed.

ii. BAC – The indicative timetable

5.61 As stated in article 18.1 of the BAC IA Rules, one of the objectives of the tribunal is to ensure the 'fair, expeditious, economical and final resolution' of disputes. Therefore, the BAC takes measures to facilitate the tribunal to achieve the objective. For example, the BAC requires all arbitration documents, including statements, notices, orders and awards, to be delivered electronically by default, except the Notice of Arbitration and the Respondence to the Notice.[111] In addition, the BAC IA Rules specify that any party that delays the arbitral proceedings may face adverse cost consequences. According to articles 47.4 and 47.7, unless otherwise agreed by the parties, the tribunal will decide the allocation of costs, including costs for arbitration and costs for legal counsels of parties, based on the 'the outcome of case, each party's contribution to the efficiency and expeditiousness of arbitration' and other relevant factors.[112] Finally, arbitration proceedings may be ordered to discontinue if parties fail to take any steps for 6 consecutive months.[113]

5.62 The BAC IA Rules follow a common practice in international arbitration: an arbitral tribunal is expected to set a working timetable for the case after consulting with parties in the case management meeting so as to control the procedure.[114] Furthermore, the BAC provides tribunals with an indicative timetable in Appendix

[110] SIAC Rules (n 31) art 30.3.
[111] BAC Rules (n 54) art 49.2.
[112] See also cost for appeal at ibid Appendix E arts 9.7 and 9.10.
[113] ibid art 30.6.
[114] ibid art 9.

B.[115] Each major step of the proceedings, starting from the constitution of the tribunal to the production of the final award, is designated with a suggested time frame, save for any changes in light of developments in the arbitral proceedings.[116] For example, according to the indicative timetable, the first case management conference should be held within 30 days from the date of constitution of the arbitral tribunal; a hearing should be scheduled no later than 60 days from the date of filing of the rejoinder by the respondent; and the closure of arbitral proceedings should happen within 60 days from the hearing and a final award should be rendered 150 days from the date of closure of the proceedings. In accordance with the timetable, an award is expected to be delivered within 730 days from the constitution of the arbitral tribunal if the tribunal and parties stick to the timetable with no modifications. This is consistent with the prescribed time limit in article 19.4 where a tribunal shall issue a final award within 24 months from its constitution or 30 months in bifurcated cases, save for a justified extension of time permitted by the BAC upon request of the tribunal.

d. Expedited procedure of BAC

5.63 As one of the major innovations of the BAC IA Rules, parties may agree to expedite the arbitration via special rules of expedited arbitration in accordance with the Rules of Expedited Procedures for International Investment Arbitration in Appendix C.[117]

5.64 Accordingly, parties that agree to follow the expedited procedure shall jointly notify their consent to the BAC in writing within 20 days after the respondent receiving the notice of arbitration.[118] In summary, the expedited procedure differs from normal arbitral proceedings under the BAC IA Rules in the following aspects, in addition to general more stringent time limits for each procedure.

[115] ibid art 19.2.
[116] ibid Appendix B note 2.
[117] ibid art 38.
[118] ibid Appendix C, rule 1.

- The tribunal for expedited arbitration is composed by a sole arbitrator by default.[119] In contrast, a tribunal applying normal procedure rules is composed by three arbitrators by default.[120]

- Neither party is allowed to file new claims or counterclaims after the composition of the tribunal unless being permitted by the tribunal after full consideration of relevant circumstances.[121] In normal proceedings, however, parties are generally allowed to amend its claims or counterclaims unless the tribunal considers the amendment is proposed too late or inappropriate to be accepted.[122]

- An application of documents disclosure may be declined by the tribunal after consulting opinion of both parties,[123] while the indicative timetable allocates 90 days for the disclosure phase for normal arbitral proceedings.[124]

- The tribunal may make the final arbitral award only based on the documents submitted by the parties without any hearing or expert examination after consulting opinion of both parties.[125] In contrast, the tribunal shall hold at least one hearing for a normal arbitration case under the BAC IA Rules unless otherwise agreed by parties.[126]

- As to the time limits, a final award under the expedited procedure could be rendered within 385 days from the date of constitution of the tribunal, save for any extension that is deemed necessary by the tribunal.[127]

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[119] ibid Appendix C, rule 2.1.
[120] ibid art 9.2.
[121] ibid Appendix C, rule 3.1.
[122] ibid art 23.6.
[123] ibid Appendix C, rule 6.
[124] Ibid Appendix B.
[125] ibid Appendix C, rule 7.
[126] ibid art 24.1.
[127] ibid Appendix C, rules 3.2 and 3.3.

e. Costs

i. CIETAC

5.65 The arbitration costs under the CIETAC IA Rules are relatively lower than those under other rules. Article to Article 52.1 and Appendix I, arbitration costs charged by the CIETAC include:

- The tribunal's fees and expenses (including emergency arbitrators), which will either be charged according to an ad valorem-based scale or an hourly rate.[128] By default, an arbitrator (excluding an emergency arbitrator) will charge in line with the Fees Table that provides the range of fees subject to the increase of the amount in dispute.[129] For disputes that amount up to CNY 500,000 (USD 76,580),[130] the fees for each arbitrator will be within the range from CNY 15,000 (USD 2,300) to CNY 60,000 (USD 9,200) as determined by the CIETAC. The fee cap is placed on disputes over the amount of CNY 2,000,000,001 (USD 306,170,000), where each tribunal member charges from CNY 536,500 (USD 82,100) to CNY 10,000,000 (USD 1,530,800).[131] The maximum limit of each range can be lifted upon either both parties' consent or a decision of the CIETAC in certain circumstances.[132] For emergency arbitrators and other arbitrators to whom parties agree to pay an hourly rate, the rate normally shall not exceed the maximum hourly rate published on the website of the CIETAC (though it has not been published yet), save for some exceptions.[133]

- Experts' fees and charges for other assistance required by the tribunal.

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[128] CIETAC Rules (n 42) Appendix I s III.
[129] ibid Appendix I s III (a) 2.
[130] For this chapter, the converter used for calculation of currency is XE Currency Converter based on live market rates on 31 December 2020.
[131] CIETAC Rules (n 42) Appendix I s III (a) 1.
[132] ibid Appendix I s III (a) 3.
[133] ibid Appendix I s III (b).

- Fees for the CEITAC administration include a fixed registration fee of CNY 25,000 (USD 3,800);[134] an administration fee calculated according to the amount in dispute, starting from CNY 24,000 (USD 3,700) and capped at CNY 420,900 (USD 64,400) for an amount over CNY 400,000,001 (USD 61,228,600); and other expenses, such as translation fees, transcription fees and the costs for using hearing rooms.[135]

5.66 Unless otherwise agreed by the parties, the tribunal has the power to determine in the final judgment the allocation of arbitration costs spent by the parties.[136] The tribunal can order the losing party to indemnify the wining party reasonable costs for the arbitration, but the reasonableness depends on the result, complexity, actual workload and number of disputes.[137]

ii. BAC

5.67 The Schedule of Fees for investment arbitration of the BAC IA Rules, which is listed in Appendix A, is generally similar to the one of the CIETAC IA Rules with slight differences in the amount. The non-refundable registration fee is CNY 20,000 (USD 3,100),[138] and the administrative fee is calculated based on the value of the dispute, which starts from CNY 25,000 (USD 3,800) for disputes below CNY 1,000,000 (USD 153,100) and is capped at CNY 456,000 (USD 69,800) for disputes over CNY 500,000,000 (USD 76,541,400).[139] In terms of the costs of the tribunal, arbitrators are also allowed to charge either an hourly rate or by the value of the dispute,[140] subject to the cap applied in each situation. The hourly rate cap is explicitly stipulated

134 ibid Appendix I s I.
135 ibid Appendix I ss II.1 and II.4.
136 ibid art 53.1.
137 ibid art 53.3.
138 BAC Rules (n 54) Appendix A rule 1.
139 ibid Appendix A rule 2.
140 ibid Appendix A rule 3.1.

as CNY 5,000 (USD 765) for each arbitrator.[141] The remuneration for each arbitrator is capped at CNY 10,000,000 (USD 153,000) if he/she charges by the value of the dispute.[142]

5.68 Nevertheless, charges for emergency arbitrators are calculated separately and in addition to the normal costs as illustrated above. Costs for the emergency arbitrator procedures are usually fixed, including a non-returnable administrative fee of CNY 20,000 (USD 3,100), a fixed remuneration of the emergency arbitrator of CNY 100,000 (USD 15,300) and his/her actual expenses.[143] In rare cases, the chairman of the BAC may alter the administrative fee and the remuneration upon the request of the emergency arbitrator or if otherwise deemed appropriate.[144]

5.69 In terms of costs for the appeal proceedings, the BAC will charge a fixed non-returnable registration fee of CNY 30,000 (USD 4,600) and administration fees in principle between CNY 50,000 (USD 76,600) and CNY 200,000 (USD 30,600).[145] Members of the appellate tribunal will charge by the hourly rate with a cap of CNY 5,000 (USD 765) and reasonable expenses approved by the tribunal.[146]

Transparency

a. CIETAC

5.70 Transparency of arbitral proceedings is specifically regulated in the CIETAC IA Rules, especially in terms of hearings and disclosures of arbitral documents. Hearings shall be public unless otherwise agreed by parties or decided by the tribunal.[147] Disclosure of case documents in the arbitral proceedings is the default under the

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141 ibid Appendix A rule 3.3 (d).
142 ibid Appendix A rule 3.4.
143 ibid Appendix D rule 6.1.
144 ibid Appendix D rule 6.2.
145 ibid Appendix E rules 9.4 and 9.5.
146 ibid Appendix E rule 9.2.
147 CIETAC Rules (n 42) art 32.1.

CIETAC IA Rules article 55, unless otherwise agreed by the parties. Types of disclosable documents are expressly specified in article 55.2, include any written statements by the parties,[148] any written submission by non-parties, minutes of hearings, and orders, decisions, awards of the arbitral tribunal, excluding any confidential or protected information.[149]

5.71 The transparency rules of the CIETAC are in sharp contrast with the SIAC Investment Rules where all meetings and hearings shall be in private and all matters relating to the arbitral proceedings, including all submissions and documents produced by parties and even the arbitral award, are treated as confidential unless otherwise agreed by the parties.[150] Specifically, the SIAC may only publish limited details of the arbitration, such as the nationality of the parties, the identity of the tribunal members, the legal instrument under which the arbitration has commenced and the date of commencement, and whether the proceedings are ongoing or have been terminated. Although the SIAC cannot publish an award without parties' prior written consent, it may publish redacted excerpts of reasoning of the tribunal and redacted decisions on challenges to arbitrators.[151]

b. BAC

5.72 The transparency rules under the BAC may refer to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the 'UNCITRAL Rules on Transparency'). Though China is not a signatory to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the 'Mauritius Convention

[148] ibid art 55.2 (a)-(f). Including Request for Arbitration, Response to the Request for Arbitration, Statement of Claim, Statement of Counterclaim, Statement of Defence and any other written states of the parties.
[149] ibid art 55.3.
[150] SIAC Rules (n 31) arts 21.4, 37.1 and 37.3.
[151] ibid arts 38.1 and 38.2.

on Transparency'),[152] parties may opt in Article 3 to Article 7 of the UNCITRAL Rules on Transparency in whole or part by written agreement in accordance with Article 50.1 of the BAC IA Rules,[153] and such applications of the UNCITRAL Rules on Transparency will prevail over relevant provisions of the BAC IA Rules.[154]

5.73 Article 1.1 of the UNCITRAL Rules on Transparency provides an automatic application for arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded on or after 1 April 2014 by default. Given the BAC IA Rules allow parties to submit a dispute to the BAC in accordance with the UNCITRAL Arbitration Rules, the UNICTRAL Rules on Transparency may also be applied by default for cases arising from most recent treaties.

5.74 When parties do not consent to the application of the UNCITRAL Rules on Transparency, the default scope of publishable arbitral documents is narrower compared with the CIETAC IA Rules. In other words, only the Notice of Arbitration, the Notice of Appeal, and orders, decisions and awards made by the tribunal or the appellate court will be published save for any confidential or protective information therein.[155] This conservative approach is consistent with the attitude of the BAC on the hearings. In contrast with the CIETAC IA Rules, hearings under the BAC IA Rules will be private by default. All recordings, transcripts and documents of the proceedings shall be kept confidential unless otherwise agreed by parties.[156]

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[152] 'Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York 2014)' (*UNCTRAL*) <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> accessed 30 December 2020.

[153] Namely, the scope of provisions that may be applied include article 3 Publication of documents, article 4 Submission of a third person, article 5 Submission of a non-disputing party to the treaty, article 6 Hearings and article 7 exceptions to the transparency. Article 1.9 of the UNCITRAL Rules on Transparency allows the Rules to be used in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

[154] BAC Rules (n 54) art 50.1.

[155] ibid art 50.2.

[156] ibid art 24.4.

<u>Third-party submission</u>

a. CIETAC

5.75 Article 44 of the CIETAC IA Rules provides a set of rules on third-party submissions similar to Rule 29 of the SIAC Rules. Accordingly, a third-party other than the disputing parties can submit its written opinion to the tribunal after notifying the parties and the CIETAC in writing. There are two types of third-party submissions. For an investment dispute arising from an investment treaty, the other contracting State other than the State that is usually the respondent may make written submissions on the interpretation of the treaty in relation to the dispute either on its own initiative or by invitation of the tribunal.[157] On the other hand, a party that is neither a disputing party nor a contracting party may also make written submissions to the tribunal on matters within the scope of the dispute.[158] Whether a tribunal will accept the submissions in this circumstance depends on various factors in addition to the opinion of both disputing parties, such as the extent the submissions would assist the tribunal in the determination of issues, the intensity of interests of the third-party in the arbitral proceedings and whether allowing the written submission would compromise the disputing parties' rights and confidentiality,[159] though the tribunal may provide with the third-party documents of arbitral proceedings if truly necessary to facilitate its participation in the arbitration.[160]

5.76 As a general rule, a third-party must disclose its interests in the dispute in the submission, include its members and legal status, its general objectives, the nature or its activities and any parent organisations that directly or indirectly controls the third-party. It should also disclose whether it has any direct or indirect affiliation with any disputing party and identify any government, organisation or person that has provided financial assistance or other assistance during the preparation of the

157 CIETAC Rules (n 42) art 44.1.
158 ibid art 44.2.
159 ibid art 44.4.
160 ibid art 44.10.

written submission.[161] A tribunal has the duty to ensure that any submission of a third-party will not disrupt the arbitral proceedings and parties will not suffer any unreasonable additional burdens or unfair prejudice.[162]

b. BAC

5.77 As to the third-party submissions, the BAC takes a similar approach by allowing a party to the treaty that is not a party to a dispute to make written submissions on a question of treaty interpretation directly relevant to the dispute[163] or any third-party that is not a disputing party to submit its written opinion on a matter within the scope of the dispute subject to the approval of the tribunal.[164] The tribunal may, after consulting with the parties, also open documents related to the arbitral proceedings to the third party to the extent that is necessary for the third-party to participate in the proceedings.[165]

Third-party funding

a. CIETAC

5.78 Third-party funding has become a major concern for states, as expressed in the UNCTAD Working Group Meetings. However, despite the SIAC and CIETAC, other major investment arbitration rules, including the ICSID Arbitration Rules, SCC Rules, UNCITRAL Arbitration Rules and the PCA Arbitration Rules, have not contained provisions on third-party funding. Under the SIAC Arbitration Rules, whether to order the disclosure of the existence and details of a third-party funding arrangement depends on the discretion of the tribunal.[166] In contrast, the disclosure of third-party

161 ibid art 44.3.
162 ibid art 44.11.
163 BAC Rules (n 54) art 36.1.
164 ibid art 36.2.
165 ibid art 36.9.
166 SIAC Rules (n 31) art 24.l.

funding is mandatory under the CIETAC IA Rules. Article 27.1 defines third-party funding as referring to a non-party that provides funds to a party to the arbitral proceedings to cover all or part of that party's costs for the arbitral proceedings through an agreement with the party accepting the funding. After the conclusion of the agreement, the party that receives the funds has an immediate obligation to notify in writing the other party, the tribunal and the arbitration centre that administrates the case the existence and nature of the third-party funding arrangement as well as the name and address of the funder, and any other information as demanded by the tribunal.[167] The existence of the funding and whether the party that receives the funds has performed the duty of disclosure without delay may be a considering factor for the tribunal when apportioning the arbitral costs in the final award.[168]

b. BAC

5.79 The BAC IA Rules impose a heavier burden on the disclosure of third-party funding than the CIETAC IA Rules. In addition to the existence of the identity of the third-party funder, a third-party that is relied on for funding under the BAC IA Rules shall also promptly notify the BAC of the identity of the actual controller of the funder, the relationship between the actual controller and the arbitrators of the tribunal, and whether the third-party funder will undertake adverse costs liability.[169] The duty of disclosure is extended to any change to the information occurring after the initial disclosure.[170] Like the tribunals under the CIETAC IA Rules, the BAC tribunals shall also consider any relevant factor of the third-party funding and may even order the party that receives the funding to provide surety against costs if the funder does not commit to cover adverse costs liability.[171]

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167 CIETAC Rules (n 42) art 27.2.
168 ibid art 27.3.
169 BAC Rules (n 54) art 39.2.
170 ibid art 39.4.
171 ibid art 39.5.

Conciliation and mediation

5.80 Using alternative dispute resolutions (ADRs) to resolve investment disputes is not a novel idea in the Chinese BITs. For example, article 13.1 of the latest draft of the Chinese model BIT demands a 6-month compulsory negotiation before judicial procedure.[172] Though it has yet to sign the Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation'), China stared in the written submission to the UNCITRAL Working Group III 36th Session recommending ADRs in the ISDS system. As previously illustrated, Chinese arbitration centres advocate mediation to supplement the investor-State arbitration.[173] In fact, there is a tradition under the Chinese legal system that mediation is encouraged both before and during the court and arbitration proceedings.

a. Mediation under the CIETAC IA Rules and BAC IA Rules

5.81 Both the CIETAC IA Rules and BAC IA Rules combine conciliation/mediation into the arbitration proceedings, which is unique compared with other investment arbitration rules.[174] The conciliation/mediation rules under the CIETAC IA Rules and BAC IA Rules are largely identical. For example, under the CIETAC, a conciliation will normally be held by the same tribunal that hears the arbitration case upon a unanimous consensus of parties, or upon a request of a party and a consent of the other party obtained by the tribunal.[175] The conciliation shall be conducted in any manner but must be in private. Any opinion, view or statement, proposal or proposition expressing acceptance or opposition in the process of conciliation shall be made without prejudice and cannot be invoked by the other party in the subsequent arbitral proceedings.[176] To avoid any possible influence on the judicial

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[172] Xiantao Wen, 'Comments on the Draft of China's Model BIT (III)' (2012) 19 Journal of International Economic Law 57.
[173] The Delegate of the BAC (n 53).
[174] CIETAC Rules (n 42) art 43; BAC Rules (n 54) art 31.
[175] CIETAC Rules (n 42) art 43.1.
[176] ibid art 43.8.

discretion of the tribunal, parties may conduct the conciliation in any other form without the interference of the tribunal but with the assistance of the CIETAC,[177] or even change arbitrators upon both parties' consent after the failure of conciliation.[178] If the conciliation is successful, then the parties must conclude a settlement agreement[179] and either withdraw the application of arbitral claims/counterclaims or request the tribunal to render a final arbitral award based on the settlement agreement, which is enforceable as a normal arbitral award.[180]

b. CIETAC Mediation Rules for Investment Disputes

5.82 Apart from the investment arbitration rules, it is worth mentioning that the CIETAC has promulgated special mediation rules for investment disputes, though they are not applicable to general investor-State investment disputes. As the first specialised mediation rules for investment disputes in China, the CIETAC Mediation Rules for Investment Disputes under the CEPA Investment Agreements (the 'CIETAC Mediation Rules') were published in 2018 in correspondence with the Closer Economic Partnership Arrangements (CEPAs) signed by Mainland China with Hong Kong and Macau respectively. According to the Investment Agreements under the two CEPAs, an investment dispute between an investor of Hong Kong or Macau and a governmental department or authority of Mainland China may be submitted to a Mainland mediation centre for mediation.[181] There are few investor-State mediation rules globally. The CIETAC Mediation Rules resemble the IBA Rules for Investor-State Mediation published by the International Bar Association in 2012 (the 'IBA Mediation Rules') which provides a legal framework for future specific mediation rules for investment disputes. Since 2018, the ICSID has been working on the world's first

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[177] ibid art 43.5.
[178] ibid art 43.6.
[179] ibid art 43.4.
[180] ibid art 43.5.
[181] Mainland and Hong Kong Closer Economic Partnership Arrangement Investment Agreement Investment Agreement (2017) (CEPA Investment Agreement) art 19.1 (v); Mainland and Macau Closer Economic Partnership Arrangement Investment Agreement (2017) art 19.1 (v).

institutional investment mediation rules. The latest draft on Rules for Mediation Proceedings (ICSID Mediation Rules) was published in February 2020 in the Proposals for Amendment of the ICSID Rules (Working Paper #4).[182] For a better understanding of the CIETAC Mediation Rules, both the IBA Mediation Rules and the ICSID Mediation Rules will be invoked if necessary.

5.83 Although the CIETAC Mediation Rules only apply to investment disputes arising from the CEPAs, they may reference foreign investors in terms of future mediation procedures for investment treaty disputes against a Chinese governmental party. Hong Kong and Macau are Special Administrative Regions (SARs) of China that have independent jurisdictions and operate as independent customs territories. Therefore, the investment agreements between the Mainland China and the two SARs are by nature agreements between two customs territories. They share similar frameworks and provisions with modern BITs, such as fair and equitable treatment, national treatment, most-favoured treatment, transparency, expropriations and dispute settlement mechanisms. It is worth noting that both CEPAs do not provide investment arbitration as one of the dispute settlement mechanisms. Apart from investment mediation, investment disputes between investors from the SARs and the Mainland China government may be settled via amicable negotiation, foreign-invested enterprise complaints procedure, the Committee on Investment established under the CEPA investment agreements, administrative review procedures and court proceedings.[183]

5.84 According to the Mediation Rules, the mediation is a stand-alone mechanism that must follows the principle of voluntary participation by the parties.[184] Though mediation is provided in the CEPA as one of the available dispute settlement

[182] 'Investor-State Mediation' (*ICSID*) <https://icsid.worldbank.org/services-arbitration-investor-state-mediation> accessed 31 December 2020.
[183] CEPA Investment Agreement (n 181) art 19.1.
[184] CIETAC 'CEPA Investment Agreement' Investment Dispute Mediation Rules (2018) (CIETAC Mediation Rules) art 4.

mechanisms, it does not mean the State party has irrevocably consented to a mediation. Therefore, unlike the IBA Rules or ICSID Rules where a mediation may be commenced upon a prior mediation agreement concluded by the parties,[185] the mediation under the CIETAC Mediation Rules can only be launched upon a unilateral application of the investor. After the mediation centre transmits the request for mediation filed by the applicant (i.e. the investor from Hong Kong or Macao) to the respondent, the respondent has 15 days to decide whether to take part in the mediation.[186] The mediation procedure will be terminated if the respondent rejects the mediation or fails to respond within the prescribed time.[187] After the mediation is commenced, either party may terminate the mediation proceedings upon written notice.[188]

5.85 The mediation will be conducted by two co-mediators by default, unless otherwise agreed by the parties.[189] Each party has the right to nominate or authorise the mediation centre to appoint a mediator.[190] However, a mediator must be selected from the roster kept by the mediation centre to ensure competence.[191] Like the CIETAC IA Rules, there is a separate roster of mediators, including 55 law practitioners, academics and enterprisers from the Mainland and SARs.[192] This is one of the major features distinguishing the CIETAC Mediation Rules from the IBA Rules and proposed ICSID Mediation Rules, as neither has a roster. Mediators shall act with fair manners and remain independent and impartial.[193] Mediators also have a duty of due diligence.[194] In return, the parties to the mediation shall cooperate with the mediators in good faith, such as providing with the mediators any required documents or information, coordinating with witnesses and experts, facilitating

[185] IBA Rules for Investor-State Mediation (2012) art 2.1 (a); ICSID Rules (n 77) rule 5.
[186] CIETAC Mediation Rules (n 184) art 9.1.
[187] ibid art 9.2.
[188] ibid art 19.2.
[189] ibid art 12.1.
[190] ibid arts 12.2 and 12.3.
[191] ibid art 12.4.
[192] CIETAC CEPA Investment Disputes Panel of Mediators (2018).
[193] CIETAC Mediation Rules (n 184) art 5.1.
[194] ibid art 5.2.

onsite examination and sticking to any time limits.[195]

5.86 Both the IBA Rules and the ICSID Rules require the mediators to hold a hearing on the management of mediation to determine detailed protocols. This hearing is called the Mediation Management Conference in article 9 of the IBA and the First Session in Rule 22 of the ICSID. In contrast, a management hearing under the CEPA rules is not mandatory and can be conducted in any way that seems appropriate to the mediators unless otherwise agreed by the parties,[196] save for the rule of confidentiality and without prejudice principle. Whereas the CIETAC IA Rules hold investment arbitration hearings in public by default,[197] the CIETAC investment mediation shall be conducted in private with no written records unless otherwise agreed by the parties.[198] Unless otherwise provided in the CEPA or agreed by the parties, the parties, mediation participants or staff members of the CIETAC are prohibited from disclosing any information related to case merits or procedures.[199] Furthermore, article 21 stipulates that the parties may not invoke any statement, recognition or compromise by the other party or by the mediators to against the other party in the process of mediation or in any administrative review proceedings or judicial proceedings for the same dispute.[200]

5.87 The mediators may terminate the mediation proceedings after consulting with both parties if they believe there is no possibility of reaching consensus.[201] On the other hand, a settlement agreement can be reached anytime by the parties themselves or with the assistance of the mediators, and the mediators shall conclude the mediation agreement based on the settlement agreement.[202] However, compensation in the agreement is restricted to monetary compensation and interests, restitution of

[195] ibid art 17.
[196] ibid art 16.
[197] CIETAC Rules (n 42) art 32.1.
[198] CIETAC Mediation Rules (n 184) art 15.1.
[199] ibid art 15.2.
[200] ibid art 21.
[201] ibid art 19.3.
[202] ibid arts 18.1 and 18.2.

property and other legitimate methods of compensation only.[203] The mediation agreement is final and binding upon parties and can be enforced in accordance with relevant rules where the investment is made.[204] Though there is no specific regulation on the enforcement of the mediation agreement made under the Mediation Rules, it may be referred to the relevant provisions for the enforcement of a mediation agreement compiled by the arbitral tribunal. According to article 51.2 of the Arbitration Law, a mediation agreement compiled by the arbitral tribunal is with equal legal effect as an arbitral award. The enforcement of an arbitral mediation agreement shall be referred to the same regulation on the enforcement of arbitral award promulgated by the SPC.[205] Unless in the cases where the mediation agreement violates public policy, a court will not uphold the application of the person subject to the enforcement not to enforce the mediation agreement.[206]

5.88 As to the costs of mediation, the mediation centre adopts a fee schedule similar to that of the CIETAC Investment Arbitration Rules. In particular, the mediation centre charges charge a registration fee of CNY 5,000 (USD 765), administrative fees from CNY 10,000 (USD 1,530) to CNY 267,000 (USD 40,900) depending on the amount in dispute plus miscellaneous expenses, and the remuneration of each mediator in a range from CNY 10,000 (USD 1,530) to CNY 1,000,000 (USD 153,100) depending on the amount in dispute as well.[207] However, given the nature of mediation that a settlement may not be reached despite of the efforts of the mediators, the mediation centre may decide to refund party of the prepaid mediation fee to the parties if a mediation only proceeds for a relatively short time and finally fails, subject to a threshold as well as a cap on the refundable prepayment.[208] It is a unique provision to the IBA Rules or the ICSID Rules that expressly grants reductions on the mediation

[203] ibid art 18.3.
[204] ibid art 18.5.
[205] Regulation of the Supreme People's Court on Several Issues Concerning the Handling of Cases Regarding Enforcement of Arbitral Award by the People's Court (2018), FaShi [2018] No 5, art 1.
[206] ibid art 17.
[207] CIETAC Mediation Rules (n 184) Mediation Fee Schedule for Investment Disputes under the CEPA Investment Agreements, ss I to III.
[208] ibid, s IV.4.

fees in consideration of fairness and efficiency.

Application of UNCITRAL Arbitration Rules

5.89 If disputant parties do not wish to adopt unpractised investment arbitration rules set out by the CIETAC or BAC, they may still choose to apply the UNCITRAL Arbitration Rules under the administration of the CIETAC, the BAC or the SCIA considering all the three arbitration centres allow parties to choose other arbitration rules, in particular the UNCITRAL Arbitration Rules, instead of the their own institutional rules. The validity of arbitration agreements choosing ad hoc arbitration rules was debated in the history in China.

5.90 Article 16 of the Arbitration Law provides that a valid arbitration agreement must have three elements: an expression of intention to apply for arbitration, matters for arbitration and a designated arbitration institution. This is to say, an ad hoc arbitration agreement is invalid under PRC law because the consent of an arbitration institution is a necessary condition for a valid arbitration agreement if seated in China. Therefore, if parties do not nominate a specific arbitration institution in the arbitration agreement and cannot reach a supplementary agreement on it, such an arbitration agreement is null and void.[209]

5.91 Accordingly, an arbitration agreement is invalid if no arbitration institution can be identified upon the arbitration agreement. For example, an arbitration agreement is invalid if it only stipulates the place of arbitration when there are two or more arbitral institution in this area,[210] or if it only states the applicable arbitration rules but no arbitration institution can be targeted accordingly.[211] In *Züblin International GmbH v*

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209 Arbitration Law of the People's Republic of China (2017 Amendment) (Arbitration Law) art 18.
210 Letter of the Supreme People's Court on the Validity of the Arbitration Agreement Which Only Choosing the Place of Arbitration While No Stipulation on the Arbitration Institution (1997), FaHan [1997] No 36; See also Interpretation of Arbitration Law (n 18), art 5 and 6.
211 Interpretation of Arbitration Law (n 18) art 4.

Wuxi Woco-Tongyong Rubber Engineering Co., Ltd, the arbitration agreement read 'Arbitration: ICC Rules, Shanghai shall apply'. The SPC said though there was an expressed consent to arbitration, arbitration rules and place of arbitration, it was not a valid arbitration agreement under PRC law because it lacked a specified arbitration institution.[212]

5.92 Since 2017, ad hoc arbitration is arguably permitted in the Pilot Free Trade Zones (FTZs) even if both parties are domestic companies. According to the Opinions on Providing Judicial Guarantee for the Building of Pilot Free Trade Zones promulgated by the SPC on 30 December 2016, an arbitral agreement between enterprises registered in the FTZs may be deemed valid if it is mutually agreed to arbitrate a dispute at a specific location in the Mainland China, in accordance with specific arbitration rules and by specific personnel.[213] It worth noting that the validity of such an arbitral agreement is still subject to a court's discretion. Currently, there is no relevant arbitral award or court decision on the matter.

5.93 On the other hand, an arbitration agreement is valid if it stipulates to use the UNCITRAL Arbitration Rules as long as it also appoints an arbitration institution in the arbitration agreement. In *Zhejiang Yisheng Petrochemical Co., Ltd v Luxembourg Invista Technology Co., Ltd*, the arbitration agreement that agreed that arbitration should 'take place at China International Economic Trade Arbitration Centre (CIETAC), Beijing, P.R. China' and be settled according to UNCITRAL Arbitration Rules was deemed as valid. The court regarded that the wording 'take place at' not only pointed to the place of arbitration but also the arbitration institution given there was only one CIETAC in Beijing, so that the arbitration agreement was in conform with the

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[212] Reply of the Supreme People's Court on Request for Instructions on the Case Concerning the Application of Zublin International GmbH and Wuxi Woco-Tongyong Rubber Engineering Co., Ltd for Determining the Validly of the Arbitration Agreement (2003), [2003] MinSiTaZi No 23 (Reply on Zublin case). See also Reply of the Supreme People's Court on Request for Instruction on the Validity of Arbitration Agreement in the Distribution Agreement between Amoi Electronics Co., Ltd and Belgium Products Co., Ltd (2009), [2009] MinSiTaZi No 5.

[213] Opinion of the Supreme People's Court on Providing Judicial Guarantees for the Construction of Pilot Free Trade Zones (2016), FaFa [2016] No 34 (SPC Opinion on FTZs) s 4.9.

PRC Arbitration Law.[214] This approach is adopted by the CIETAC, BAC and SCIA, even though the parties will have to bear additional administration fees charged by the arbitration centres in addition to those charged by the ad hoc tribunals.

E. Challenges on the application of new arbitration rules in China

5.94 It can be seen from the above analysis that it might be a good choice to select a China-based permanent arbitration centre to hear an investor-State arbitration under the new investment rules of each centre, especially as the new rules are designed to tackle the drawbacks of the current ISDS system. However, how these arbitration centres perform the rules as well as the administrative functions is far from clear. Indeed, none of the new rules have been practised so far and none of the arbitral centres have accepted an investment arbitration case, no matter under which set of arbitration rules.

5.95 Parties that are willing to submit their claims to the CIETAC, BAC or SCIA based on a valid arbitration agreement under a treaty or a contract may be advised to reconsider their choice on account of the foreseeable challenges on the application of the new arbitration rules. First, there are conflicts between the arbitration rules and the current Arbitration Law of China, in particular the lack of arbitrability of investment disputes and issues arising from the foreignness. Second, one may doubt the impartiality and independence of the arbitration conducted in the China-based arbitration centres, especially when considering the close relationship between arbitration centres and governmental agencies. Finally, the verification procedure for arbitration-related decisions under Chinese domestic court system may be a concern for some parties, though for other parties the system may nevertheless be in favour of the correctness of arbitration.

[214] *Zhejiang Yisheng Petrochemical Co., Ltd v Luxembourg Invista Technology Co., Ltd,* (2012) ZheYongZhongQueZi No 4, Zhejiang Ningbo Intermediate People's Court; See also Model Cases on Providing Judicial Services and Safeguards by the Supreme People's Court for 'One Belt and One Road' (2015), 7 July 2015, Case 6.

<u>Foreign-related arbitration or domestic arbitration</u>

5.96 The first question, however, is whether an investment arbitration applied the new rules is classified as a domestic arbitration or a foreign-related arbitration under Chinese law. If choosing China as the seat of the arbitration, it is important to determine whether the arbitration is a domestic arbitration or an arbitration involving foreign-related matters ('foreign-related arbitration'). These two types of arbitration are treated differently by law and in practice in almost all aspects, as discussed later.

a. Definition of a foreign-related arbitration

5.97 As the name implies, the major difference between the domestic arbitration and foreign-related arbitration is whether the arbitration at issue has any 'foreign element'. There is no foreign element in a domestic arbitration, but an arbitration case involving foreign-related matters refers to one of the following circumstances as provided in a judicial explanation of the SPC in 2012:[215]

- Where one or more parties is/are foreign citizen(s), foreign legal person(s) or other organisation(s), or stateless person(s);
- Where the habitual residence(s) of one or more parties is/are located outside the territory of China;
- Where the subject matter of the dispute is located out of the territory of China;
- Where the legal fact leading to the establishment, modification or termination of the civil legal relation occurs out of the territory of China;

[215] Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law on Choice of Law for Foreign-Related Civil Relationships of the People's Republic of China (I) (2012), FaShi [2012] No 24 (Interpretation on Choice of Law), art 1; See also Opinion of Shanghai High People's Court on Several Issues in the Implementation of the Arbitration Law of the People's Republic of China (2001), HuGaoFa [2001] No 49, art 6.

- Other circumstances that can be deemed to be involving foreign elements. This is a catch-all clause to be determined by court's discretion. An example of this scenario, as illustrated later, is disputes between companies registered in the FTZs.

5.98 In addition to the above general guidance, there are some practical rules on the determination of foreign elements drawn up from cases and specific regulations afterwards. The following rules are specifically important for foreign investment disputes.

- Parties that are enterprises registered in China but wholly invested by foreign investors are domestic parties. An arbitration case raised by a Chinese subsidiary of a foreign investor against another Chinese subsidiary is a domestic case, if no other foreign elements are involved. In *Beijing Capital Co., Ltd v Microsoft Mobile (China) Investment Co., Ltd,*[216] the court considered the dispute purely domestic because, among other reasons, both parties to the dispute were limited companies registered in Mainland China. The fact that the respondent was solely set up and invested by Microsoft (a U.S. company), or originally Nokia (a Norwegian company), would not add a foreign element to the dispute.

- As an exception of the above rule, disputes between two wholly foreign-owned enterprises (WFOEs, a term widely used in China referring to a Chinese enterprise that is wholly invested by its parent company registered in a foreign country) registered in the FTZs of China may be submitted to foreign arbitration regardless of foreign elements. The first case that illustrated the exception is *Siemens International Trade (Shanghai) Co., Ltd v Shanghai Golden Landmark Co, Ltd* decided in 2015, where both the applicant and the respondent were WFOEs incorporated in the Shanghai Pilot Free Trade Zone (Shanghai FTZ) by their

[216] (2015) ErZhongMinTeZi No 13516, Beijing No 2 Intermediate People's Court.

foreign parent companies, while the arbitration agreement provided that any disputes should be submitted to the SIAC for arbitration. The agreed applicable law on the merits of the sale of good contract was the PRC law. Though both parties were Chinese legal persons, the Shanghai No 1 Intermediate Court initially agreed there were no typical foreign elements in the dispute given the stipulated place of delivery was in China and the subject matter, (i.e. equipment for sale) was also located in the territory. However, the court finally invoked the catch-all clause and concluded that the dispute involved foreign elements after an overall consideration of the nature of parities and characteristics performance of the contract. Specifically, given both parties were WFOEs registered in the Shanghai FTZ, 'the source of capital, the ownership of ultimate interests and the decision-making are in general closely related to their foreign investors, so such entities have more obvious foreign-related elements than ordinary domestic companies'. More importantly, these foreign-related elements 'should be given more attention' in the context of the reform of investment and trade facilitation in the FTZs. Furthermore, the dispute at issue had features of international sale of goods given the goods at issue were at a bonded zone, so that the performance of the sale contract would have involved import procedures.[217]

A year later, in 2016, the SPC affirmed the decision of *Siemens* case in the Opinions on Providing Judicial Guarantee for the Building of Pilot Free Trade Zone by providing that an arbitration agreement between WFOEs registered in the FTZs on submitting commercial disputes to foreign arbitration will not be deemed invalid solely based on the lack of foreign elements.[218] The SPC further extends the exception to cases between WFOEs registered in the FTZs and other companies. The recognition and enforcement of a foreign arbitral award based on an arbitration agreement between a WFOE registered in the FTZs and another

[217] (2013) HuYiZhongMinRen (WaiZhong) Zi No 1, Shanghai No.1 Intermediate People's Court.
[218] SPC Opinion on FTZs (n 213) s 3.9.

company will not be negatively impacted by the lack of foreign elements as long as a party to the arbitration agreement does not raise any objections on the validity of the arbitration agreement during the arbitration.[219] Therefore, for an arbitration agreement that involves a WFOE registered in an FTZ, foreign elements will no longer be a concern for the validity of the arbitration agreement if it provides arbitration in a foreign country, while whether the arbitration agreement is valid will still be bound by other rules as provided by the applicable law.

- A dispute arising from a contract signed by a foreign party but performed by a domestic-registered enterprise may not necessarily be a foreign-related dispute. Courts have reached diverse decisions on this issue. In *Leaf Sugar (Shanghai) Co., Ltd v Shanghai Lianfu Food Co., Ltd*, the court upheld the arbitral award made by the SIAC by dismissing the challenge that the dispute lacked foreign elements. In this case, the court identified the existence of foreignness because one of the signature parties to the disputed contract was a foreign national and a party listed in the arbitral award, even though the foreign national did not undertake any responsibilities during the performance of the contract.[220] In contrast, in a more recent case in Jiangsu Province, *Kunshan Jicheng Communication Technology Co., Ltd v Renbao Communication Industry (Kunshan) Co., Ltd,* the court determined there was no evidence proving that the foreign parties, which is the parent companies of the applicant and the respondent, were involved in the transaction at issue although all four companies were signatories to the disputed contract, so that the dispute did not have a true foreign element.[221] Given the distinct opinions of the courts at the same level, one might only sum up the rule that whether a foreign element exists in a similar scenario would

[219] ibid s 3.9 para 2.
[220] (2008) HuErZhongMinWu (Shang) ChuZi No 19, Shanghai No 2 Intermediate People's Court.
[221] (2016) Su05MinXiaZhong No 305, Jiangsu Province Suzhou Intermediate People's Court.

depend on the subtle facts that whether and to what extent the foreign party is involved in the performance of the contract.

b. The foreignness of investment arbitration

5.99 If foreign investment arbitration becomes possible under the domestic arbitration system in China, given that the respondent is always the Chinese government which is a Chinese domestic party and the investment at issue is in China, one may infer from the above rules that whether an arbitration case is domestic or foreign-related may largely depend on the nationality of the applicant. If an arbitration claim is raised by a foreign investor directly, it is probably a foreign-related arbitration case. If it is raised by a Chinese subsidiary of the foreign investor, it is more likely a domestic arbitration case.

5.100 It is an obvious answer because a typical investor-State arbitration is launched by a foreign investor for a dispute related to foreign investments, so that it is a foreign-related arbitration involving foreign elements. However, neither the CIETAC IA Rules nor the BAC IA Rules explicitly state that the investment arbitration rules shall only be applied to investment disputes between a 'foreign' investor and a governmental party of a State that is different from the nationality of the investor. Unlike article 25.1 of the ICSID Convention, where the jurisdiction of the ICSID Centre is in any legal dispute arising from an investment between a Contracting State and 'a national of another Contracting State', there is no requirement on the nationality of the investor and the State related to the international investment dispute under both sets of rules.[222] Theoretically, a WFOE or a Chinese subsidiary of a foreign company may also be an applicant to launch an investment arbitration against a Chinese administrative agency based on an arbitration agreement before the CIETAC or the BAC. In such a case, this kind of arbitration is classified as a domestic arbitration

[222] CIETAC Rules (n 42) art 2; Article 2.5, BAC IA Rules.

under the Chinese law.

5.101 It is unclear whether or not the omission on the requirement of nationality is intentional, especially as article 2.2 of the SCIA Investment Arbitration Rules do follow the ICSID's wording by clearly limiting the scope of jurisdiction on investment arbitration to disputes between a State and a national of another State. If the purpose of the CIETAC and BAC is to extend the jurisdiction to national investment arbitration between a Chinese national and the Chinese government, it is foreseeable that there will be a significant number of investment arbitrations heard before the CIETAC and BAC if the administrative dispute is allowed to be arbitrated, though they may remain subject to procedural rules different from foreign-related arbitration, such as court supervision, enforcement and annulment.

c. Practical issues on the dual system

i. Choice of applicable law

5.102 Chinese law offers parties of foreign-related disputes a more flexible right on the choice of law for arbitration. However, as parties to domestic disputes have not been granted by law the right to choose a foreign law as the governing law, the applicable law for the arbitration agreements, the merits or the procedural rules of domestic arbitration cases can only be Chinese law.

5.103 In contrast, regarding arbitration involving foreign elements, parties can stipulate the applicable law to the arbitration agreement, which will be discussed later in the section of arbitrability.[223] Parties to the foreign-related arbitration can explicitly choose the applicable law to the contract,[224] except when the choice will impair

[223] See paras 411-422.
[224] Law on the Choice of Law for Foreign-related Civil Relationships of the People's Republic of China (2010) (Law on Choice of Law), art 3.

public policy or conflict with mandatory rules.[225] However, foreign investors should note that the governing law of Chinese-foreign equity joint venture contracts, Chinese-foreign contractual joint venture contracts and contracts for Chinese-foreign joint exploration and development of natural resource is Chinese law as long as the contract is performed within the territory of China.[226] Features of the foreign-invested enterprises of these three types have been discussed in the Chapter 1 on domestic foreign investment law in China. In certain areas, including food, public health, environment and foreign currency control, the applicable law should also be Chinese law.[227] If the parties fail to choose the applicable law to the contract, the applicable law is either the law of the habitual residence of the party conducting the characteristic performance of the contract or the law that beats the closest relation to the contract.[228] Concerning a non-contractual dispute, the applicable law should be the law bearing the closest relation with the foreign-related civil action unless otherwise provided by law or agreed by the parties.[229]

ii. Choice of foreign arbitration institutions and ad hoc arbitration

5.104 Parties of foreign-related disputes can choose either Chinese arbitration institutions or foreign arbitration institutions for dispute settlement.[230] However, parties cannot choose foreign arbitration if the dispute lacks 'foreign elements'. In *Beijing Chaolaixinsheng Sports and Entertainment Co., Ltd v Beijing Suowangzhixin Investment Consulting Co., Ltd*, the court refused to enforce the arbitration award rendered by the Korean Commercial Arbitration Board pursuant to articles 5.1 and 5.2 of the New York Convention. The court considered the dispute purely domestic because both parties were limited companies registered in Mainland China. That the respondent

225 ibid arts 4 and 5.
226 Contract Law of the People's Republic of China (1999) (Contract Law) art 126.2.
227 Interpretation on Choice of Law (n 215) art 10.
228 Law on Choice of Law (n 224), art 41.
229 ibid art 2.2.
230 Contract Law (n 226) art 128.2; see also Civil Procedure Law of the People's Republic of China (2017 Amendment) (Civil Procedure Law) art 271.

was solely invested by a Korean national would not impact the domestic nature of the dispute. As the dispute did not involve any foreign elements, the arbitration agreement that stipulated a Korean arbitration institution was invalid under Chinese law.[231]

5.105 In addition, parties of both domestic arbitration and foreign-related arbitration may be allowed to choose a foreign arbitration institution but have the arbitration seated in China. In *LD Packaging and Printing Co., Ltd v BP Agnati S.R.L.* in 2013, the SPC confirmed the validity of the arbitration agreement therein, which said disputes should be submitted to the ICC International Court of Arbitration for arbitration under the ICC arbitration rules and 'the place of jurisdiction should be Shanghai, China'. The SPC determined that the clause, in fact, meant the seat of arbitration should be Shanghai. The SPC further ascertained that the applicable law for the arbitration agreement should be Chinese law in accordance with article 16 of the Judicial Interpretation of the Arbitration because the parties were silent on the choice of law in the arbitration agreement. The SPC concluded that the arbitration agreement was valid because it conformed with the criteria of article 16 of the Arbitration Law.[232] Although the case was foreign-related because the respondent was an Italian company, this case arguably set a precedent for a foreign arbitration institution having arbitration seated in China for both types of arbitration regardless of the concern of foreign elements. In short, article 16 of the Arbitration Law equally applies to any kinds of arbitration in China.

5.106 Given China agrees in the New York Convention that foreign arbitration awards of both institutional arbitrations and ad hoc arbitrations should be equally recognised

[231] *Beijing Chaolaixinsheng Sports and Entertainment Co., Ltd v Beijing Suowangzhixin Investment Consulting Co., Ltd*, (2013) ErZhongMinTeZi No 10670, Beijing No 2 Intermediate Court; See also Reply of the Supreme People's Court on Request for Instruction on the Validity of the Arbitration Agreement between Jiangsu Energine Wind Turbine Manufacture Co., Ltd and LM Wind Power (Tianjin) Co., Ltd (2012), (2012) MinSiTaZi No 2.

[232] Reply of the Supreme People's Court on Request for Instruction on Application for Confirming the Validity of an Arbitration Agreement in the Case of Anhui Long Li De Packaging and Printing Co., Ltd v BP Agnati SRL (2013), [2013] MinSiTaZi No 13

and enforced, it serves an exception for foreign ad hoc arbitrations to be recognised and enforced in Mainland China. In practice, the SPC confirmed this position in *Fujian Province Capital Goods Company and Jinge Shipping Limited Company* in 1995. The SPC said, in a reply to the Guangdong Province High Court, that if parties to a foreign-related dispute agree in the contract or after the dispute has arisen that the dispute should be submitted to ad hoc arbitration seated in a foreign country, such an arbitration agreement shall be recognised in principle so that a court should not accept the claims from the parties.[233]

iii. Grounds for enforcement and annulment

5.107 There is a fundamental difference between grounds for annulment or non-enforcement of domestic arbitration and foreign-related arbitration. A court can review the merits of a domestic arbitration when deciding whether an arbitration award should be set aside or not enforced, while the review of foreign-related arbitration is limited to the procedure issues.

5.108 In particular, the statutory grounds for annulment and non-enforcement of a domestic arbitration award fall into three categories:

- procedure defects in arbitration proceedings, namely lack of a valid arbitration agreement,[234] issues determined in the arbitration award is beyond the scope of the arbitration or the tribunal has exceeded its power,[235] the composition of the tribunal or the arbitration procedure has violated the statutory procedure

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[233] Reply of the Supreme People's Court on the Validity of the Arbitration Agreement in the Bill of Lading of the International Maritime Dispute Between Fujian Province Capital Goods Company and Jinge Shipping Limited Company (1995), FaHan [1995] No 135

[234] Arbitration Law (n 209) art 58.1.1; See also Interpretation of Arbitration Law (n 18) art 18; Civil Procedure Law (n 230) art 237.2.1; However, this ground cannot be invoked if the party has not challenged the validity of arbitration agreement in the arbitration proceeding. See Interpretation of Arbitration Law (n 18) art 27.1.

[235] Arbitration Law (n 209) art 58.1.2; Civil Procedure Law (n 230) art 237.2.2.

provided in the Arbitration Law or stipulated arbitration rules,[236] and the arbitrator has committed bribery or acted biasedly or applied the law wrongly for personal benefits.[237]

- flaws in evidence, including evidence on which the award is based has been forged,[238] and evidence which is sufficient to affect the impartiality of arbitration has been concealed;[239]

- the arbitration award violates public policy.[240]

5.109 In comparison with the grounds for annulment and non-enforcement of a domestic arbitration award, foreign-related arbitration awards can only be annulled by procedural defects. According to article 70 of the Arbitration Law, the grounds for setting aside a foreign-related arbitration award replicate the statutory reasons for not enforcing such an award, as provided in article 274.1 of the Civil Procedure Law. Accordingly, a party to a foreign-related arbitration can request a competent intermediate court to annul the arbitration award if one of the flaws regarding the arbitration procedure can be evidenced:

- the parties have not concluded an arbitration agreement in the contract or failed to reach an arbitration agreement later;[241]

- the party has not been notified of the appointment of arbitrators or the commencement of arbitration proceeding, or the party fails to present its case

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[236] Arbitration Law (n 209) art 58.1.3; Civil Procedure Law (n 230) art 237.2.3. There is a slight difference between grounds for annulment and non-enforcement. According to article 20 of the Interpretation of Arbitration Law, the violation of statutory procedure invoked in the annulment procedure has to be seriously enough to affect the imparity of the arbitration, while there is no such a requirement of intensity for a violation in the non-enforcement.
[237] Arbitration Law (n 209) art 58.1.6; Civil Procedure Law (n 230) art 237.2.6.
[238] Arbitration Law (n 209) art 58.1.4; Civil Procedure Law (n 230) art 237.2.4.
[239] Arbitration Law (n 209) art 58.1.5; Civil Procedure Law (n 230) art 237.2.5.
[240] Arbitration Law (n 209) art 58.3; Civil Procedure Law (n 230) art 237.3.
[241] Civil Procedure Law (n 230) art 274.1.1.

due to the reason that cannot be attributed to the party;[242]

- the composition of the tribunal or the arbitration procedure does not comply with the arbitration rules;[243] or

- the issue dealt by arbitration is beyond the scope of the arbitration agreement or the tribunal has exceeded its power.[244]

5.110 It is worth noting that the only difference between the grounds for annulment and grounds for non-enforcement is whether the court can use public policy to defeat a foreign-related arbitration award. Article 274.2 of Civil Procedure Law specifies that a court should not allow the enforcement of a foreign-related award that will violate public policy. However, this clause is not invoked in article 70 of the Arbitration Law, which means that strictly speaking, a court cannot set aside a foreign-related arbitration award if it conflicts with the public policy of China.[245] However, some scholars believe that a court should actively examine the public policy and annul the award if a conflict occurs despite the flaw in the Arbitration Law and Civil Procedure Law.[246] In practice, there has been no case known to the public that annulled a foreign-related arbitration award based on public policy.

Limited arbitrability

5.111 Administrative disputes are generally excluded from the scope of arbitration in China. An arbitration agreement is null and void if the agreed matters for arbitration exceed the scope of arbitrability defined by Chinese law.[247] Under article 2 of the Arbitration

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[242] ibid art 274.1.2.
[243] ibid art 274.1.3.
[244] ibid art 274.1.4.
[245] Huanfang Du, 'Case Study on the Perfection of the Annulment of Foreign-Related Arbitration Award in China' (2005) 100 Arbitration and Law 95.
[246] Peiyu Geng, 'Decision on the Annulment of Foreign-related Arbitration Award' (*Shanghai No.2 Intermediate Court,* 2012) <http://www.shezfy.com/view.html?id=2998> accessed 18 March 2016.
[247] Arbitration Law (n 209) art 17.1.

Law, only contractual disputes or disputes over other property rights between equal parties can be arbitrated.[248] The scope of arbitration in China is determined by three criteria set up by the legislator.[249] First, parties to arbitration, whether citizens, legal persons and other organisations, shall have equal status in the civil relationship. Second, parties to arbitration shall have the right to deal with the issue(s) of arbitration. Third, disputes can be contractual or non-contractual. A contractual dispute may arise from the conclusion, effect, modification, transfer, performance, liability, interpretation and termination of a contract.[250] Non-contractual disputes, or disputes over other property rights, mainly refer to the tort disputes in the legal practice of China. The jurisdiction of an arbitral tribunal over tort disputes was first confirmed by the SPC in *Jiangsu Material Group Light Industry and Textile Corporation v Topcapital Holdings Ltd and Prince Development Ltd* in 1998. There, the court confirmed that 'any disputes arising from or in connection with the contract … shall be decided by the CIETAC' should include tort disputes and was in line with the provisions of the Arbitration Law and CIETAC Arbitration Rules.[251] Most tort disputes submitted to arbitration concern maritime issues, real estate, product quality and intellectual property protection.[252]

5.112 Based on the above criteria of arbitrability, two kinds of disputes cannot be arbitrated in China. First, disputes over family affairs, including marriage, adoption, guidance, maintenance and inheritance, are not arbitrable.[253] Second, administrative affairs that should be handled by administrations cannot be submitted to arbitration.[254] As exceptions for the restriction, employment disputes and rural land disputes, which may involve elements of administrative disputes, are arbitrable but subject to special arbitration laws and regulations so they are also excluded from the scope of general

[248] ibid art 2.
[249] Gu (n 10).
[250] Interpretation of Arbitration Law (n 18) art 2.
[251] *Jiangsu Material Group Light Industry and Textile Corporation v. Topcapital Holdings Ltd. and Prince Development Ltd,* (1998) 3 Gazette of Supreme People's Court of the People's Republic of China.
[252] Xiaoming Wang, International Business Law (Southwestern University of Finance & Economics Press 2009)277.
[253] Arbitration Law (n 209) art 3.1.
[254] ibid art 3.2.

arbitration. Finally, if a dispute should be exclusively handled by administrative procedures, it cannot be arbitrated. For example, in *Expert Assets Limited and Resistor Technology Limited v Jiangsu Huayuan Pharmaceutical Co., Ltd*, the SPC supported the annulment of the CIETAC arbitration award on the basis that the tribunal had exceeded its power. Changes of equity shares of Chinese-foreign equity joint ventures should be subject to administrative approvals in accordance with the applicable law at that time, so any dispute on such a change should be mandatorily submitted to administrative litigation.[255]

5.113 A recent SPC decision issued in 2019 has further suggested that disputes with the public nature such as antitrust may also be excluded from arbitration even though they are disputes over property rights between equal parties on the surface. In *Hohhot City Huili Materials Co., Ltd v Shell (China) Co., Ltd*, the SPC upheld that a court had jurisdiction over the antitrust dispute raised by the Huili Company against Shell China even though there was an arbitration agreement in the distributor agreement between the parties. The SPC considered that the Antitrust Law of China clearly had a nature of public law, and the determination of whether an act had constituted an antitrust behaviour or not exceeded the rights and duties between parties to the contract. As a result, such a dispute was no longer limited to a contractual dispute or other dispute over property rights between equal parties and thus no longer within the scope of arbitrability provided by the Arbitration Law. As neither the Antitrust Law nor the Arbitration Law explicitly stipulates that antitrust disputes can be arbitrated, antitrust disputes can only be resolved by litigation before court.[256]

5.114 In terms of investment disputes, if an investor considers an administrative action taken by an administrative agency to infringe upon its legitimate interests (i.e.

[255] Reply of the Supreme People's Court on Request for Instruction on Whether to Annual the CIETAC Arbitral Award [2004] ZhongGuoMaoZhongJingCaiZi No.0222, [2006] MinSiTaZi No 2; See also *Hong Kong Green Valley Investment Company v Canada Green Valley (International) Investment & Management Ltd et al,* (2002) MinSiZhongZi No 14, Supreme People’s Court

[256] (2019) ZuiGaoFaZhiMinXiaZhong No 47, Supreme People’s Court.

suspension of concession or expropriation), the investor has to seek remedies via administrative review procedures and/or file a complaint with a court rather than submit it to arbitration against the government in China, as discussed in detail in Chapter 2.[257]

5.115 If parties stipulate to submit an investment dispute before arbitration, this arbitration agreement may be null and void pursuant to article 17.1 of the Arbitration Law if the applicable law of the arbitration agreement is Chinese law. Though China recognises that the applicable law to the arbitration agreement is independent from the governing law to the merit of dispute,[258] Chinese law does not offer parties of a domestic arbitration the right to choose a foreign law as the governing law on the grounds that it lacks 'foreign elements'. The applicable law to domestic arbitration and the corresponding arbitration agreement can only be Chinese law. In contrast, parties of a foreign-related arbitration are granted the right to choice of law for the case merit, arbitration procedure and arbitration agreement.[259] If the parties fail to consent to the applicable law for arbitration agreement, but agree on the place of arbitration, the applicable law to the arbitration agreement is the law of the place where the arbitration institution locates or the law of the seat (*lex arbitri*), whichever grants the validity of arbitration agreement.[260] If the seat cannot be determined by the arbitration agreement, the applicable law is the law of the court (*lex fori*),[261] namely Chinese law.[262]

5.116 If parties stipulate that the PRC law is the applicable law to the arbitration agreement, or choose Mainland China as the seat of arbitration if the parties are silent on the

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257 Administrative Review Law of the People's Republic of China (2017 Amendment), art 2; Administrative Procedure Law of the People's Republic of China (2017 Amendment), art 2.

258 Notice of Supreme People's Court on Circulation of Minutes of the Second National Meeting on Foreign-Related Commercial and Maritime Trials (2005), FaFa [2005] No 26 (Notice on Foreign-Related Trials), art 58

259 Law on Choice of Law (n 224) art 3.

260 Regulation of the Supreme People's Court on Certain Issues Concerning the Hearing of Arbitral Judicial Review Cases (2017), FaShi [2017] No 22 (Regulation on Judicial Review), art 14.

261 Law on Choice of Law (n 224) art 18; See also Interpretation of Arbitration Law (n 18), art 16.

262 Interpretation on Choice of Law (n 215) art 14.

applicable law, an arbitration agreement resolving an investment dispute via arbitration is invalid in China. Even if a tribunal renders the arbitral award on the investment dispute, a party may apply to set aside the award due to the lack of a valid arbitration agreement before the intermediate court where the arbitration institution sits.[263] The competent court will object to the enforcement of the award in accordance with Chinese law.[264]

5.117 It should be noted that for parties who submit the claims to a China-based permanent arbitration centre based on an arbitration agreement under a treaty, such as article 13.2 (d) of China-Tanzania BIT (2013) where parties may submit arbitration claims to any arbitration institution, the arbitration agreement may be valid despite the restriction on arbitrability under Chinese domestic law. The recognition and enforcement of an arbitral award made under this arbitration agreement will not be hindered for the reason of the invalidity of the arbitration agreement. However, given China has made reservations to only recognise and enforce commercial arbitration awards when ratifying the New York Convention, a foreign investor who gains a favourable arbitral award against China may only rely on China's commitment on the recognition and enforcement of arbitral awards under the treaty.[265]

5.118 For other arbitration where the arbitration agreement comes from a contract, this is the most crucial challenge to any party or arbitral tribunal that wishes to conduct investor-State arbitration in Mainland China and enforce awards even outside China. New York Convention article V.1 (a) provides that one ground for refusing to recognise and enforce an award is that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. As China does not allow investment arbitration, an investment arbitration award may not be recognised or

[263] Arbitration Law (n 209) arts 58.1 and 70; Civil Procedure Law (n 230) art 274.1.
[264] Arbitration Law (n 209) arts 63 and 71; Civil Procedure Law (n 230) arts 237.2 and 274.1.
[265] For example, see China-Tanzania BIT (n 28) art 13.8.

enforced either within or outside Mainland China if (1) the applicable law is Chinese law or (2) the arbitration award is deemed to be made in China if China is the seat when the applicable law is not stipulated.

5.119 All three Chinese arbitration centres that recently promulgated new arbitration rules (i.e. the CIETAC, BAC and SCIA) have circumvented the restriction on the arbitrability imposed by Chinese law by avoiding naming a place in Mainland China as the seat of arbitration. The CIETAC provides applicants a choice to select the CIETAC Hong Kong Arbitration Centre for filing arbitration applications in addition to the CIETAC headquarters in Beijing.[266] This way, Hong Kong can be the seat of arbitration for cases administrated in the CIETAC Hong Kong Arbitration Centre. The parties and the tribunal may choose any other seat based on the circumstances of the specific case provided that the seat locates in a member state of the New York Convention.[267] The BAC takes an approach similar to the CIETAC by allowing the parties and tribunals to determine the seat of the arbitration on a case-by-case basis as long as the seat is in a signatory of the New York Convention.[268] The SCIA directly appoints Hong Kong as the default seat of ad hoc arbitration unless otherwise agreed by the parties or decided by the tribunals.[269] All three arbitration centres further emphasised that arbitration awards will be deemed to be made in the seat.[270]

5.120 As a result, if Hong Kong is determined as the seat of an investment arbitration against the Chinese government either by express agreement or default, the arbitral award might be enforced in Mainland China in accordance with the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (2000). Though this arrangement does not restrict the types of arbitration that can be recognised and enforced in the Mainland

[266] CIETAC Rules (n 42) art 4.3.
[267] ibid arts 28.1 and 28.2.
[268] BAC Rules (n 54) art 20.1.
[269] SCIA Guidelines for the Administration of Arbitration under the UNICTRAL Arbitration Rules (2019), art 3.
[270] CIETAC Rules (n 42) art 28.3; BAC Rules (n 54) art 20.2; SCIA Rules (n 58) art 4.3.

China, there is a public policy reservation with regard to enforcement. It is possible for the courts of Mainland China to refuse to enforce an unfavourable arbitral award to the Chinese government made in Hong Kong on the grounds that the enforcement would be contrary to the social and public interests of the Mainland.[271] If the parties choose a seat located in other member states of the New York Convention, the recognition and enforcement proceedings of the arbitral award will refer to the New York Convention. China may still refuse to recognise or enforce it in China based on the commercial reservation it made when ratifying the convention.

5.121 However, a judicial opinion of the SPC promulgated in 2019 indicates the possibility that administrative disputes with foreign parties may be arbitrable in China in the near future. Article 26 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Agreement Cases, a judicial opinion that has the same legal effect as a national law, states that:

> Where an administrative agreement stipulates an arbitration agreement, the people 's court shall confirm that the arbitration agreement is invalid, except as otherwise provided by laws, administrative regulations or international treaties concluded or participated in by China.

5.122 Though this provision still generally prohibits submitting a dispute between parties to an administrative agreement, namely an administrative agency and a non-administrative party, before an arbitration tribunal, it opens a window of opportunity for administrative arbitration in China.

Implied arbitration agreement

5.123 Both the CIETAC IA Rules and BAC IA Rules provide that parties may reach arbitration agreements via performance. However, these provisions arguably contradict the

[271] Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (2000), FaShi [2000] No 3, art 7.

current Arbitration Law for a valid arbitration agreement.

5.124 Article 2.2 of the CIETAC IA Rules resembles article 1.2 of the SIAC Investment Rules by providing two ways to reach an arbitration agreement: (1) it may be stipulated in a contract, a treaty, a statute of law or regulation, or other instrument, or (2) it is deemed to have been reached if one party manifests its intention to refer the dispute to CIETAC or to settle the dispute by arbitration in accordance with the CIETAC IA Rules in such an instrument and the other party accepts either by commencing an arbitration or by other means. In other words, a valid arbitration agreement is not necessarily a written agreement between parties but can be concluded by parties' performance based on a unilateral written instrument. A similar provision appears in article 2.6 of the BAC IA Rules.

5.125 According to article 4 of the Arbitration Law, a valid arbitration agreement is a prerequisite for arbitration. An arbitration agreement must be concluded in writing and contain a mutual consent to arbitration, the scope of arbitration and a specific arbitration institution.[272] In other words, all elements of the arbitration agreement should be explicated in writing either before or after a dispute arises.[273] It can be reached in the main contract or other kinds of written format, such as a separate contract, letter exchanges, telegraphs, fax, emails and other digital correspondence.[274] If the contract at issue refers to an international treaty that explicates that disputes should be submitted to arbitration, it can also be regarded as a written arbitration agreement.[275]

5.126 However, it is debatable that China permits implied arbitration agreement despite the above provisions.[276] Article 20.2 of the Arbitration Law requires a party that

[272] Arbitration Law (n 209) art 16.2.
[273] ibid art 16.1.
[274] Interpretation of Arbitration Law (n 18) art 1.
[275] ibid art 11.2.
[276] Yang Wensheng, Zhang Hu, 'Probe on Ascertaining Effect of Arbitration Agreement under New York Convention – In View of Implied Arbitration Agreement' (*China Council for the Promotion of International Trade*, 18 December 2014)

challenges the validity of an arbitration agreement to raise the objection before the first hearing of arbitration. In a case where the party, namely the respondent, fails to challenge the arbitration agreement before the first hearing but replies to the arbitration claims, the court may refer to the applicable arbitration rules to determine whether the respondent is deemed to waive the right of objection in accordance with SPC judicial reply to *Hong Kong Chinese Medicine Biomedical Science Co., Ltd*.[277] Therefore, China arguably recognises the validity of an implied arbitration agreement, especially when the applicable arbitration rules allow.

Confusing definition of the seat of arbitration

5.127 The Arbitration Law does not use the concept of the seat of arbitration adopted by the New York Convention even though China is a signatory. Instead, the concept of the seat of arbitration is frequently referred as the place where the arbitration institution is located. In most cases, the two concepts point out a concurrent location as China only allows institutional arbitration. The place where the arbitration institution locates is the place of arbitration (i.e. the seat of arbitration). An ad hoc tribunal could exercise its jurisdiction only if the parties to the dispute also agree on an arbitration institution to administrate the arbitration.

5.128 According to the Arbitration Law, the court located in the place where the arbitration institution resides has jurisdiction over the annulment of an arbitral award.[278] Given that the CIETAC, BAC and SCIA rules split the seat of arbitration from the registration offices of the arbitration institutions, this provision may face difficulties in future practice.

<www.ccpit.org/Contents/Channel_3488/2014/1218/436569/content_436569.htm> accessed 30 December 2020.

[277] Reply of the Supreme People's Court on Request for Instruction on the Annulment of Arbitral Award [2008] ZhongGuoMaoZhongJingCaiZi No 0044 of China International Economic and Trade Arbitration Commission (2009), [2009] MinSiTaZi No 1.'

[278] Arbitration Law (n 209) art 58.

5.129 Nevertheless, in a recent judicial review case published by Guangzhou Municipal Intermediate People' Court on 6 August 2020, the court determined that an arbitration award made by an ICC tribunal seated in Guangzhou, China, was a foreign-related arbitral award rather than a foreign arbitral award because it was rendered in a city of Mainland China. Therefore, the enforcement of award should be governed by the relevant provisions of the Civil Procedure Law rather the New York Convention.[279] This decision distinguished between the place of arbitration institution (i.e. Paris where the ICC's headquarters is located) and the seat of arbitration (i.e. Guangzhou). Though this civil decision was made by a local court, it may still be a good signal for future practice.

Interim Measures

5.130 As discussed in the previous section, an arbitral tribunal or an emergency arbitrator is unable to impose interim measures under the current legal system of Mainland China. Rather, an application for imposing an interim measure either before or after the filing of arbitration will be forwarded and determined by a competent court of the Mainland. Therefore, if choosing anywhere in the Mainland as the arbitral seat, the provisions on the interim measures and emergency arbitrators can hardly be implemented in Mainland China.

5.131 Interim measures under the Arbitration Law during arbitral proceedings in China primarily refer to two types of measures: asset preservation to secure the implementation and enforcement of arbitral awards,[280] and evidence preservation to avoid evidence being lost or hard to collect in the future.[281] However, a decision on whether an interim measure can be imposed is not made by the tribunal that hears

[279] *Brentwood Industries Inc. v Guangdong Environment Engineering Equipment General Company and others*, (2015) SuiZhongFaMinChuZi No. 62, Guangzhou Municipal Intermediate People's Court; see also New York Convention (n 26), article 1.1.

[280] Arbitration Law (n 209) art 28.

[281] ibid art 46.

the case or the arbitral institution that acts as the administer of the proceeding. Under both the Arbitration Law and the Civil Procedure Law, only a court has the authority to decide and conduct interim measures upon the parties' applications.[282] arbitral proceedings in China applies for an interim measure, the application will be forwarded by the arbitral institution to the competent court, usually where the respondent or the asset or evidence locates, to decide and implement.[283] A court may demand the applicant to provide security against the interim measure if it may cause losses to the counterparty.[284] If the application is determined to be wrong (i.e. the arbitration claims have been dismissed), the applicant should compensate the respondent for any loss incurred from the interim measure.[285]

5.132 Although the current Arbitration Law does not mention emergency arbitrators, a party to an arbitral proceeding in China can request evidence and asset preservation against the counterparty or a third party before filing the arbitration in accordance with the Civil Procedure Law.[286] However, if the party fails to file the arbitration after the interim measures are taken, the counterparty or third party can file a lawsuit against the party that applied for the interim measure for the losses incurred before the court that conducted the interim measures.[287] When the interim measures taken before arbitration cause any losses to the counterparty or a third party, the latter can also file a lawsuit to claim the loss before the court that conducts the interim measures.[288]

5.133 Compared with domestic arbitration, there are some special provisions for foreign-related arbitration cases in addition to the general rules. First, intermediate courts

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[282] Civil Procedure Law (n 230) arts 81 and 100.
[283] Circular of the General Office of the State Council on Some Issues Needed to be Clarified in Implementation of the Arbitration Law of the People's Republic of China (1996), GuoBanFa [1996] No 22 (Clarification of Arbitration Law), art 2; See also Arbitration Law (n 209) arts 28 and 46.
[284] Interpretation of the Supreme People's Court on Application of the Civil Procedure Law of the People's Republic of China (2015), FaShi [2015] No 5 (Interpretation of Civil Procedure Law), art 98.2 and 152.
[285] Arbitration Law (n 209) art 28.3.
[286] Civil Procedure Law (n 230) arts 81.2 and 101.1,
[287] Interpretation of Civil Procedure Law (n 284) art 27.1.
[288] ibid art 27.2.

where the respondent is located, or the asset or evidence is located, receive and decide applications of interim measures.[289] Second, if the court approves the application for asset preservation, a security against the application of asset preservation is mandatory for foreign-related arbitration.[290] In the case of the evidence preservation, a security is not necessarily requested.[291] Other rules on the interim measures are consistent with those for domestic arbitrations.[292]

5.134 In terms of interim measures imposed by arbitral tribunals seated outside the jurisdiction of Mainland China, currently there is no provision on whether or how the measures can be implemented except for commercial arbitration in Hong Kong and maritime arbitration.[293] For other cases, an application to implement an interim measure before a Chinese court will probably be refused. For example, in *Dongwon F&B v Shanghai Lehan Commercial Co., Ltd* was an arbitration proceeding seated in South Korea before the Korean Commercial Arbitration Board International and raised by a Korean company against a Chinese company. The applicant applied to the Shanghai No 1 Intermediate Court to preserve the assets of the respondent so as to ensure the enforcement of a (future) arbitral award. The intermediate court dismissed the application on the grounds that the arbitration was not in China.[294] The Shanghai High Court affirmed the decision.[295]

5.135 When a foreign investor chooses Hong Kong as the seat of an investor-State arbitration against China, there would still be a problem on the implementation of interim measures imposed by the tribunal or the emergency arbitrator even though the Hong Kong Arbitration (Amendment) Ordinance 2013 permits emergency reliefs

[289] Civil Procedure Law (n 230) art 272; see also Arbitration Law (n 209) art 68
[290] Interpretation of Civil Procedure Law (n 284) art 542.1.
[291] ibid art 542.2.
[292] Arbitration Law (n 209) art 65; see also Civil Procedure Law (n 230) art 259.
[293] Notice of the Supreme People's Court on Implementing the Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (2019), Fa [2019] No 207 (Mutual Assistance between Mainland and Hong Kong); Interpretation of the Supreme People's Court on Application of the Special Maritime Procedure Law of the People's Republic of China (2003), FaShi [2003] No 3, art 21.2.
[294] (2014) HuYiZhongShouChuZi No 2, Shanghai No 1 Intermediate People's Court.
[295] (2014) HuGaoShouZhongZi No 21, Shanghai High People's Court.

granted inside or outside of Hong Kong to be enforced in Hong Kong.[296] In 2019, the SPC and the Hong Kong government reached the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region,[297] by which Mainland courts are able to aid the implementation of interim measures made in arbitration proceedings in Hong Kong. It deems to be a huge advantage for arbitration seated in Hong Kong against a party that has benefits in the Mainland compared with anywhere else in the world.[298] The Arrangement, as a judicial interpretation by nature, is the first national law instrument that allows Mainland courts to aid in the enforcement of interim measures made by arbitration of a foreign jurisdiction. However, the SPC further clarifies in another legal instrument that for the purpose of the Arrangement, the 'arbitral proceedings made in Hong Kong' refers to arbitration in conformity with the Arbitration Law, so that it does not include investor–State arbitration.[299] As a result, interim measures imposed by an investor-State arbitral tribunal seated in Hong Kong will not be enforced in the Mainland China, even from a CIETAC arbitral tribunal.

Finality

5.136 The Chinese legal system applies the *res judicata* doctrine of arbitration awards. First, article 9.1 of the Arbitration Law provides that an arbitration award is binding and final. Parties cannot request a court or arbitration tribunal to adjudicate the same dispute after the arbitration award is rendered.[300] Second, facts that have been ascertained by an arbitration award can be directly used as evidence in another case

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[296] Ord. No. 7 of 2013, part 2 s 5, part 3A Enforcement of Emergency Relief, s 22B. 'Enforcement of emergency relief granted by emergency arbitrator (1) Any emergency relief granted, whether in or outside Hong Kong, by an emergency arbitrator under the relevant arbitration rules is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court…'
[297] FaShi [2019] No 14, Supreme People's Court.
[298] 'Interim Measures Arrangement to Take Effect Tomorrow' (Government of the Hong Kong Special Administrative Region, 30 September 2019) <www.info.gov.hk/gia/general/201909/30/P2019093000455.htm> accessed 30 December 2020.
[299] Mutual Assistance between Mainland and Hong Kong (n 293) art 1.
[300] Arbitration Law (n 209) art 9.1.

unless otherwise proves.[301] Therefore, parties are obliged to respect and perform effective arbitration award.[302] A party is entitled to request a competent court to enforce an effective arbitration award if the other party refuses to perform it.[303]

5.137 The innovative appeal procedure under the BAC IA Rules may challenge the rule of finality provided by the Arbitration Law. The BAC has tried to evade the issue of finality by defining a final arbitral award in three different scenarios. First, article 42.8 of the BAC IA Rules provides a general principle that an award shall be final and binding on the parties as of the date it is made if there is no agreement of appeal. Second, if there is an agreement of appeal, the arbitral award made by the original tribunal is deemed to be final if neither party has appealed the arbitral award within 60 days, or the appellate proceeding is terminated if an appeal is made.[304] Third, an appeal award shall be final and binding as of the date it is made.[305] Accordingly, there will be only one final and binding award under the design of the BAC, regardless of any appellate proceedings.

5.138 It is unclear whether the BAC strategy may work under the current legal context of China. No case or official comment from the legislators or the courts has been made on the issue. However, to facilitate the application of the new investment arbitration rules, the Arbitration Law is expected to undergo an overall and extensive modification, in particular on the issues of arbitrability and finality.

Doubts on the impartiality of arbitration centres

5.139 Article 14 of the Arbitration Law stipulates that all arbitration institutions (in China) are independent of the government at any level; there is no superior–subordinate

[301] Interpretation of Civil Procedure Law (n 284) art 93; See also Some Provisions of the Supreme People's Court on Evidence in Civil Procedure (2008), FaShi [2001] No 33, art 9.
[302] Arbitration Law (n 209) art 62.
[303] ibid; Civil Procedure Law (n 230) art 237.
[304] BAC Rules (n 54) arts 2.8 and 42.9.
[305] ibid Appendix E rule 8.7.

relationship among the arbitration institutions. However, there has been always a concern about the role and nature of the Chinese arbitration institutions.[306] Historically, as illustrated in detail by Dr Chen Fuyong, the deputy secretary-general of the BAC, in his study in 2010, the question was whether an arbitration institution had been an administrative institution or a non-governmental institution.[307] After years of development on the transformation of Chinese arbitration institutions into non-governmental institutions, the question remains to some extent. As the deputy head of the SIAC (also known as the Shanghai International Economic and Trade Arbitration Commission) pointed out in 2019, a key question that needed clarification was whether an arbitration institution (in China) was a dispute settlement organisation like a court or a legal service organisation. In China, it has been recognised for a long time that an arbitration institution is just a place to solve a dispute, but internationally and according to the category of business, arbitration institutions, law firms, notary offices, judicial appraisal institutions are all parts of legal services.[308]

History of arbitration centres in China

5.140 The long-standing concern may date back to the establishment of the first arbitration commission in China. As discussed in the paragraphs above on the origin of arbitration in China, the first arbitration commission (i.e. the CIETAC) was established by the China Chamber of International Commerce (CCPIT), an affiliate institution of the central government of China, the Government Administration Council (GAC), in accordance with the GAC's decision in 1954.[309] At that time and long after, there were only two permanent arbitration institutions in the true sense of the term in the Mainland China. The CIETAC and the China International Maritime

[306] See Fuyong Chen, *The Unfinished Transformation-An Empirical Study of the Current Status and Future Trends of China's Arbitration Institutions* (Law Press China 2010)
[307] ibid, chapter 1.
[308] Chun Wang, 'China's Role in International Arbitration' (2019) 21 People's Weekly <http://paper.people.com.cn/rmzk/html/2019-12/10/content_1960818.htm> accessed 30 December 2020.
[309] Decision on FTAC (n 4).

Arbitration Centre (CIMAC) handled foreign-related disputes. As to the domestic arbitration, though there were plenty of dispute settlement bodies under the name of 'arbitration committees', they were by nature affiliated organisations of administrative agencies.[310]

5.141 In fact, one of the major legislative purposes of the Arbitration Law (1994) was to split arbitration committees with administrative agencies to mitigate administrative influences on arbitration.[311] All local arbitration institutions were re-established by local governments according to the plan launched by the central government of China, the State Council, in 1995.[312] Initially, the main duty of local arbitration institutions was to adjudicate domestic arbitration, while the State Council confirmed in 1996 that they could also accept foreign-related arbitration upon the consent of the parties.[313]

5.142 After the promulgation of the Arbitration Law in 1994, the State Council nominated seven cities, including Beijing, Shanghai and Shenzhen, as pilot cities for the re-organisation of arbitration commissions in November 1994.[314] Local governments of these 7 pilots were demanded by the State Council to figure out and present solutions for detailed implementations of Arbitration Law. Each city had to choose one of the top officials to take charge of the responsibility. These cities became the first batch of cities with local arbitration committees, which were established before 1 September 1995 as demanded by the State Council.[315] The BAC and Shenzhen Arbitration Commission, the predecessor of the SCIA, were two of the earliest arbitration commissions established by local governments.

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[310] Wei Tu, *Study on the Mechanism of Supervision and Management of Arbitration Institutions* (Law Press China 2015) 42.
[311] Gu (n 10).
[312] Plan for Reorganisation of Arbitration Institutions (n 50) art 1.
[313] Clarification of Arbitration Law (n 283), art 3.
[314] Circular of the General Office of the State Council on Making Good Arrangements for the Re-organisation of Arbitration Institutions and the Establishment of the China Arbitration Association (1994), GuoBanFa [1994] No 99, art 1.
[315] Circular of the General Office of the State Council on Further Implement for the Re-organisation of Arbitration Institution (1995), GuoBanFa [1995] No 38, art 2.

5.143 Six months later, the State Council further demanded all provincial governments to formulate local plans of re-organisation of arbitration committees, so that each province could have its arbitration committee established in its territory, with at least one located at the capital of the province.[316] Again, this responsibility was assigned to one of the top leaders of each province. Based on the experiences of pilot cities, the State Council formally circulated a set of directions for re-organisation of arbitration committees on 28 July 1995, including a detailed arrangement for the reorganisation of arbitration committee, an interim regulation on registration of arbitration committee, a regulation on charge of arbitration fee, a model charter of arbitration committee and a model interim arbitration rules of arbitration committee.[317]

5.144 According to the directions of the State Council, a typical arbitration committee at that time should have the following features:

- Be the only arbitral committee in the city, which means the local government could not establish a second arbitration institution, even those of specific industries or professions.[318]

- Consist of a chairman, 2–4 vice chairmen and 7–11 members, but only 1–2 of the members were full-time, and the rest were part-time. Members of committees should be professionals with working experience and selected from universities, research and science institutions, or state agencies. Members were not necessarily arbitrators. It is worth noting that the first session of each arbitration committee would be proposed by government departments of legal affairs, trade

[316] ibid art 2.
[317] Circular of the General Office of the State Council on Printing and Distributing the 'Plan for Re-organisation of Arbitration Institutions', 'Interim Measures for Registration of Arbitration Committees' and 'Measures for Arbitration Committee Arbitration Fees' (1995), GuoBanFa [1995] No 44
[318] Plan for Reorganisation (n 50) art 1.

and commerce, revolution, judicial, industry, science, construction and leading trade associations. All members would be engaged by the government of each city.[319]

- Engage arbitrators and maintain an arbitrator roster categorised by profession. Civil servants were allowed to be arbitrators on the condition that the engagement would not affect their official duties.[320]

- Be treated with reference to regulations of relevant public institutions at the early stage of establishment. Staff, funding, premises would be solved by local governments. However, arbitration committees should gradually achieve self-funding.[321]

5.145 There are two examples of how provinces promoted the re-organisation/establishment of new arbitration committees. After receiving the 1995 notice of the State Council, Sichuan Province, a large province located in middle China, rapidly forwarded the notice to its lower governments on 14 July 1995, decided to nominate two largest cities of the region as its first batch of cities who must established their arbitration committees before 1 September 1995. It further required every city with districts (i.e. larger cities) to propose its plan and set up its arbitration committee before 1 September 1995 at the latest. To ensure these duties could be done within the time limits, each local government elected a leading officer whose name must be reported to the province government before 25 July 1995.[322]

5.146 Compared with Sichuan Province, Guangxi Province took a steady approach by dividing the re-organisation progress at the regional level into three stages: the first

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[319] ibid art 2.
[320] ibid art 3.
[321] ibid art 4.
[322] Circular of the General Office of Sichuan Province on Making a Good Arrangement for the Re-organisation of Arbitration Institutions, ChuanBanFa [1995] No 69

three arbitration committees in three major cities had to be done before 1 January 1996, but the other four cities with districts were allowed extended time to finish the progress either before 1 May 1996 and 1 September 1996.[323] Furthermore, when circulating, the notice from Guangxi Province provided more detailed directions to local governments. The first directions were on personnel: the group leader of the re-organisation should be the vice mayor who was taking charge of legal or financial affair; the vice leader should be the director of the Legislative Affairs Office of the city.[324] Second, preparation and start-up grants should be apportioned by local governments; after an arbitration committee was established, it should gradually be self-financing; domicile of a committee could be either a lease or an appropriation. Third, the selection of arbitrators should be locally based.[325] Fourth, members of the arbitration committee should be engaged by the local city government and elected from government offices of legal affairs, commerce, judicial, economic, science, construction, and trade association, business association and so on.[326]

<u>Current status of arbitration centres</u>

5.147 Since the implementation of the Arbitration Law, more than 60,000 personnel work in 255 arbitration institutions in Mainland China as of 2018, according to the statistics of the Ministry of Justice.[327] Until now, new arbitration committees still have to be set up by government departments and the corresponding chambers of commerce arranged by local governments in accordance with article 10.2 of the Arbitration Law. A recent example is Xian'ning Arbitration Committee, located at Xian'ning, a middle-sized city of Hubei Province in central region of China, which is

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[323] Circular of People's Government of Guangxi Zhuang Autonomous Region on Promptly Making a Good Arrangement for the Re-organisation of Arbitration Institutions in the Region (1995), 10 October 1995, art 1.
[324] ibid art 2.
[325] ibid art 3.
[326] ibid art 4.
[327] Ning Fei and others, 'Annual Review of Commercial Arbitration in China' in *2020 Annual Report on Commercial Dispute Resolution in China* (Beijing Arbitration Commission 2020)

established by Xian'ning City Government in 2014.[328]

5.148 However, the de-administration is happening in major arbitration centres. In the draft Arbitration Law (1994), an arbitration commission was initially categorised as a non-profit public institution legal person in article 10. This categorisation was deleted in the revision because some experts were concerned that it was not 'precise or clear'.[329] In the final version of the Arbitration Law, all arbitration centres established by local governments after 1995, were initially treated as public institutions. A public institution, or government institution officially translated by Shenzhen Municipal Government, refers to a public service organisation that is established by a state agency or other organisation by using state-owned assets for the purpose of engaging in activities including education, science and technology, culture and hygiene in China.[330] At this moment, most of arbitration institutions are public institutions, but some have been transformed into other structures. For example, staff of the CIETAC South China Sub-commission no longer are treated as governmental institutional staff and transferred to employees with employment contracts since December 2010.[331] In Hebei Province, all 11 large cities (i.e. those with districts) have set up arbitration institutions, among which eight of the 11 are public institutions, and three of them are other entities.[332]

5.149 As designed in the Arbitration Law, arbitration committees should be established by relevant departments and chambers of commerce under the arrangement of local city governments. The initial funds of establishment should be settled by the

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[328] Notice of Xian'ning City People's Government on the Establishment of Xian'ning Arbitration Committee (2014), XianZhengFa [2014] No 15

[329] Ju Xue, *Report of the Legal Committee of the NPC on the Opinion of Revision on the Arbitration Law (Revision on Draft) and the Audition Law (Revision on Draft)* (NPC, 30 August 1994) s 1.2.

[330] Interim Provision for Registration of Public Institutions (2004 Revision) (2004), Order No 411 of the State Council of the People's Republic of China, art 2.

[331] 'Problems and Countermeasures in the Governance and Reform of Arbitration Institutions'(*Dalian Arbitration Commission*, 24 April 2019) <http://zcw.dl.gov.cn/info/69_124061.html> accessed 30 December 2020.

[332] 'Improving Arbitration System and Enahncing Arbitration Credibility in Hebei' (*Hebei Provincial Department of Justice*, 19 September 2019) <http://sft.hebei.gov.cn/system/2019/09/19/011883920.shtml>accessed 30 December 2020.

founders (i.e. governmental funds released by government departments or chambers of commerce).[333] In return, arbitration charges imposed by arbitration committees were governmental revenues that should be turned into State treasury or governmental treasury at provincial or local level, depending on where the arbitration committee registered.[334]

5.150 It is in the legislators' mind that it would not be appropriate for the government to resolve all the funds with the development of arbitration business after the establishment of an arbitration committee.[335] In 2002, the BAC became the pilot arbitration institution in China and transferred the financial catalogue of its arbitration charges from Revenue from Administrative and Institution Fees to Operational Services Charges upon the approval of Beijing Municipal Government. Any revenue of the BAC was no longer regarded as revenues of the Beijing Municipal Government.[336] Since 2010, the category of arbitration charges of the CIETAC, including case filing fees and handling fees, has been transformed to Operational Service Charges and subject to legal taxes.[337] This means the CIETAC has been transformed into an enterprise and taxpayer. It is no longer supported by government financial appropriation. However, this regulation is not automatically applied to other arbitration commissions at local or provincial levels, though local governments may decide, at their discretion, whether to keep arbitration charges under government revenues or transform them into operational service charges.[338] In this regard, the Guangdong Province government approved the transformation of the category of arbitration charges of four local arbitration commission into operational service charge. The original Shenzhen Arbitration Commission, one of the predecessors of the SIAC, was excluded from the approved list in consideration

[333] Xue (n 329) s 1.9.
[334] Measures on Arbitration Commissions Arbitration Fees (1995), GuoBanFa [1995] No 44, art 14.
[335] Xue (n 329) s 1.9.
[336] Letter of Beijing Municipal Price Bureau on Adjusting the Arbitration Fee Standard (2002), JingJia (Shou) Zi [2002] No 255.
[337] Notice of the Ministry of Finance and the National Development and Reform Commission on Issues concerning the Adjustments to the Policies on the Administration of Arbitration Charges, CaiZong [2010] No 19, art 1.
[338] ibid, art 4.

of its status.[339]

5.151 After years of development and reform, the Several Opinions on the Perfection of Arbitration System and Improvement of Credibility of Arbitration (2018) confirms that an arbitration institution is independent, for the public welfare and non-profit. There are two modes of charges of arbitration institutions in China: administration charges for public institutions and operation charges for business entities. Arbitration institutions can choose either mode based on their own developments and approvals of local organisational setup departments. However, even after the reform, arbitration institutions in some provinces still need government funds to stay afloat.[340] So far, despite reforms around the state, arbitration charges are still listed as 'Revenue from Administrative and Institutional Fees', according to the database on the List of National Governmental Financial Endowment and Revenue from Administrative and Institutional Fees kept by the central government of China. The Management Mode of Funds is indicated as 'To Be Paid into Local Treasury'.[341]

5.152 Nevertheless, the major arbitration centres in China – here, the three permanent arbitration centres that have promulgated investment arbitration rules – seem to have been free from governmental control by achieving financial independence. However, there are reasons for believing that the government may still have channels to exert its influence on the management of these arbitration centres.

5.153 For example, the CIETAC was set up by the CCPIT and remains an affiliate institution of the CCPIT.[342] Although the CCPIT determines itself as a non-governmental

[339] Notice of Guangdong Provincial Development and Reform Commission on Clarifying Arbitration Fees of Arbitration Institutions (2010), YueJiaHan [2010] No. 1074.

[340] For example, Hebei province allocated special funds to support arbitration institutions to ensure the function of the institutions as one of the measures of the reform of arbitration system in that province. 'The Ministry of Justice Clarifies the Goals of Arbitration Reform and Development in the New Era' (*Legal Daily*, 2 April 2019) <http://www.moj.gov.cn/Department/content/2019-04/02/612_231935.html> accessed 31 December 2020.

[341] 'List of National Government Funds and Administrative and Public Institutional Charges' <www.gov.cn/zhuanti/shoufeiqingdan/shoufeiqd.html>accessed 9 June 2020.

[342] 'Institutional Setup' (CCTIP 13 August 2014) <www.ccpit.org/Contents/Channel_3549/2014/0813/409534/content_409534.htm> 31 December 2020;

organisation, it is a public institution managed according to the Civil Servant Law of China.[343] All staff members of the CCPIT, except service workers, enjoy the same level of salaries, benefits, retirement treatments as civil servants of the same rank, and their recruitment, assessment, promotion and ranks resemble those of civil servants.[344] According to the 'Annual Accounts Report of the CCPIT of 2019', it received a fiscal appropriation from the central government of RMB 485,225,500 (USD 72,528,270.18) in 2019, representing 78% of the total annual income.[345] Though administration of the CIETAC itself never refers to the laws and regulations for the civil servants,[346] one can hardly split the management of the CIETAC and CCPIT. According to the Articles of Association of the CIETAC, all heads of the CIETAC, including the director, executive deputy director, vice deputy directors, members of committee, honorary director and consultants, shall be engaged by the CCPIT.[347] The CCPIT has to approve the establishment of any sub-institution or sub-centre, including the CIETAC Hong Kong Arbitration Centre.[348] Further, the CCPIT has to approve the promulgation and revision of the CIETAC arbitration rules before implementation.[349]

5.154 The SCIA is an even better example of how a local government may intervene in the management of an arbitration centre. The predecessor of the SCIA was a sub-institution of the CIETAC. In 2012, two sub-institutions of the CIETAC in Shanghai and Shenzhen announced their independence from the CIETAC and renamed themselves as Shanghai International Economic and Trade Arbitration Commission (also known

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Articles of Association of China Council for the Promotion of International Trade (2015) (CCPIT Articles of Association), art 26.

[343] CCPIT Articles of Association (n 342), art 2; Notice of the Central Organisation Department and the Ministry of Personnel on 'Printing and Distributing the Implementation Plan for the Administrating the China Council for the Promotion of International Trade Organs with Reference to the "Interim Regulations on National Civil Servants"' (1996), ZuTongZi [1996] No 38 (Plan for Administrating CCPIT); Civil Servants Law of People's Republic of China (2018 Revision) art 112.

[344] Plan for Administrating CCPIT (n 343) Appendix arts 1, 3, 4, 5 and 6.

[345] 'CCPIT 2019 Department Final Accounts' (CCPIT, 17 July 2020) <www.ccpit.org/Contents/Channel_3468/2020/0717/1276184/content_1276184.htm> accessed 30 December 2020.

[346] Plan for Administrating CCPIT (n 343) art 1.2.

[347] ibid arts 5 and 6.

[348] ibid arts 21 and 24.

[349] ibid art 28.

as Shanghai International Arbitration Centre, SHIAC) and South China International Economic and Trade Arbitration Commission (also known as Shenzhen Court of International Arbitration, SCIA).[350] This incident caused nationwide chaos in the practice of arbitration. All cases involving the challenge of arbitration agreement and annulment and enforcement of arbitration award regarding the three institutions had been suspended until the SPC finally admitted the independence of the two arbitration institutions after three years in 2015.[351] In 2017, the Shenzhen Municipal Government decided to merge the original SCIA with Shenzhen Arbitration Committee, which was one of the earliest local arbitration centres established by local governments in 1995 and set up a new SCIA.[352]

5.155 The most recent administration rules of the SCIA, the Regulation of Administration of Shenzhen Court of International Arbitration (2019 Revision), is by nature a set of local government rules announced by the Shenzhen Municipal Government in the form of a government order.[353] Article 2 of the administration rules stipulates that the SCIA is an arbitration organisation set up by the Shenzhen Municipal People's Government. Article 3 provides that the SCIA is a non-profit statutory body that operates independently as a public institution legal person. All leaders of the SCIA, including the chairman, vice chairman and members of the council (the decision-making body of the SCIA) shall be appointed or engaged by the Shenzhen Government.[354] Funds of the SCIA come from the charges for arbitration, other dispute settlement services it provides and other legal incomes,[355] which does not preclude the governmental funds. Staffing setting of the SCIA shall be reported to the

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[350] 'Announcement of China International Economic and Trade Arbitration Commission' (CIETAC 2012) <www.cietac.org/index.php?m=Download&a=show&id=28> accessed 22 March 2016.
[351] Notice of the Supreme People's Court on Issues Concerning the Proper Trial of Cases of Arbitration-Related Judicial Review (2013), Fa [2013] No 194; Reply of the Supreme People's Court on Requests of Shanghai High People's Court and Other Courts for Instructions on Cases Involving Judicial Review of the Arbitration Awards Issued by the China International Economic and Trade Arbitration Commission and Its Former Sub-Commissions and Other Arbitration Institutions (2015), FaShi [2015] No 15.
[352] Notice of the Office of Government Set-up Committee of Shenzhen Municipality on Optimising the Allocation of Resources and Integrating the Establishment of Arbitration Institutions, ShenBian [2017] No 78.
[353] Shenzhen Municipal Government Order No 322, 23 April 2019.
[354] ibid arts 7 and 12.
[355] ibid art 21.

human resource department of the municipal for record and plans for staff salaries and benefits shall also be reported to the treasury department.[356] So far, one of the senior leaders of the Shenzhen Municipal Government is appointed by the city government to oversee the SCIA.[357] The Regulation of Shenzhen Court of International Arbitration is listed in the legislative plan of Shenzhen municipal government.[358]

5.156 Finally, it is noted that the involvement and development of arbitration institutions in international business is specially funded by the Chinese government. In March 2019, the Ministry of Justice (MOJ) promoted a vision of a China Arbitration 2022 Plan in the national arbitration working meeting that China would support national arbitration institutions for more global impact. As admitted by the MOJ, the national Central Finance has arranged public legal service projects in the CCPIT's budget to support the participation of the CIETAC and other institutions in the UNCITAL and ICSID, as well as research on investment arbitration and commercial arbitration rules. Local governments were also required to provide financial support for the necessary input and special projects of other foreign-related arbitration institution.[359] For example, arbitration institutions, especially those with foreign-related services, are receiving preferential tax rates.[360]

The verification procedure

5.157 The last possible concerns for disputing parties that may consider choosing a China-based permanent arbitration centre to hear investment disputes may be the

[356] ibid art 27.2.
[357] Notice of Shenzhen Municipal People's Government on Adjusting the Division of Work among the Members of the Municipal Government Leadership Team (2020), ShenFu [2020] No 20.
[358] Notice of Shenzhen Municipal People's Government on Issuing the 2020 Legislative Work Plan (2020), ShenFu [2020] No 18, s 1.1.1.
[359] 'Letter of Reply of the Ministry of Justice Concerning Proposal No 4050 (Political and Legal No 357) of the Second Session of the 13th National Committee of the CPPCC' (Ministry of Justice 25 November 2019) <www.moj.gov.cn/government_public/content/2019-11/25/143_3236473.html> accessed 31 December 2020.
[360] ibid.

verification procedure before Chinese courts, though others may, on the contrary, appreciate the procedure as a safeguard against incorrect decisions.

5.158 When choosing China as the seat of arbitration, a Chinese civil court plays a role in the arbitration in the following aspects. First, parties may challenge an arbitration agreement before a civil court despite the competence-competence doctrine.[361] Second, only courts have the power to decide and execute interim measures, such as asset and evidence preservations. Arbitral tribunals, as well as the applicants of the arbitration, have to seek assistance from courts following the Civil Procedure Law.[362] Third, a civil court is entitled to set aside,[363] recognise and/or enforce of arbitration awards upon application of the parties.[364]

5.159 Without prejudice to the finality of arbitration awards, China has imposed a verification procedure on judicial review cases which has replaced the previous internal report system to secure the consistency and correctness of courts' decisions on arbitration-related cases since 1 January 2018. By definition, a judicial review case is a civil action before a competent court applying to confirm the validity of an arbitration agreement; enforce or set aside a domestic or foreign-related arbitral award rendered by an arbitral institution of Mainland China; recognise and enforce a foreign arbitral award (including that made in Hong Kong, Macau and Taiwan); or other arbitral-related application that may need to be reviewed by court.[365] On the whole, considering that usually a decision of a judicial review case is final and binding and cannot be appealed,[366] only after being verified by a superior court can a lower

[361] Arbitration Law (n 209) art 19.2.
[362] ibid art 28; Civil Procedure Law (n 260) art 81.
[363] Arbitration Law (n 209) art 58.
[364] ibid, art 62.
[365] Relevant Regulation of the Supreme People's Court on Issues Concerning Applications for Verification of Arbitration Cases under Judicial Review (2017), FaShi [2017] No 21 (Regulation on Verification), art 1; Regulation on Judicial Review (n 260) art 1; Other arbitration-related judicial review cases is a catch-all clause that is to include new cases, such as ad hoc arbitration, in the future. See Yongjian Zhang and Xuefeng Ren, 'Comprehension and Application of Relevant Provisions on Issues Concerning Applications for Verification of Arbitration Cases under Judicial Review and Provisions on Several Issues Concerning Trying Cases of Judicial Review on Arbitration' (2018) 4 The People's Judicature (Application) 27 s 2.4.
[366] Except for decisions on inadmissibility, rejection of applications and objection on jurisdiction; See Regulation on Judicial Review (n 260) art 20.

court make a negative decision on a judicial review case (i.e. namely denying the validity of an arbitration agreement, annulling or refusing to enforce an arbitral award of arbitration seated in Mainland China, or refusing to recognise or enforce an arbitral award of arbitration seated outside Mainland China).[367]

a. The predecessor – the internal report system

5.160 Before the judicial review mechanism introduced at the end of 2017, China had adopted an internal report system within the courts (the 'Report System') that had been a review procedure specifically designed for protecting foreign-related arbitration and foreign arbitration against illegitimate impediments from local courts for about 20 years. It was established by the SPC according to two judicial explanations promulgated in 1995 and 1998.[368] Accordingly, only the SPC had the final authority to deny the effectiveness of a foreign/foreign-related arbitration agreement, annul a foreign-related arbitration award, or refuse to recognise or enforce a foreign/foreign-related arbitration award. All local courts had to seek instructions from the SPC before making a negative decision on these issues.

i. Background of the Report System

5.161 The Report System aimed to counter the local protectionism of the local courts and judges who excessively used their discretion in dealing with foreign/foreign-related arbitration, which was common in the early stage of China's accession to the New York Convention.[369] The consequence was fatal and irreversible if local courts had been influenced by local governments to act biasedly against external investors for

[367] Regulation on Verification (n 365) art 2 and 3.
[368] Notice of the Supreme People's Court on People's Courts' Dealing with Issues Regarding Foreign-Related Arbitration and Foreign Arbitration (1995), FaFa [1995] No 18 (Notice on Dealing with Foreign-Related Arbitration and Foreign Arbitration); Notice of the Supreme People's Court on Issues Regarding the Annulment of Foreign-Related Arbitration Award (1998), Fa [1998] No 40 (Notice on Annulment of Foreign-Related Arbitration Award).
[369] Yingwei Cai, 'Certain Procedure Issues in the Recognition and Enforcement of Foreign Arbitration Awards in China' (2012) Beijing Arbitration 72

the sake of local interests, especially given that a court's decision in related with an arbitration agreement or arbitration award was final and non-appealable.[370]

5.162 In *Kaifeng Dongfeng Clothing Factory v Henan Province Clothing Import and Export (Group) Company and Dajin International Trade (Hong Kong) Co., Ltd* in 1992, the local court refused to enforce the arbitration award that was unfavourable to Henan Province Clothing Import and Export (Group) Company, a local-based state-owned company. The local court determined that enforcement would severely impair the state economic interests and public benefits and impact the foreign trade order, as the execution against properties of a state-owned company would result in the loss of State assets. After the applicant revealed the case to the public and reported it to the SPC, the SPC criticised the local court for the abuse of public policy. This case was regarded as a major incident that stimulated the launch of the Report System.[371]

ii. Details of the Report System

5.163 The Chinese court system has four tiers: primary courts, intermediate courts, high courts at the provincial level and the SPC at the national level.[372] As the initial decisions on the annulments of arbitral agreements and arbitral awards were rendered by the competent primary courts or intermediate courts according to the Civil Procedure Law, the Report System required these lower courts to report their preliminary decisions to the corresponding high courts and subsequently the SPC for instructions and final decisions. According to the relevant judicial explanation of the SPC, the Report System was operated as follows:

- when a foreign-related commercial and maritime dispute (including those

[370] Civil Procedure Law (n 230) art 154.9.
[371] Zhidong Chen and Wei Shen, 'The Origin and Application of Recognition and Enforcement of Foreign Arbitration Award in China' 4 Legal Science
[372] Organic Law of the People's Courts of the People's Republic of China (2018 Revision), arts 2.2, 17, 22, 25 and 29.

related to Hong Kong, Macau and Taiwan) had been brought to a competent court while there was an arbitration agreement herein, if the court decided that the arbitral agreement was invalid, void or could not be enforced, it should report the case to its corresponding high court for review before formally accepting the case; if the high court decided that the original court could take the case, the high court should report the case to the SPC for final review. The original court should not accept the case before the SPC made the final decision.[373]

- when a foreign-related arbitral award made by a Chinese arbitral institution was submitted to an intermediate court for annulment,[374] if the intermediate court decided to annul the award, it should report the case to its high court for review within 30 days; if the high court agreed with the decision, the high court should report the case to the SPC for final review within 15 days. Only after the SPC replied could the original court decide to annul the award or notify the tribunal for re-arbitration.[375]

- when a foreign-related arbitral award made by a Chinese arbitral institution or a foreign arbitral award being submitted to an intermediate court for recognition and/or enforcement,[376] if the intermediate court decided not to recognise or enforce the award, it should report the case to its high court for review; if the high court agreed to the decision of the intermediate court, the high court should report the case to the SPC for final review. The intermediate court could not refuse to recognise or enforce the award before the SPC replied.[377]

iii. Problem of the Report System

[373] Notice on Dealing with Foreign-Related Arbitration and Foreign Arbitration (n 368) art 1.
[374] Notice on Foreign-Related Trials (n 258) art 6.
[375] Notice on Annulment of Foreign-Related Arbitration Award (n 368) arts 1 and 2.
[376] Civil Procedure Law (n 230) arts 273 and 283.
[377] Notice on Dealing with Foreign-Related Arbitration and Foreign Arbitration (n 368) art 2.

5.164 As an alternative solution for appeal against the court's decision on the arbitration-related issues, the Report System did impel local courts to respect arbitration and shield parties with foreign interests from judicial discrimination when disputes arise to some extent. However, criticisms against the Report System remained. First, there was no time limitation for the SPC to make the final decision. In some cases, it might take several years for the parties to be acknowledged in the result from the original court.[378] Second, though the Report System was regarded as a substitution for appeal, it was, in fact, an internal procedure followed within the court system but without any participation of the parties. Third, the Report System was only designed for arbitrations involving foreign interests, which might be considered as a super-national treatment unfavourable to the domestic parties. Fourth, in practice, a few local courts neglected the Report System, especially when dealing with the challenge to jurisdiction and rendering the judgement on the merits without consulting the SPC.[379] Parties in these cases had to reveal the fact by appealing to the judgements before the higher court so as to attract attention from the latter and the SPC.[380] In conclusion, though the Report System was an expedient measure tailored for the early days of the arbitration law in China, it was believed to be replaced by an appeal system in the future to accelerate the arbitration process.[381]

b. The new verification rules on judicial review cases

5.165 Nevertheless, the reform of incorporating an appeal phase has not been realised. Instead, on 26 December 2017, the SPC launched a systematic verification procedure

[378] For example, see Reply on *Züblin* case (n 212). In this case, *Züblin* asked the local court to recognise the arbitration agreement in April 2003, while the SPC replied in July 2004 and the local court finally made the decision denying the validity of the arbitration agreement in September 2004. However, during this period, *Züblin* had already launched the ICC arbitration in April 2004 and requested to enforce the arbitration award in August 2004. The enforcement was finally rejected in July 2006.

[379] Xingjun Ge, 'Problems in the Enforcement of Arbitral Awards (Speech in the 2003 Conference for Arbitrators)' (2004) 89 Arbitration and Law 18. Mr. Ge Xingjun was the Director of the Office of Enforcement of the Supreme People's Court.

[380] For example, see Reply of the Supreme People's Court on Request for Instructions on Objection over Jurisdiction in Dispute over Contract for Carriage of Goods by Sea in the Case of China Beijing Ailisheng Import & Export Co., Ltd v Japan Solar Shipping and Trading Ltd. and Singapore Songa Ship Holding PTE Limited (2007), MinSiTaZi [2007] No 14.

[381] Ge (n 379)

on judicial review cases with the promulgation of two specific judicial interpretations that became effective on 1 January 2018.[382] Compared with the report system, the most significant modification made by the new verification procedure is that domestic arbitration cases now also fall into the scope of verification, which may impact foreign investors because, as noted above, the pure existence of foreign investments in a local-registered subsidiary set up by a foreign investor is not a foreign element itself when distinguishing a foreign-related arbitration from a domestic arbitration. In addition, it is stipulated that a higher court may inquire parties about the facts of cases when verifying judicial review decisions,[383] so that parties now theoretically have opportunities to participate in the verification proceedings.

5.166 In practical terms, the capable courts with jurisdiction of judicial review are intermediate courts or special courts (i.e. maritime courts or railway transportation courts) determined in accordance with specific rules, but generally include intermediate courts of the places where the agreed arbitration institution are located, where the respondent resides and where the assets are located.[384] The difference in the verification procedure between domestic arbitration and foreign-related arbitration is on the level of the court of verification. Just like the Report System described above, foreign-related arbitration will be finally verified by the SPC if a competent high court agrees with the negative decision suggested by the review court.[385] In contrast, a negative decision on domestic arbitration is normally verified by a high court and does not need to be further approved by the SPC, unless a party of the arbitration is located outside the province where the high court sits, or the court intends to use the violation of public policy as the reason to annul or refuse to enforce an arbitral award.[386]

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[382] Regulation on Judicial Review (n 260); Regulation on Verification (n 365)
[383] Regulation on Verification (n 365) art 5.
[384] Regulation on Judicial Review (n 260) arts 2 and 3; Arbitration Law (n 209) art 58.
[385] Regulation on Verification (n 365) art 2.
[386] ibid art 3.

c. Performance of judicial review mechanism

5.167 The SPC believes that the verification procedure can effectively avoid wrongful cases relating to arbitration.[387] According to the current legal system of China, the parties to arbitration do not have the right to appeal, apply for judicial reconsideration or retrial against decisions of judicial review cases given these decisions are final and binding upon delivery to the parties. Therefore, the parities do not have remedies if the arbitration agreement is determined to be invalid or the arbitral award could not be enforced based on illegitimate reasons. Instead, the parties can only submit the dispute that has been heard before an arbitral tribunal to a court for a new judgement that will rack up enormous costs to parties.

5.168 To ensure the uniformity on the judicial review standards and professionality of the review courts, the SPC required high courts across the state to centralise the jurisdiction of judicial review cases by establishing specialised courts and enhancing case data management.[388] The SPC further launched a pilot scheme in Beijing by nominating Beijing No 4 Intermediate People's Court (the 'No 4 Court') to be the only court that specially accepts all Beijing judicial review cases, except the review cases on the non-enforcement of domestic arbitral awards.[389] It is worth mentioning that both two Chinese arbitration centres that have published specific investment arbitration rules, the CIETAC and BAC, are located in Beijing. Disputes on the validity of arbitration agreements involving the two centres and annulment of arbitral awards made by the two centres will be submitted to the No 4 Court. Therefore, statistics published by the No 4 Court on the judicial review cases are of substantial practical

[387] 'Correctly Hearing Arbitration Judicial Review Cases and Promoting Healthy Development of Arbitration' (Supreme People's Court, 29 December 2017) <www.court.gov.cn/zixun-xiangqing-75882.html> accessed 30 December 2020.
[388] Notice of the Supreme People's Court on Issues of Centralisation on Handling Judicial Review of Arbitration (2017), Fa [2017] No 52.
[389] Notice of Beijing High People's Court on Issuing Regulations of Beijing High People's Court on Jurisdiction over Cases of Beijing No 4 Intermediate People's Court (2018 Revision) (2018), 2 February 2018.

meaning to future investment arbitration cases in China.

5.169 One may concern that the verification procedure may delay the progress of judicial review cases and increase the uncertainty of disputes and costs of parties. According to a recent research report on the judicial review cases accepted by the No 4 Court from 8 February 2018 to 1 September 2019,[390] the average duration for cases confirming the validity of arbitration agreements and annulling arbitral awards were 57.4 days and 57.49 days, respectively. However, there were significant differences on durations between domestic arbitration and foreign-related arbitration: applications on confirming the validity of arbitration agreements for domestic arbitration cases were dealt within 42.99 days on average, and applications on annulling domestic arbitral awards were decided in 45.27 days. In contrast, the average duration for foreign-related arbitration surged to 230.38 days and 153.02 days on average. Moreover, the average duration for deciding applications on recognising and enforcing foreign arbitral awards were 409 days.[391] According to the No 4 Court, the lengthiness on dealing foreign-related arbitration and foreign arbitration was primarily attributed to the complicated issues on the delivery of documents to parties located outside China and various procedures for foreign parties to participate in the court proceedings, such as authentications and visa applications. In short, the court concluded that very few cases were delayed merely by the verification procedure at the SPC level.[392]

5.170 In general, as suggested in the statistics, Chinese courts show a favourable attitude to arbitration in the judicial review cases. Among all 316 cases related to the validity of arbitration agreements, only in two cases (occupying 0.64% of the total) were the

[390] China Arbitration Institute (CAI) Project Group, 'The Big Data Research Report on Judicial Review Cases of Arbitration of Beijing No 4 Intermediate People's Court Part I' (Beijing No 4 Intermediate People's Court, 12 March 2020) <http://bj4zy.chinacourt.gov.cn/article/detail/2020/03/id/4843350.shtml> assessed 31 December 2020.
[391] China Arbitration Institute (CAI) Project Group, 'The Big Data Research Report on Judicial Review Cases of Arbitration of Beijing No 4 Intermediate People's Court Part II' (Beijing No 4 Intermediate People's Court, 18 March 2020) <http://bj4zy.chinacourt.gov.cn/article/detail/2020/03/id/4853547.shtml> assessed 31 December 2020.
[392] ibid.

arbitration agreements determined invalid.[393] This statistic is consistent with the instruction of the SPC, which emphasised that the principle in determining the validity of arbitration agreement was 'make it as effective as possible'.[394] In terms of the judicial review cases of applications on the annulment of arbitral awards, only three cases (0.46%) out of 647 applications were upheld and another two cases were remanded for a new arbitration. Less than 1% arbitration awards were successfully challenged in the judicial review cases.[395]

5.171 Moreover, the No 4 Court published a Standardisation Guide for Adjudication of Cases Involving Judicial Review of Arbitration that provides detailed rules and typical cases for all aspects of judicial review of arbitration in September 2019.[396] As a result, the guide for adjudication is regarded as an efficient tool for judges in determining judicial review cases so as to provide the parties of CIETAC arbitration or BAC arbitration with predictable, consistent and correct decisions of judicial review cases related to arbitration.[397]

d. Problems of the verification procedure

5.172 Notwithstanding the positive report and statistics published by the No 4 Court, the new verification procedure may still be questioned on account of the efficiency. On the good side, parties may be more likely to obtain a 'correct' decision via the verification procedure than an appeal procedure because the consequence of the former procedure represents a view of an upper or even highest court of China. On the other side, unlike an appeal procedure where both parties will have chances to

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[393] China Arbitration Institute (CAI) Project Group, 'The Big Data Research Report on Judicial Review Cases of Arbitration of Beijing No 4 Intermediate People's Court Part III' (Beijing No 4 Intermediate People's Court, 18 March 2020) <http://bj4zy.chinacourt.gov.cn/article/detail/2020/03/id/4853548.shtml> assessed 31 December 2020 (Big Data Research Part III).
[394] Ibid; Regulation on Judicial Review (n 260) art 14.
[395] Big Data Research Part III (n 393).
[396] Jun Ma and others, 'Beijing No 4 Intermediate People's Court Held a Press Conference to Publish Standardisation Guide for Adjudication of Cases Involving Judicial Review of Arbitration' (Beijing No 4 Intermediate People's Court, 11 December 2019) <http://bj4zy.chinacourt.gov.cn/article/detail/2019/12/id/4718669.shtml> accessed 31 December 2020.
[397] ibid.

present their cases, the decision of an upper court is still largely based on the written report of the hearing court. The parties may be consulted only if the upper court considers the facts represented in the report as unclear.[398] However, even in this case, an upper court may choose to return the files to the lower court demanding the latter to supplement facts.[399] There is no time limit for an upper court to make a decision, nor for a lower court to re-conduct the report. Because the parties may not be involved in the proceedings, the lack of time limits may not only result in lengthy proceedings but also leave parties at loose ends. Furthermore, it is confusing whether the verification procedure is limited to the review of procedure issues or extended to the merits. As noted above, the grounds for setting aside and not enforcing a foreign-related arbitration are only limited to procedural defects pursuant to the Civil Procedure Law. However, the verification procedure now allows an upper court to take actions when it believes 'facts are not clear', leading to a concern about the scope of review, especially for foreign-related arbitration.

F. Conclusion

5.173 The CIETAC, BAC and SCIA have provided their solutions via new arbitration rules addressing the concerns of the current ISDS system. However, there are still practical issues on the applications of the new arbitration rules, especially in consideration of those conflicting to the current Arbitration Law. The fundamental obstacle is on the limited arbitrability under the current Arbitration Law. If investment disputes cannot be arbitrated in China, though the arbitration centres allow their arbitration rules to be applied to investment arbitration seated outside the Mainland China, such as in Hong Kong, the enforcement of interim measures and awards will be problematic. Indeed, if an investment arbitration cannot sit in China, why should parties choose a China-based permanent arbitration centre compared with more mature arbitration centres, such as the ICSID or the SIAC, that are located in another Chinese-dominant

[398] Regulation on Verification (n 365) arts 4 and 5.
[399] ibid art 5.

country. Even for parties who submit their disputes to arbitration based on an arbitration agreement under a treaty, although they may less likely to be impacted by the domestic law, they may still have concerns about the impartiality of the Chinese arbitration centres.

5.174 That said, by virtue of the established domestic commercial arbitration system and internationally tested investor-State arbitration, it is foreseeable that investment arbitration would have systematic advantages over domestic administrative dispute resolution mechanism discussed in the Chapter 2 in China. Furthermore, the Chinese centres, especially the BAC, have taken innovative steps to incorporate an appeal phase and an expedited procedure in the investment arbitration rules, which may possibly mitigate the concerns of parties about the current ISDS system. Therefore, to take advantage of these new rules and to enhance competitive ability of China in the global arbitration market, the study suggests an overall modification of Arbitration Law as well as other laws and regulation on foreign investment in China, which will be presented in detail in the conclusion chapter.

Chapter 6: Conclusions and Recommendations

A. Conclusion

6.1 In the past five years, the overall legal environment of investor-State dispute settlement (ISDS) has changed dramatically in China. The new Foreign Investment Law, which serves as a milestone of Chinese investment legislation, first appeared on the scene in 2015 when a discussion draft of the law was published for public review. After years of discussion and modification, the Foreign Investment Law finally took effect in 2020, replacing the 40-year-old Chinese foreign investment law system. Article 26 of the Foreign Investment Law specifies the three domestic disputes mechanisms that a foreign investor and/or its invested-enterprise registered in China may approach over investment disputes with administrative agencies: the Complaint Mechanisms for Foreign-Invested Enterprises (the 'Complaint Mechanism'), administrative review and administrative litigation. Although these three mechanisms existed prior to the Foreign Investment Law, their laws and regulations have been modified in recent years. For the Complaint Mechanism, the formal Rules on Handling Complaints of Foreign-Invested Enterprises was published in August 2020, replacing the previous interim rules Ienacted since 2006. Both the Administrative Review Law and the Administrative Litigation Law underwent minor modifications in 2017.

6.2 At the international law level, the fourth generation of Chinese bilateral investment treaty (BIT), which is based on the latest draft of the Chinese model BIT prepared by the Ministry of Commerce of China around 2010, further loosens restrictions on the ISDS system. It allows foreign investors to submit any disputes arising from a BIT to any international arbitration forum other than the International Centre for Settlement of Investment Disputes (ICSID) and ad hoc tribunals, subject to certain prerequisites. Furthermore, article 9.23 of the China–Australia Free Trade Agreement (2015) is the first Chinese international investment agreement (IIA) to attempt to break through the traditional

practices in previous Chinese IIAs wherein awards made by international investment arbitration tribunals should be final and non-appealable. In addition, China has actively participated in the meetings hosted by the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) on the possible reforms of ISDS since 2017. Meanwhile, negotiations on new investment-related treaties with major economic partners have made real achievements, such as the recent conclusion of the Regional Comprehensive Economic Partnership (RCEP) and upcoming China–EU bilateral investment treaty. Nearly all international investment arbitration involving a Chinese party has occurred in the past decade, and more than half of the cases were initiated after 2015.

6.3 After an overview on the evolution of the Chinese foreign investment legal framework, this thesis has examined the current ISDS mechanisms in China from both domestic and international aspects, covering the legal basis, features, advantages and disadvantages of the Complaint Mechanism, administrative review, domestic administrative litigation and international treaty arbitration.

6.4 Indeed, domestic proceedings are not only available to foreign investors under domestic law but also an essential part of the ISDS clause in Chinse IIAs. The Complaint Mechanism is a voluntary mediation procedure, although whether time spent on the Complaint Mechanism can be calculated into the mandatory cooling-off period is unclear. The administrative review procedure, an internal correction mechanism within the Chinese administration, is compulsory in almost every BIT concluded since 2000 and will be expected in future IIAs. It is also a mandatory phase before administrative litigation if the dispute concerns natural resources. Administrative litigation is available in almost every Chinese BIT. In contrast, most Chinese BITs concluded before 2000 only allow international arbitration for a very limited scope of cases. Only disputes relating to the amount of compensation of expropriation can be submitted to international tribunals. This is the most common cause of action used by foreign investors when initiating international arbitration against China. For other causes of action, such as breach of fair

and equitable treatment, breach of national treatment and even disputes on the legality of expropriation, investors subject to these BITs with limited arbitrability clause may only submit the disputes before Chinese domestic courts.

6.5 On the bright side, in addition to the common advantages as to the costs of the three domestic proceedings, each may benefit investors and their invested enterprises in multiple ways: the complainant may take advantage of the Complaint Mechanism as a communication channel and a mediator to achieve an amicable settlement on the dispute; the applicant may request an administrative agency directly superior to the disputing counterparty to review both the legality and the reasonableness of the disputed administrative act via administrative review proceedings and gain a decision that may be easily enforced within the internal administrative system; the claimant before a neutral administrative court may obtain an enforceable judgment against the counterparty. Most importantly, the investor and its invested enterprise will have the right to appeal against any unfavourable decision made during the three proceedings before the dispute reaches the appeal phase of administrative litigation, except in rare cases where an administrative review decision is final.

6.6 However, although domestic proceedings are multilayer and inexpensive, all three mechanisms are prone to external influences, especially from domestic administration agencies. When a foreign investor and/or its invested enterprise files a dispute against an administrative agency, it may hardly convince itself that it may be impartially treated: the corresponding complaint centre is closely related the counterparty, and sometimes even a department or affiliate entity of the counterparty; an administrative review agency is a superior agency to the counterparty; and an administrative court, although seemingly an independent and impartial judicial body, financially relies on the counterparty or its superior administrative agency. Moreover, the qualifications of staff members in the complaint centres and administrative review agencies are often questionable, but parties can hardly challenge it.

6.7 In contrast, international arbitration represented by ICSID arbitration and ad hoc arbitration under the UNCITRAL arbitration rules seems to be a more independent and impartial dispute resolution mechanism for foreign investors. However, it is facing growing criticisms, including inconsistency and incoherence of awards, lack of correction system, doubts as to the arbitrator's professionalism and independence, long duration and high costs, lack of regulation of third-party funding and lack of transparency. These issues have occurred in Chinese BIT practices and investment arbitration cases involving a Chinese party.

6.8 To respond to the trend of reforming the ISDS system and competing for the future market share of investment arbitration, three China-based arbitration centres – the China International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Centre (BAC) and Shenzhen Court of International Arbitration (SCIA) –recently promulgated new arbitration rules expanding their business scope to international investment arbitration in 2017 and 2019, respectively. In particular, the CIETAC and BAC have enacted special sets of arbitration rules tailored for investment arbitration. Unlike the CIETAC Investment Arbitration Rules, which primarily resemble other institutional investment arbitration rules, the BAC Investment Arbitration Rules engage innovative systems, including an appeal phase and an expedited procedure.

6.9 Foreign investors may benefit from submitting investment disputes before these China-based arbitration centres under the new arbitration rules because the rules may mitigate parties' concerns about the current ISDS system. In particular, the BAC's appeal mechanism may enhance the correctness and consistency of arbitral awards; keeping a roster of highly selected arbitrators may ensure arbitrators meet moral, professional and language requirements; establishing rules, including emergency arbitrator, early dismissal of claims, indictive timetable and expedited procedure, may largely reduce the duration and costs of arbitration; transparency rules on arbitral proceedings, third-party submissions and third-party funding may not only ensure the neutral status of arbitration but also enhance the public credibility of arbitration; and incorporating mediation and

conciliation into arbitration proceedings may provide parties opportunities to settle disputes at an early stage.

6.10 In addition, foreign-invested enterprises (FIEs) that are wholly or partially owned by foreign investors might also take advantage of the new CIETAC and BAC arbitration rules. Traditionally, FIEs are not regarded as investors under Chinese BITs or Chinese domestic law because they are registered within the territory of China. However, given that the new CIETAC and the BAC investment arbitration rules do not limit the scope of jurisdiction on investment arbitration to disputes between a State and a national of another State, it may be argued that these two arbitration centres may accept claims from FIEs if it is allowed in applicable law or contracts.

6.11 Nevertheless, all three sets of new arbitration rules face practical difficulties in China, particularly as the current Arbitration Law of China precludes administrative disputes from the scope of arbitration. Even for parties to investment arbitration under these arbitration rules that choose to have the arbitration seat outside Mainland China, the final award's enforcement may be barred in China. Moreover, some provisions under the current Arbitration Law and Civil Procedure Law, such as the formation of an arbitration agreement, interim measures and the finality of arbitral awards, may hinder the application of certain rules under the new arbitration rules.

6.12 Furthermore, although all three China-based permanent arbitration centres are independent institutions, they still have close links with China's central or local administrative agencies. Such links may raise questions about the impartiality of these arbitration centres when handling investor-State arbitration. Finally, parties to an arbitration will face a verification procedure when challenging an arbitration agreement or applying to set aside or enforce an arbitral award before a Chinese court. Although this internal review procedure within the Chinese court system may arguably avoid wrong court decisions on arbitration cases, one may still be concerned about the verification procedure's efficiency and transparency.

6.13 To sum up, by a thorough analysis on the latest developments of China's legal framework on international investment dispute settlement mechanisms and creative solutions for ISDS reform presented by the China-based permanent arbitration centres via new investment arbitration rules, this study suggests that the conditions for implementing these arbitration rules are not met at this stage, unless there will be a thorough modification of China's arbitration system. Otherwise, even foreign investors relying on arbitration agreements under the IIAs will be reluctant to switch from the ICSID or UNCITRAL ad hoc arbitration to a Chinese arbitration centre. More importantly, it would be a more effective solution for the sake of foreign investors to allow administrative arbitration initiated by foreign investors and/or their invested enterprises registered in China against Chinese administrative agencies or even the state under domestic law. In this regard, choosing a China-based permanent arbitration centre would be a compromise for the Chinese government compared with foreign arbitration centres.

6.14 Based on the results of this study, the following section aims to provide general recommendations on the future reform of Chinese arbitration law and arbitration centres relating to ISDS to (1) facilitate the conduct of investment arbitration in China and promote China-based arbitration centres in the global market of investment arbitration, (2) take advantage of the new arbitration rules of Chinese permanent arbitration centres and (3) enhance China's competitiveness in the global arbitration market

B. Recommendations

6.15 Achieving the abovementioned aims first requires an overall modification of the Arbitration Law and other laws and regulation related to foreign investment disputes in China. Second, the three China-based permanent arbitration centres and other Chinese arbitration centres that eager to enter the market of investment arbitration may need a thorough reform to rid the administrative agency control. Doing so would gain global

confidence as to the impartiality and independence of these arbitration centres. Third, from an international law perspective, China may try to nominate one or more of the three arbitration centres as the exclusive arbitration forum to solve investor-State disputes in future international treaties.

Modification of the Arbitration Law

6.16 The revision of the Arbitration Law was included in the legislative plan of the National People's Congress in 2018 and is being prepared by the Ministry of Justice.[1] For this thesis, the proposed revision may be emphasised on the extension of arbitrability to administrative disputes, in particular disputes related to foreign investment raised by either foreign investors or FIEs. If investment disputes become arbitrable, article 25 of the Foreign Investment Law will add arbitration as the fourth dispute settlement mechanism for foreign investors and FIEs against administrative acts.

6.17 The extension of the scope of arbitrability could be achieved step by step to avoid possible chaos arising from the reform. First, arbitration on administrative disputes may be experimented in the Pilot Free Trade Zone (FTZ) in Shanghai, where some reforms to the arbitration system have already occurred. For example, as mentioned in Chapter 5, although the current Arbitration Law provides for the opposite, ad hoc arbitration is arguably permitted in the FTZs, and disputes between two FIEs registered in the FTZs may submit their disputes to foreign arbitration institutions. Furthermore, the Shanghai FTZ is the first and the only place where overseas arbitration institutions can set up branches in Mainland China.[2] Therefore, Shanghai FTZ's friendly environment for arbitration reform and foreign investment would make it a good place to test investment arbitration. However, considering that the Shanghai International Arbitration Centre has

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[1] The Constitution and Law Committee of the NPC *Report of the Constitution and Law Committee of the National People's Congress on the Results of Review of the Motions Submitted by the Presidium of the First Meeting of the 13th National People's Congress* (2018), s 29.

[2] Measures for the Administration of Overseas Arbitration Institutions Setting up Business Organisations in China (Shanghai) Pilot Free Trade Zone Lin-gang Special Area (2019), HuSiGui [2019] No 5.

set up the China (Shanghai) Pilot Free Trade Zone Court of Arbitration (the 'FTZ Court of Arbitration') in the Shanghai FTZ, if investment arbitration were permitted in the FTZs, it would be more likely that the FTZ Court of Arbitration, rather than the CIETAC or BAC, would take the lead. The FTZ Court of Arbitration would formulate new investment arbitration rules and be nominated as the China-based permanent arbitration centre that accepted investment arbitration for disputes arising from the investments of foreign investors or FIEs registered in the FTZs.

6.18 The extension of arbitrability may also be started from selected causes of actions of investment-related administrative disputes and then extended to all kinds of administrative disputes to arbitration. One may recall that the majority of Chinese IIAs concluded before 2000 only allow international arbitral tribunals to hear disputes arising from the amount of compensation for expropriation, and this restriction has been removed in the new IIAs since. Similarly, the scope of arbitrable administrative disputes under domestic law may be limited to the amount of compensation arising from expropriation and then extended to the examination of the legality of expropriation acts and other causes of action. In addition, disputes arising from the administrative agreement may also be a test for arbitration, which the Supreme People's Court (SPC) has already hinted. Proposed provisions for the future law of arbitration may reference the articles in the new Arbitration Law of Macau published in 2019. Article 77 specifies that arbitrable administrative disputes are limited to three types: disputes arising from administrative agreements, disputes on liabilities for losses caused by administrative authorities or officials due to their public management acts, and disputes arising from rights with property content or interests protected by law.[3] Article 88 further requires that awards of administrative disputes should be mandatorily published online for public access.[4] This transparency requirement for administrative arbitration is particularly important, considering the principle of conducting arbitration confidentially under the

[3] Arbitration Law of Macau Special Administrative Region Law no 19/2019.
[4] ibid, art 88.

current Arbitration Law of China.[5]

6.19 The third approach to extend the arbitrability may be achieved via special investment agreements made by Mainland China and Hong Kong, Macau or Taiwan. As noted in Chapter 5, currently investment disputes against the Chinese government under the Closer Economic Partnership Arrangements (CEPAs) signed by Mainland China with Hong Kong and Macau cannot be submitted to any arbitration centre. However, the CEPAs can be mediated before the CIETAC, which has promulgated a special set of mediation rules for solving investor–government disputes under the CEPAs only. Considering the precedent on investment mediation, it would be possible to incorporate investment arbitration conducted in nominated arbitration centres, probably also the CIETAC, in the future agreements between Mainland China and the three special areas. In this case, the enforcement of arbitration awards and cooperation for interim measures would likely be achieved not only upon governments' commitments under the agreements, but also special arrangements similar to those for commercial arbitration between the courts of both sides.

6.20 In addition to the extension of arbitrability, other modifications on the current Arbitration Law that may facilitate the coming administrative arbitration on investment disputes include the following issues:

a) Allow parties to reach an arbitration agreement via performance rather than via written agreements only.
b) Clarify the definition of the seat of arbitration and abandon the usage of the place where the arbitration institution is located when determining the nationality of an arbitration award and courts that accept applications for interim measures, enforcement and annulment.
c) Allow arbitral tribunals to decide applications directly on interim measures and formulate

[5] Arbitration Law of the People's Republic of China (2017 Amendment), art 40.

rules on the implementation of such interim measures.

d) Clarify whether arbitration awards can be appealed under arbitration rules and set up rules on the recognition and enforcement of final awards that have undergone an appeal.

e) Formulate transparency rules related to the documents, arbitral proceedings, decisions and awards, third-party submissions and third-party funding.

6.21 Finally, in terms of the judicial review procedure before Chinese courts, although the procedure is believed to be a safeguard against wrong decisions on the validity of arbitration agreements and issues related to arbitral awards, it is suggested that the procedure should be more transparent to parties. First, parties should be notified when an initial decision is made by the hearing court and if this initial decision should be reviewed by a higher court. Second, parties should be invited to present before judges in the higher court. Third, parties should be given a clear timeframe for the review procedure and notified at each step, which could be done via a digital case management system.

Further reform on arbitration centres

6.22 As noted in Chapter 5, the close relationship between Chinese permanent arbitration centres and the central or local governments would be a major concern for investors and their invested enterprises when submitting their investment disputes before these arbitration centres. Although it is understandable that not all permanent arbitration centres in China could be structurally or financially independent from governments considering the unbalanced economic development across the state, it would be a fundamental requirement for arbitration centres that wish to extend their business to investment arbitration to achieve total independence and impartiality against any impact from the administration.

6.23 It is understood that major arbitration centres in China, include CIETAC, BAC and SCIA, have no longer relied on fiscal appropriation to survive and are acting independently in normal business. However, further reforms are still expected, although the plan for each

centre differs on account of their particular situations. In general, it is suggested that senior officials of the arbitration centres should only be recruited and remunerated by arbitration centres rather than local governments or governmental-related public institutions. Current governmental officials should not take part in the management of arbitration centres in whatever position. Staffing of arbitration centres should be decided by arbitration centres according to the needs of development, and staff should be regarded as employees of centres. Resolutions on management, arbitration rules and structural changes should be decided within the decision-making body of the centre, though the government may be consulted.

6.24 Furthermore, arbitration centres are suggested to expand other business related to investment disputes, such as setting up advisory centres and formulating investment mediation rules. Advisory centres may establish cooperation with local complaint centres that deal with complaints from foreign investors and FIEs. Either before or after a complaint is lodged with the complaint centre, an advisory centre may provide suggestions on investment dispute settlement in China from both the international law and national law levels, so as to help parties in reaching a settlement or pursuing further remedies. Mediation is encouraged in every stage of dispute resolution in China and in the new investment arbitration rules as well. However, as noted above, the only set of investment mediation rules is designed for disputes under the CEPAs. Therefore, investment mediation rules for general investment disputes may be another task for the arbitration centres to benefit parties who wish to avoid confrontational proceedings or facilitate the mediation procedure during the arbitration.

Negotiation on future bilateral or regional IIAs

6.25 Considering the defects on the application of the new arbitration centres rules, one would hardly expect a Chinese permanent arbitration centre to be nominated in the IIAs concluded in the near future, especially the coming China–EU BIT, although a provision

allowing parties to choose any arbitration centres would be incorporated into the ISDS clause like other new IIAs reached in recent years.

6.26 However, a possible breakthrough may be in the future agreements or model contracts under the ASIAN Infrastructure Investment Bank (AIIB), a new multinational development bank headquartered in Beijing. With more than 100 member states collectively accounting for 78% of world's population and 63% global GDP,[6] China has the largest subscription (30.7811%) and voting power (26.5893%) among all members.[7] However, the dispute settlement provisions under the AIIB have yet been drafted. Given the dominant power within the AIIB, it would be possible to promote a China-based permanent arbitration centre as one of the nominated fora to settle not only commercial disputes but also investor-State disputes arising from investment contracts for AIIB projects.

6.27 If Chinese permanent arbitration centres could gain experience and a high reputation in settling investment disputes under the AIIB, it would be easier for the Chinese government in negations or re-negotiations of IIAs with its partners in the future, such as in the RCEP agreement where the settlement of investment disputes has yet to be discussed.

<u>Establishment of a multinational investment court</u>

6.28 The promotion of China-based permanent arbitration centres in ISDS is not the aim of this thesis. On the contrary, it is not recommended for either foreign investors or FIEs to submit their investment disputes to these arbitration centres at this stage despite the innovative arbitration rules. Extending the scope of arbitration to administrative disputes

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[6] 'AIIB Reaches 100-member Milestone' (*Asian Infrastructure Investment Bank*, 13 July 2019) <www.aiib.org/en/news-events/news/2019/AIIB-reaches-100-member-milestone.html> accessed 30 December 2020.

[7] 'Members and Prospective Members of the Bank' (*Asian Infrastructure Investment Bank*, 24 November 2020) <www.aiib.org/en/about-aiib/governance/members-of-bank/index.html> accessed 30 December 2020.

under domestic law for the benefit of both foreign investors and their invested enterprises in China, but the reform of the arbitration system in China is ongoing.

6.29 In this regard, during the time when the domestic arbitration system and permanent arbitration centres are reforming, China may actively participate in the establishment of a worldwide multinational permanent investment court, which may be another solution curing the defects of the current ISDS system.[8] How this multinational court should operate, how it could meet the needs of both states and investors, and how this proposed court could avoid similar problems in the current dispute settlement mechanism of the World Trade Organization may be researched in the future.

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[8] Wenhua Shan, 'Toward a Multilateral or Plurilateral Framework on Investment' (2015) The E15 Initiative Think Piece <http://e15initiative.org/publications/toward-a-multilateral-or-plurilateral-framework-on-investment/> accessed 30 December 2020.

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