China's Accession to the New York Convention: An Analysis of the New Regime of Recognition and Enforcement of Foreign Arbitral Awards

INTRODUCTION

In order to achieve economic progress, the People's Republic of China (PRC) is reevaluating and reforming many aspects of its legal order, including its legal relations with foreign entities. As part of its effort to instill confidence in foreign parties and increase the quality of its international commercial relations, China has recognized the need for the adoption of more reliable dispute resolution procedures. Prior to the "open policy," there was no legal certainty that foreign arbitral awards would be recognized or enforced by the Chinese. On December 2, 1986, China took a step toward alleviating fears of foreign investors by joining the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958[1] (the Convention) which creates simple procedures for the recognition and enforcement of foreign arbitral awards.[2]

China's intent in joining the Convention is consistent with the Convention's basic goal, which is to provide a favorable climate for international trade. As then Premier Zhao Ziyang explained to the Standing Committee of the National People's Congress, "The ratification of the Convention . . . is aimed at meeting the demands of implementing the policy of opening China to economic cooperation with foreign countries and facilitating the country's foreign trade."[3]

To achieve this goal, China is establishing a new regime for the recognition and enforcement of foreign arbitral awards. In order to understand the substance of this new system and how it differs from

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter Convention].

2. *See generally*, Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW 269 (1979); INTERNATIONAL COMMERCIAL ARBITRATION: THE NEW YORK CONVENTION (G. Gaja ed. 1978).

3. *China to Ratify Convention on Foreign Arbitration*, Xinhua General Overseas News Service, Nov. 27, 1986, Item No. 1127093.

earlier practices, this note will first review the provisions of the Convention that will have the greatest influence on the enforcement of arbitrations to which China is a party. Second, this note will review China's reasons for previously refusing to accept the Convention. Finally, this note will examine the procedures through which the Convention has been implemented, the changes in Chinese law necessitated by joining the Convention, and some of the problems China will face in implementing the Convention.

I. THE CONVENTION

The Convention has achieved widespread acceptance by the international community. As of January 1, 1988, there were seventy-four signatories from both the East and the West,[4] representing developed as well as developing countries, capitalist as well as socialist countries. The only area seriously underrepresented is South America.[5] This widespread acceptance, with new signatories constantly joining, is perhaps the best available testimony to international satisfaction with and recognition of the benefits available under the Convention.

A. The Convention's Basic Provisions

The Convention itself is a relatively short document. The general scope and purpose of the Convention are set out in articles I and III. Article I states that the Convention applies to "the recognition and enforcement of arbitral awards made in a state other than the state where recognition and enforcement of such awards are sought."[6] Article III, which provides the essential mandate of the Convention, states: "Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." This article further provides that the conditions and fees for recognition and enforcement shall not be "substantially more onerous" than those imposed for recognition and enforcement of domestic arbitral awards.

Additionally, although the primary subject of the Convention is the recognition and enforcement of arbitral awards, article II provides that each contracting state shall recognize an agreement to arbitrate if it concerns a "subject matter capable of settlement by arbitration."[7]

4. U.S. DEPT. OF STATE, TREATIES IN FORCE 266 (1988).
5. Sanders, *supra* note 2, at 269.
6. Convention, *supra* note 1, art. I.
7. *Id.* art. II(1).

The agreement must be in writing,[8] and courts in the contracting states are required to refer the parties to arbitration upon the request of one of the parties, unless it "finds that the said agreement is null and void, inoperative or incapable of being performed."[9]

B. Grounds for the Refusal of Recognition and Enforcement of Awards

Recognition and enforcement of foreign arbitral awards may only be refused for reasons specifically enumerated in the Convention. First, a contracting state may condition its acceptance of the Convention upon reciprocity, or restrict its effect to commercial disputes. Under article V, section 1, technical and procedural grounds for refusal to enforce an award are enumerated. Proof of these grounds must be furnished to a "competent authority where the recognition and enforcement is sought." These grounds include invalidity of the arbitration agreement, incapacity of the parties to agree to arbitrate at the time the arbitration agreement was made, the scope of the award being beyond the issue validly submitted for arbitration,[10] a lack of proper notice or an inability to present one's case, the composition of the arbitral tribunal not being in accordance with local law (or rules by which parties agreed to be governed), and the award having been set aside or not declared binding under the law of the situs of the arbitration. Finally, article V, section 2, stipulates that enforcement may be refused if "the competent authority in the country where it is sought finds that: a) the subject of the difference is not capable of settlement by arbitration under the laws of the country; or b) recognition and enforcement of the award would be contrary to the public policy of that country."

Although article V provides much leeway to local "competent authorities" to determine the breadth of the stated exceptions to recognition and enforcement, courts throughout the world, in keeping with the spirit of the Convention,[11] have generally construed these exceptions very narrowly. "The general tendency . . . is that the courts are inclined to grant recognition and enforcement whenever possible. In general, the courts favor international commercial arbitration, and recognition and enforcement under the New York Con-

8. *Id.* art. II(1), (2).

9. *Id.* art. II(3).

10. Under this ground for refusal of recognition and enforcement, that portion which is beyond the submission to arbitration is invalid; the remainder, however, may be recognized and enforced. If the award is on a different subject matter, or under any of the other grounds under this section, the entire award should not be recognized or enforced.

11. *See* Sanders, *supra* note 2, at 270, 272.

vention are seldom refused."[12] Thus, the enumerated grounds for non-enforcement have rarely been successfully invoked,[13] and the public policy exception has generally been applied only where enforcement would violate the forum state's "most basic notions of morality and justice."[14] Courts have not, in fact, applied traditional public policy tests, but instead have used "the narrower criterion of violation of the international public order."[15] This practice, however, is certainly not mandated by acceptance of the Convention.

II. BASES OF PRE-CONVENTION RECOGNITION AND ENFORCEMENT

Prior to joining the Convention, China developed mechanisms for the resolution of disputes involving foreign parties, and clauses involving foreign arbitration were at times included in agreements with Chinese concerns. Without the guaranties of recognition and enforcement of foreign arbitral awards provided by the New York Convention, the Chinese government took other steps to convince foreign parties that such awards would indeed be recognized and enforced.

A. International Agreements

In the past, the PRC has concluded bilateral economic trade and navigation agreements that include clauses concerning international arbitration and the enforceability of awards granted under such clauses.[16] In a recent article, Jerome Cohen describes the process through which these treaties resulted: "China's new policy of welcoming a broad range of foreign economic cooperation has brought to the fore the entire question of dispute resolution, and of arbitration in particular. Foreign governments concerned with providing adequate dispute resolution facilities for their nationals engaged in the China

12. *Id.* at 270.

13. *Id.* at 274-77.

14. Klitgaard, *People's Republic of China Joint Venture Dispute Resolution Procedures*, 1 UCLA PAC. BASIN L.J. 1, 33 (1982). Klitgaard discusses the domestic implications of accession to the Convention for the United States and provides relevant case citations interpreting the Convention in the United States.

15. Sanders, *supra* note 2, at 270.

16. *See, e.g.*, the Sino-United States Trade Agreement, July 7, 1979, United States-PRC, art. VII, 31 U.S.T. 4651, T.I.A.S. No. 9630 [hereinafter Sino-U.S. Trade Agreement]; Sino-Japanese Trade Agreement, June 5, 1974, art. 8, 1002 U.N.T.S. 110. An example of a less detailed provision is contained in the Sino-Japanese Agreement which states that "both signatory countries are held responsible for the execution of arbitration rulings by organs under terms provided for under the laws of the country being sought to make the ruling."

trade have sought to negotiate assurances with China."[17] The most detailed and precise clause contained in any bilateral treaty resulting from this process is contained in the Sino-U.S. Trade Agreement of July 7, 1979:

> (2) If such disputes cannot be settled promptly by . . . [friendly consultations, conciliation or other mutually acceptable means], the parties to the dispute may have recourse to arbitration for settlement in accordance with provisions specified in their contract or other agreements to submit to arbitration. Such arbitration may be conducted by an arbitration institution in the United States of America, the People's Republic of China, or a third country. . . .
> (3) Each Contracting Party shall seek to ensure that arbitration awards are recognized and enforced by their competent authorities where enforcement is sought, in accordance with applicable laws and regulations.[18]

Relying on the existence and presumed enforceability of such provisions, numerous contracts have been concluded calling for international arbitration in the event of dispute.[19] Some commentators have concluded that due to the international obligation created by the signing of a treaty, any foreign arbitration awards to which treaties apply must be enforced.[20] However, such provisions which rely on "applicable laws and regulations," provide a weak foundation on which to base recognition and enforcement. Other commentators have therefore concluded that "such provisions are general expressions that lack specific assurances and procedures."[21] It therefore appears that specific domestic laws and regulations mandating recognition and enforcement would be necessary for the recognition and enforcement of foreign arbitral awards, whether or not such laws and regulations are required by the treaties.

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17. Cohen, *The Role of Arbitration in Economic Cooperation with China*, in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 299 (M. Moser ed. 1984).

18. Sino-U.S. Trade Agreement, *supra* note 16, art. VIII, secs. 2, 3.

19. It is impossible to know the degree of reliance of such contracting parties; it must be presumed, however, that if foreign arbitral awards were regarded as unenforceable, they probably would not have been included in any agreements.

20. *See* Klitgaard, *supra* note 14, at 32, which states that under the Sino-Japanese Trade Agreement "a foreign joint venturer that arbitrates a dispute with a Chinese venturer in Japan under the rules of the JCAA can obtain enforcement in China [under the Treaty]."

21. Cohen, *supra* note 17, at 310.

B. *Domestic Legal Bases for Recognition and Enforcement*

China had long been without domestic laws and regulations governing the enforcement of foreign arbitral awards. The only relevant laws and regulations were those that could be inferred from other provisions of Chinese law. For instance, the Code of Civil Procedure contains three articles discussing the enforcement of "verdicts" rendered in foreign countries,[22] but these articles do not refer to foreign "judgments." In addition, four articles concern the enforcement of arbitral awards,[23] but these sections are concerned with the jurisdiction of people's courts over the enforcement of *domestic* arbitral tribunals' awards. These articles give the intermediate level people's courts jurisdiction in districts in which the arbitration was conducted or in which the property which was the subject of the claim is located the power to enforce judgments by the domestic arbitral tribunal.[24]

In addition to these legal bases, "the Chinese point out that compliance with awards is mandated by the principle of honoring contracts."[25] However, there were no guidelines or procedures for compelling a recalcitrant party to perform its obligations under an arbitral award.

C. *Voluntary Recognition and Enforcement*

Principles of sovereignty allow a nation free reign in its own courts to decide whether to regard or disregard foreign arbitral awards. Nevertheless, although enforcement of foreign arbitral awards before China's accession to the Convention was voluntary,[26] in general China did provide for the recognition and enforcement of such awards.

Evidence of voluntary recognition and enforcement of foreign awards can be seen in China's willingness to enter into the treaty provisions noted above. These provisions allow Chinese concerns to enter into contracts providing for foreign arbitration. Other Chinese laws also contain such provisions. For example, the rules governing

22. Code of Civil Procedure for Trial Implementation (Zhonghua Renmin Gongheguo Minshi Susongfa (Shixing)) arts. 202-04 (1982) [hereinafter Code of Civil Procedure], *trans. in* CHINA LAWS FOR FOREIGN BUSINESS (CCH Australia) 19-200 (1985) [hereinafter CHINA L.FOR.BUS.].

23. *Id.* arts. 192-95.

24. *Id.* art. 195.

25. Holtzmann, *A New Look at Resolving Disputes in U.S.-China Trade*, in A NEW LOOK AT LEGAL ASPECTS OF DOING BUSINESS WITH CHINA 235, 338 (H. Holtzmann and W. Surrey eds. 1979).

26. *See, e.g.*, Cohen, *supra* note 17, at 310; Surrey, *Dispute Settlement in U.S.-China Trade — Another Look*, in LEGAL ASPECTS OF DOING BUSINESS WITH CHINA 277 (E. Theroux ed. 1985).

China's Foreign Economic Trade Arbitration Council (FETAC) and Marine Arbitration Council (MAC),[27] provide that parties to a contract are "free to agree to arbitrate outside of China."[28] Similarly, many of the recent foreign economic regulations provide express stipulations that arbitration may be conducted, and that it may be conducted outside of China.[29]

D. Conditions for Recognition and Enforcement

The Chinese government has long adhered to the principle that foreign arbitral awards would be recognized and enforced under certain conditions. A representative statement was offered by Ren Jianxin, who is currently the President of the Supreme People's Court of the PRC and was then Deputy Head of the China Council for the Promotion of International Trade (CCPIT):

> As to the enforcement of foreign arbitral awards in China, . . . the enforcement is in fact fully secured so long as [the awards] are fair and not in violation of the Chinese laws and policies. There are also provisions in some bilateral treaties and agreements . . . guaranteeing the enforcement of arbitral awards on a reciprocal basis. In fact, Chinese corporations and enterprises will execute foreign awards voluntarily.[30]

This excerpt outlines the conditions necessary for recognition and enforcement of a foreign arbitral award, as well as China's claim of voluntary acquiescence to such recognition and enforcement. These conditions are that the foreign arbitral award sought to be enforced be fair, consonant with Chinese laws, consistent with Chinese policies,

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27. FETAC and MAC are organs of the China Council for the Promotion of International Trade (CCPIT), under the Ministry of Foreign Economic Relations and Trade (MOFERT).

28. *See, e.g.*, Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade (Zhongguo Guoji Maoyi Cujin Weiyuanhui Duiwai Maoyi Zhongcai Weiyuanhui Zhongcai Chengxu Zhanxing Guize) (1956) [hereinafter Provisional Rules of FETAC], *trans. in* LEGAL ASPECTS OF DOING BUSINESS IN CHINA 1983 422 (J. Cohen ed. 1983).

29. *See, e.g.*, Regulations of the People's Republic of China on the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises (Zhonghua Renmin Gongheguo Duiwai Hezuo Kaicai Haixiang Shiyou Zeyuan Tiaoli) (1982) art. 27, *trans. in* CHINA L.FOR.BUS., *supra* note 22, at 14-560; Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiyefa) (1979) art. 14, *trans. in* CHINA L.FOR.BUS., *supra* note 22, at 6-500.

30. Ren Jianxin, *China's Foreign Economic and Trade Arbitration*, 2 CHINA'S FOREIGN TRADE 4, 5 (1981). For additional statements, see also Klitgaard, *supra* note 14, at 32; Pettit, *Dispute Resolution in the People's Republic of China*, ARB. J., Mar. 1984, at 3; Cohen, *supra* note 17, at 311; and Comment, *An Evaluation of the PRC's Participation in International Commercial Arbitration: Pragmatic Prospectus*, 12 CAL.W.INT'L L.J. 128, 135 (1984).

and the internationally commonplace requirement of reciprocity.[31]

E. Procedures for Recognition and Enforcement

Ren Jianxin's comments also addressed the procedural means through which recognition and enforcement of foreign arbitral awards were implemented:

> [I]f, in an extreme case, the Chinese party refuses to execute the award, the foreign party may request the Chinese departments concerned or CCPIT to assist, or apply, pursuant to the bilateral treaties or agreements, to the Chinese law court to enforce it in accordance with law.[32]

Thus the foreign party could request that governmental departments responsible for the subject matter of the dispute or the department in charge of the party attempt to persuade the party to abide by the arbitral decision. The foreign party could also request CCPIT to exert similar pressure. It is unclear, however, how CCPIT could utilize judicial organs to seek recognition and enforcement of the award on behalf of the foreign party under a bilateral treaty or international agreement. The procedural laws contained no provisions regarding such recognition and enforcement. Chinese authorities therefore asserted that China's procedural laws "establish principles which are equally applicable to enforcement of foreign awards. . . . [I]n the case of an award made outside China 'the same treatment would be given and the FTAC [now FETAC] would give the same assistance that it would give in one of its own cases.' "[33] Yet, though CCPIT may have treated these provisions as "equally applicable," they were not constrained to do so by any explicit provisions of the procedural law.[34]

The adoption of the Convention alters this system. Before discussing precisely what effects acceptance of the Convention will have on this system, however, an analysis of why China is no longer reluc-

31. Evidence of the reciprocity requirement is also seen in the Code of Civil Procedure, *supra* note 22, art. 187, which provides "The people's court will follow the principle of reciprocity regarding the litigation rights of citizens, enterprises and organizations of a country which restricts the rights of civil procedures of citizens, enterprises and organizations of the People's Republic of China."

32. Ren Jianxin, *supra* note 30, at 5.

33. Holtzmann, *supra* note 25, at 340.

34. *See* Cohen, *supra* note 17, at 312. After a review of Civil Procedure provisions 202-04, he concludes: "It thus appears that a foreign award can be recognized and enforced only after being confirmed by an appropriate foreign court, which must then request enforcement by a Chinese court. In some jurisdictions this requirement will pose a barrier to enforcement. Moreover, what kinds of awards will be deemed to violate the basic principles of Chinese law or the interests of the Chinese state and society are not known, but plainly these criteria give great latitude to the courts."

tant to join the Convention and China's goals in joining will aid in understanding both what changes will occur and what the magnitude of these changes will be.

III. CHINA'S PREVIOUS RELUCTANCE TO JOIN THE CONVENTION

Developing and socialist countries have often been suspicious of international tribunals. One reason is the perception that because most international arbitration centers are located in and were established by developed Western countries, the centers will favor the interests of developed Western countries in their arbitral decisions.[35] An extreme expression of these concerns was put forth during the Cultural Revolution by Ying Tao, a Chinese legal scholar:

> The majority of decisions [the International Court of Justice] invoke[s] are those decisions rendered by municipal courts or arbitral organs of big capitalist powers and the international judicial or arbitral organs under their manipulation. In accordance with whose will and whose legal standards were these decisions made? Everyone knows that these decisions were made in accordance with the will and demands of big capitalist powers.[36]

In addition, there is a fear that the arbitrators themselves, as products of the Western, industrialized system, will possess an innate bias against the interests of developing and socialist countries.[37] Chairman Mao Zedong stated, "In class society everyone lives as a member of a particular class, and every kind of thinking, without exception, is stamped with the brand of a class."[38] China, when dominated by the ideas of Mao, thus placed great emphasis on correct ideological orientation for its participation in any international venture.[39] This class-conscious type of reasoning also helps explain China's history, particularly in the turbulent 1950's, of hostile relations with international organizations which were dominated by developed countries.

A further reason for past rejection of international arbitral bodies

35. McLaughlin, *Arbitration and Developing Countries*, 13 INT'L LAW 211, 216-17 (1979).

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

37. *See* Comment, *supra* note 30, at 135.

38. MAO ZEDONG, *On Practice*, in SELECTED READINGS OF MAO ZEDONG 66 (1971) [hereinafter SELECTED READINGS].

39. *See* Weng, *Some Conditions of Peking's Participation in International Organizations*, in CHINA'S PRACTICE OF INTERNATIONAL LAW, 325 (J. Cohen ed. 1972).

by developing and socialist countries relates to the conduct of the arbitration itself. In Europe, North America, and a few other parts of the world where arbitration is more common, there is familiarity with and confidence in the institutions and the arbitrators. But, outside of these countries, unfamiliarity with the process of arbitration can and often does lead to suspicion and rejection of the process itself.[40] The "jurisdictional theory" of arbitration, holding that procedures are governed by the rules of the country where the arbitration takes place,[41] compounds this problem of distrust and insecurity. Hence, many developing and socialist countries "prefer not to submit to arbitrators where the procedures are subject to judicial control by the courts of the forum of the arbitration, as this is only one step removed from losing one of their primary objects in resorting to arbitration . . . namely to avoid submitting to the jurisdiction of a foreign court for the resolution of such disputes."[42]

For the Chinese, these concerns are even deeper because both arbitration and court proceedings are perceived as externalizations of the dispute resolution, not conforming to traditional Chinese means of dispute resolution, and therefore to be eschewed.[43] The past Chinese position regarding court decisions was that "as far as international relations are concerned, it is extremely abnormal for the judicial organ of a country to take a stand completely different from that taken by the administrative and legislative organs of the same country."[44] This attitude has been linked to the obstinance of Chinese concerns in refusing to include foreign arbitral clauses, or to even include clauses calling for arbitration in the defendant's home state[45] where this is permitted by treaties.[46]

Another concern stems from perceptions peculiar to Chinese legal culture. Many parties to international contracts value arbitration because it "provides a flexible, mutually acceptable means of con-

40. *See* McLaughlin, *supra* note 35, at 217; Straus, *So Perfect in Theory — So Neglected in Practice* (Paper presented at Sixth International Arbitration Congress, Mexico City, March 1978).

41. *See* Comment, *supra* note 30, at 135.

42. Delocalized Arbitrations and the New York Convention (Report of the British Branch Committee to the International Law Association Conference, Montreal, 1982), *cited in* Pettit, *supra* note 30, at 12 n.18.

43. *See infra* text accompanying notes 48-50.

44. *Criticism of Japanese Court's Decision in Hostel*, in FOREIGN BROADCAST INFORMATION SERVICE DAILY REPORT, CHINA [hereinafter FBIS CHINA], Apr. 28, 1986, D3, D4.

45. Such clauses are perhaps more troublesome than beneficial. One deleterious effect of such clauses is jockeying for the "defendant's" position. Further, in the context of Sino-Foreign contracts, such clauses usually lead to arbitration in China. *See* Cohen, *supra* note 17, at 305.

46. *See generally*, *supra* note 30.

flict resolution . . . [which is] consensual: one party is not dragged unwillingly into court by another."[47] This perception may not, however, have been widely held in China. The traditional preference in China for informal means of dispute resolution is widely recognized.[48] Even in laws promulgated in the post-Mao era, despite attempts to firmly establish the "rule of law," "friendly consultation" is still the preferred means of dispute resolution.[49] Many Chinese, in fact, perceive arbitration not as a means of preserving friendly relations and resolving disputes informally, but rather as being closer to litigation on the spectrum of means of dispute resolution mechanisms.[50] Especially important in this context is the adversarial nature of the proceedings and the externalization of the dispute resolution. Thus, when compared to customary Western adversarial means of dispute resolution, arbitration is indeed "friendlier" and less formal; compared to customary Chinese means of dispute resolution, however, it is not. The advantages perceived by Westerners in submitting to arbitration may not be present in the minds of their Chinese counterparts.

47. Holtzman, *Dispute Resolution Procedures in East-West Trade*, 13 INT'L LAW. 233, 234 (1979).

48. *See, e.g.*, Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1 (1987).

49. Evidence of this view is seen throughout Chinese laws. Primary reliance is placed on mediation in the resolution of "ordinary civil and minor criminal cases among the people." *See* Renmin Tiaojie Weiyuanhui Zhanxing Zuzhi Tongze (The Provisional Rules for the Organization of People's Mediation Committees) (1954), 5 ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN 55 (1982) (COMPILATION OF LAWS OF THE CENTRAL PEOPLE'S GOVERNMENT). The Code of Civil Procedure, *supra* note 22, stipulates in art. 6, "In trying a case, the people's courts shall stress mediation." Arts. 97-102 describe the people's courts' role in encouraging and conducting mediation.

More germane to the topic of this note, the Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiyefa Shishi Tiaoli) (1983), art. 109, *trans. in.* CHINA L.FOR.BUS., *supra* note 22, at 6-550 provides that "[d]isputes . . . shall be settled through friendly consultation or mediation. Disputes that cannot be settled through these means may be settled through arbitration or courts of justice." Similarly, the Economic Contract Law of the People's Republic of China (Zhonghua Renmin Gongheguo Jingji Hetong Fa) art. 48 (1981), *trans. in.* CHINA L.FOR.BUS., *supra* note 22, at 5-500, states: "If disputes arise over economic contracts, the parties concerned should try to solve them on time through consultation. If no agreement can be reached between the parties concerned through consultation, any side can apply for mediation or arbitration . . . they may also appeal directly to the people's courts." *See also* Foreign Economic Contract Law of the People's Republic of China (Zhonghua Renmin Gongheguo Shewai Jingji Hetong Fa) art. 37 (1985) [hereinafter *FECL*], *trans. in* CHINA L.FOR.BUS., *supra* note 22, at 5-550; discussion in Cohen, *supra* note 17, which states the contemporary view that in case of dispute, conciliation and mediation should be attempted before arbitration, which should be attempted before litigation.

50. *See, e.g.*, Comment, *supra* note 30, at 136.

IV. WHY CHINA HAS OVERCOME ITS RELUCTANCE TO JOIN THE CONVENTION

China's acceptance of the Convention certainly does not indicate that all of the previously perceived shortcomings to joining the Convention and to participating in international arbitration have been overcome. Instead, perceptions of the advantages and disadvantages of joining the Convention have shifted. The fears expressed above no longer dominate PRC policy for a number of reasons.

A. Political Changes

Fundamental political changes have occurred in China's relations with the international world order. Chinese leaders believe that in a peaceful atmosphere, resulting from good relations with superpowers such as the United States, conditions will be more conducive to China's economic development.[51] In addition, the decreased domestic stress on ideology has led to decreased stress on ideology in China's international relations. The PRC has been able to shift its emphasis from protecting its sovereignty to seeking international cooperation.[52] This shift has been described as "from the negative Manichaean vision of fighting against superpower hegemonism" to a more positive version of multilateral cooperation.[53] The PRC no longer faces international rejection of its legitimacy. The PRC has been recognized by countries throughout the world, is now a United Nations member, and has vastly expanded its participation in international organizations.[54] Further, China's leaders may not regard China's interests as fundamentally opposed to those of developed countries.[55] Deng has described various aspects of present-day China as "feudal," and has stated that "any capitalism is superior to feudalism."[56]

B. Economic Concerns

Additionally, the PRC has altered its views concerning the

51. Kim, *The Development of International Law in post-Mao China: Change and Continuity*, 1 J. CHINESE L. 117, 148 (1987).

52. *Id.*

53. *Id.*

54. *Id.*

55. "[W]e cannot say that everything developed in capitalist countries is of a capitalist nature. For instance, technology, science, — even advanced production management is also a sort of science — will be useful in any society or country . . . These things as such have no class character." DENG XIAOPING, *On Opposing Wrong Ideological Tendencies*, in SELECTED WORKS OF DENG XIAOPING, 326, 333 (1984) [hereinafter SELECTED WORKS].

56. *Id.*

advantages of participating in the world economic community. In the past, the politics of economic development stressed self-sufficiency, reliance on the masses, and a rejection of any dependence on foreign assistance.[57] The tenuous external contacts which resulted naturally diminished any great desire or need to participate in international dispute resolution schemes.

The great emphasis placed on ideology in the early days of the People's Republic[58] caused leaders to fear that participation in international arbitral arrangements could lead to political repercussions. With the political winds shifting rapidly, any act with even remotely political implications had to be approached with extreme caution or expose the actor to possible criticism.[59] As the PRC seeks to increase its ties with the world economic community and engage in more international commercial transactions, it has been forced to find means of assuring foreigners that if disputes in transactions arise, acceptable means of dispute resolution will be available.[60] The acceptance of the Convention is part of this process. The main benefit China will receive is an added incentive for foreign investors to conclude contracts with Chinese entities and at lower prices.

This incentive takes the form of a national assurance to foreign investors that dispute resolution can be performed by arbitrators whom the foreign parties perceive to be less biased than CCPIT arbitration organs or other domestic dispute resolution organs. Further, such arbitration awards will be recognized and enforced in China. Increased investor confidence and competition should lower contract prices for the Chinese. Foreign investors will have less reason to factor possible costs of unenforceable claims into their calculations as they will feel more likely to receive a fair settlement in the event a dispute arises.

C. *Establishment of the "Rule of Law"*

Accession to the Convention may also be viewed as part of the PRC's overall plan to replace the "rule of man" with the "rule of

57. Perhaps Mao's stress on self-reliance is best summed up in the following excerpt from the "little red book": "We stand for self-reliance. We hope for foreign aid but cannot be dependent on it; we depend on our own efforts, on the creative power of the army and the entire people." MAO ZEDONG *We Must Learn to do Economic Work*, in QUOTATIONS FROM CHAIRMAN MAO 194-95 (1976).

58. *See, e.g.*, HONG YONGLEE, THE POLITICS OF THE CULTURAL REVOLUTION (1978).

59. For an interesting account of how individuals react to and deal with rapidly changing "political winds," see CHAN, MADSEN & UNGER, CHEN VILLAGE: THE RECENT HISTORY OF A PEASANT VILLAGE IN MAO'S CHINA (1984), elaborating on the effects of earlier political movements on peasant life in China.

60. *See generally*, Cohen, *supra* note 17.

law."[61] Whether this change of focus is viewed as the result of political efforts to avoid the chaos of the Cultural Revolution, or as an attempt to lure foreign investors, the result has been the passage of numerous new laws within the past ten years, and an emphasis on construction of the socialist legal system. This change has been described by Peng Zhen as follows:

> [W]e shall enact a variety of economic and other laws . . . and thus gradually perfect our socialist legal system. The strengthening of the socialist legal system will inevitably involve sharp and complicated struggles to break down all kinds of resistance and obstruction put up by feudalism, capitalism, revisionism and remnants of the factional setup of the Gang of Four . . . we shall certainly be able to perfect our socialist legal system step by step and thereby promote and ensure the success of our socialist modernization.[62]

This increasing emphasis on the "rule of law" instead of more informal individual dispute resolution has been viewed as a move toward more adversarial dispute resolution mechanisms. Thus, at least as far as the current leadership is concerned, traditional Chinese reluctance over the settlement of disputes by third parties is of less concern.[63] In addition, because foreigners are not part of "the people" of China, there never was an ideological need to attempt to resolve disputes involving foreign parties through informal means. Thus, Chinese reluctance to engage in formalized adversarial proceedings has presumably decreased.

D. Emergence of Asian Arbitration Centers

Another factor which likely mitigates Chinese concerns about bias of foreign arbitrators and arbitral systems is the emergence of Asian centers of international arbitration, such as Tokyo and Hong Kong.[64] It is worth noting, however, that these centers may never be as acceptable as, for instance, Stockholm.[65] Tokyo may not be as acceptable because of Japan's previous "imperialism" and past rela-

61. *See generally*, Gellhorn, *supra* note 48.

62. Peng Zhen, *Explanation of Seven Laws*, BEIJING REV., July 13, 1979, at 8.

63. *See* Comment, *supra* note 30, at 136-39; MAO ZEDONG, *On the Correct Handling of Contradictions Among the People*, in SELECTED READINGS, *supra* note 38, at 23.

64. *See* Cohen, *supra* note 17, at 307. *See also* Leung, Wall St. J., Aug. 16, 1980, at 1, col. 5; Surrey & Kellner, *International Arbitration in Hong Kong*, in LEGAL ASPECTS OF DOING BUSINESS IN CHINA (PLI 1986); McLelland, *A Survey of Pacific Rim Commercial Arbitration*, 40 ARB. J. 3 (1985).

65. *See generally*, Rafferty, *Far from the Tiger's Mouth: Present Practice and Future Prospects for the Settlement of Foreign Commercial Disputes in the People's Republic of China*, 3 J.

tions with China. Japanese legal and cultural traditions also differ markedly from Chinese traditions, as does Japan's current international economic status. And while Hong Kong may at present be an acceptable arbitration site, Western concerns may regard arbitration in Hong Kong after its absorption by China in 1997 as indistinguishable from dispute resolution in Beijing or Shanghai.

E. Experiences of Other Developing Countries with the Convention

An additional factor assuaging Chinese concerns may also be that the PRC is either satisfied with the results experienced by developing countries through their participation in the Convention, or believes it can avoid any perceived negative experiences of such countries under the Convention. The experiences of developing countries under the Convention are well-documented[66] and the PRC was certainly aware of them when it considered joining the Convention. The PRC appears to be similarly impressed by the positive experiences of the Soviet Union and its satellites with the Convention.[67]

F. Enforcement of FETAC and MAC Arbitral Awards

A further reason that weighs in favor of PRC adoption of the Convention is that the PRC can seek recognition and enforcement in foreign countries of FETAC and MAC awards rendered in the People's Republic against foreign parties. This advantage was stressed in official statements made when the National People's Congress and its Standing Committee acted upon the Convention.[68] Yet this benefit, at least for the present, appears to be partly illusory. The Convention provides for recognition and enforcement by the courts of the signatory country of arbitral awards made in the territory of another signa-

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LAW & COMM. 115 (1983); *see also* Wetter, *East Meets West in Sweden*, 13 INT'L LAW 261 (1979).

66. *See generally*, Sanders, *supra* note 2; McLaughlin, *supra* note 35.

67. *See* Comment, *supra* note 30, at 136-39.

68. "Zhu Qizhen, Vice-Minister of Foreign Affairs, explained the bill . . . 'The Chinese firm which has won the case has to apply to a foreign court for enforcement of the arbitral award. . . .' He said that after the ratification of the international convention, China is obliged to recognize and enforce foreign arbitral decisions while China's arbitral decisions will also be recognized and enforced by foreign countries which have ratified the Convention." Xinhua, *supra* note 3.

In a later release Xinhua noted remarks by Ajmal Hameed, President of the London-based Law-China Society, made at a CCPIT sponsored seminar in China: "Including China in the New York Convention on foreign arbitral awards enforcement . . . has satisfied the world's courts." Xinhua General Overseas News Service, Jan. 8, 1987, Item No. 0108077. The publicizing of such remarks indicates that a major factor, at least for propaganda purposes, in ratifying the Convention was recognition in foreign courts, especially where reciprocity is required.

tory country.[69] This means that if the countries of the arbitration forum and the foreign party are both signatories to the Convention, the Chinese party could have sought enforcement in the courts of the foreign party's country even before joining the Convention.[70] This situation exists where the foreign party is from the United States and the arbitral forum is in Stockholm, which many existing contracts calling for third country arbitration name as the situs of arbitration.[71]

V. CHINA'S ACCEPTANCE AND IMPLEMENTATION OF THE CONVENTION

A. China's Acceptance of the Convention

On December 6, 1986, the Standing Committee of the National People's Congress adopted a decision stating that China would accede to the Convention.[72] Acceptance was conditioned on the two reservations allowed under the Convention,[73] namely that China would apply the Convention only on the basis of reciprocity and that accession would apply only to commercial disputes as defined under Chinese law.[74] However, in situations where FETAC or MAC renders an award in the PRC, the convention will enable parties to the arbitration to obtain recognition and enforcement outside the PRC.

The reciprocity reservation means that the PRC will apply the Convention only to awards made in the territory of another contracting state.[75] Without further elaboration, however, the scope of both this reservation and the commercial reservation would remain unclear. Crucial terms contained in China's reservations lacked definition and China lacked legal procedures to carry out the Convention's mandates. Indeed, without implementing regulations and laws, the Convention would have had little effect.

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69. Convention, *supra* note 1, at art. I.

70. *See* Rafferty, *supra* note 65.

71. "Stockholm is particularly suitable for the arbitration of trade disputes between socialist and non-socialist states because of the wide flexibility accorded by Swedish law to the parties in their choice of arbitral procedures and in the scope of arbitral issues, the compatibility of local Swedish law with major international arbitral rules, the free choice accorded the parties in the matters of governing substantive law and nationality of the arbitrators." *Id.* at 136. *See generally*, Wetter, *supra* note 65.

72. Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Woguo Jiaru 'Chengren ji Zhixing Waiguo Zhongcai Caijue Gongyue' de Jueding (Decision of the Standing Committee of the National People's Congress with Respect to China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) (adopted Dec. 2, 1986) [hereinafter Decision], ZHONGHUA RENMIN GONGHEGUO QUANGUO RENMIN DAIBIAO DAHUI CHANGWU WEIYUANHUI GONGBAO 560 (1986).

73. *See supra* note 3 and accompanying text.

74. Decision, *supra* note 72, at 560.

75. *See supra* note 6 and accompanying text.

B. The Implementing Regulations

In examining how joining the Convention will alter the existing system of recognition and enforcement, attention must be paid to the recently promulgated implementing regulations for the Convention contained in the Supreme People's Court's "Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (Notice) to higher and intermediate level courts and certain specialized courts.[76] The Notice stated that the Convention would come into force as of April 22, 1987, and called on various court personnel to study and implement the Convention. In addition, the Notice provided clarification of a number of important issues concerning the implementation of the Convention.

1. The Convention and Chinese Law

The Notice states that where the Convention and China's Civil Procedure Code contain different provisions, the Convention shall govern.[77] The Notice, however, does not discuss the effects of a conflict between the Convention and other laws. The maxim of statutory construction "expressio unius personae est exclusio alterius" ("the expression of one thing means the exclusion of all others") might be applied in interpreting this clause to mean that provisions of the Convention would not govern where they conflict with another Chinese law. Yet, there has been no indication that Chinese authorities will interpret this provision in this manner. It should be noted, however, that some laws, such as the Foreign Economic Contract Law (FECL), provide that where the statute conflicts with an international agreement or treaty, the agreement or treaty shall govern the resolution of the issue.[78]

2. Reciprocity

The Notice reiterates China's reciprocity reservation to the Convention stating, "China shall apply the Convention to arbitral awards made in the territory of other contracting states."[79] Thus, the reciprocity reservation refers to reciprocity in terms of the situs of the arbitration, not to the opposing party's state. Were a party from a

76. Guanyu Zhixing Woguo Jiarude Chengren ji Zhixing Waiguo Zhongcai Caijue Gongyue de Tongzhi [hereinafter NOTICE], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN GONGBAO 40 (1987).

77. *Id.*

78. FECL, *supra* note 49, art. 6.

79. Notice, *supra* note 76, at 41.

non-contracting state to arbitrate a claim against a Chinese party in Sweden or the United States and seek enforcement in China, for example, the reciprocity reservation would not exclude the claim from recognition and enforcement.

3. Arbitral Awards Made in the Territory of Non-Contracting States

The Notice states that article 204 of the Code of Civil Procedure (article 204)[80] shall apply to the recognition and enforcement of awards made in the territory of a non-contracting country.[81] Thus, the amended article 204 applies to arbitrations both within and without the convention.

4. Commercial Reservation

The Notice states that China shall apply the Convention only to disputes involving "foreign investors" arising out of "commercial legal relationships of a contractual or non-contractual nature."[82] Such relationships specifically refer to economic rights and obligations based in contract, tort, or statutory law. The Notice goes on to provide a list of examples of commercial transactions giving rise to such rights and obligations. The list, although not exclusive, covers a broad range of topics including disputes involving equity joint ventures, labor matters, and products liability.[83] Important issues not resolved by the Notice include the definition of "foreign investor" under the Notice, types of commercial disputes covered, and whether contracts entered into by government enterprises are "commercial legal relationships."[84]

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80. Code of Civil Procedure, *supra* note 22, art. 204.

81. Notice, *supra* note 76, at 41.

82. *Id.* A discussion of Article 204 is found in Cheung, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, 34 AM. J. COMP. L. 295, 299 (1986).

83. The text reads as follows:

> "[C]ommercial legal relationships of a contractual nature or a non-contractual nature specifically refer to relationships of economic rights and obligations which arise out of contract, tort, or in accordance with relevant stipulations in law, such as the purchase and sale of goods, property leasing, engineering contracts, processing contracts, technology transfer, equity joint ventures, cooperative joint ventures, the exploration and exploitation of natural resources, insurance credit, labor matters, agency, consulting services and the transport of passengers and goods by sea, in civil aviation, by air and by road, as well as products liability, environmental pollution, accidents at sea and disputes over ownership rights, etc. . . ."

Id. at 41-42.

84. *See infra* text accompanying note 111.

5. Jurisdiction and Venue

The Notice provides that parties seeking to enforce foreign arbitral awards must apply to intermediate level people's courts. A court will have jurisdiction over a dispute: (1) where a party resides or possesses a household certificate, in cases of enforcement sought against a natural person; (2) where a legal person has its principal place of business, in cases of enforcement sought against a legal person (e.g. a state enterprise); and (3) where a natural or legal person's property is located, in cases of enforcement sought against a party with no residence, household registration, or place of business in China but who owns property in China.[85] Although the Notice does not mention judicial review, in general parties are entitled by the Code of Civil Procedure to one appellate review of judicial decisions.[86]

6. Method of Examination By Courts

The Notice states that in order for a court to enforce a foreign arbitral award, it must receive an application to do so. A court then determines whether any of the exceptions to enforcement provided in article V of the Convention[87] are present. If not, the court must enforce the award in accordance with the Code of Civil Procedure.[88] This procedure only applies when the court possesses "jurisdiction."[89] Presumably, jurisdiction in this context must be consonant with the venue provisions noted above, in addition to being outside the reservations made by China in accepting the Convention.

7. Retroactivity

The Notice states that the Convention shall not apply to awards rendered before April 22, 1987, the date the Convention went into effect.[90]

8. Limitations

The Notice states that the statute of limitations stipulated in article 169 of the Code of Civil Procedure shall apply to claims arising under the Convention.[91] Accordingly, there is a one year limitation

85. *Id.*

86. Code of Civil Procedure, *supra* note 22, art. 144.

87. *See supra* note 10 and accompanying text.

88. Code of Civil Procedure, *supra* note 22, arts. 202-204.

89. Notice, *supra* note 76, at 43.

90. *Id.* at 44.

91. *Id. See also* Code of Civil Procedure, *supra* note 22, art. 169: "The time limit for applying for execution, where either of the parties, or both, are individuals, shall be one year.

where either or both parties is a natural person; otherwise the limitation is six months.

C. *Implementing Laws*

The implementing regulations thus rely on the Code of Civil Procedure to specify such matters as how to gain recognition and enforcement of arbitral awards where reciprocity is lacking, and how awards under the Convention are to be recognized and enforced. Prior to 1982, China lacked a specific means for obtaining such recognition and enforcement. It was thus necessary for China to enact such legislation; the result is article 204 of the Code of Civil Procedure as recently amended to apply to arbitral awards:[92]

> When entrusted[93] by a foreign court to assist in the execution of an already affirmed judgment or of an award, a people's court shall review the judgment or award in accordance with international treaties entered into or acceded to by the People's Republic of China or which apply through the principle of reciprocity. If it considers that the judgment or award does not violate the basic principles of the law of the People's Republic of China or the national or social interest of this country, the people's court shall rule that the judgment or award be recognized as legally valid and shall execute it in accordance with the provisions of this law. Otherwise, the people's court shall return the request to the foreign court.[94]

The international treaties into which China has previously entered lack detailed provisions concerning recognition and enforcement.[95] Thus, at least for the present time, review of arbitral awards will primarily concern whether they meet the standards of the Convention and article 204, which will at least in theory replace China's previous standards of review for arbitral awards. The Convention also contains new standards for recognition and enforcement, including a requirement that there have been no technical violations in the procedure and conduct of the arbitral proceedings and decision.[96] An addi-

Where both parties are enterprises, public institutions, government organs or social groups, the time limit shall be six months."

92. On the trial nature of this Code, *see* Cheung, *supra* note 82, at 298.

93. On the unclear meaning of the entrustment right, *see* Cheung, *supra* note 82, at 316-22.

94. Code of Civil Procedure, *supra* note 22, art. 204.

95. *See infra* 17.

96. *See supra* note 10.

tional standard requires a finding that the subject matter of the arbitration is capable of settlement by arbitration under PRC law. The subject matter requirement should pose no barrier to recognition and enforcement, for FETAC is granted broad subject matter jurisdiction.[97] A finding that the enforcement of the award would not violate China's public policy constitutes a final standard. This standard is obviously vague. While outside of China this standard has generally been narrowly construed, its scope in the PRC will be determined by subsequent practice.[98]

In addition, article 204 specifies that the award must not violate the basic principles of Chinese law, although it is not clear what these principles are. The award must also not violate "national or social interests" of the PRC. These terms are similarly undefined.[99] Another standard for recognition and enforcement of awards rendered in non-Convention states is reciprocity. This requirement, however, apparently applies to the opposing party's state, not the state where the award was rendered.[100]

VI. THE NEW REGIME OF RECOGNITION AND ENFORCEMENT

China's accession to the New York Convention, and its associated implementing regulations, fundamentally change the means and bases of recognition and enforcement of foreign arbitral awards. Previous discussions of dispute resolution procedures have generally concluded that China "should" or "is considering" joining the Convention, but fail to discuss how or even whether joining the Convention will change existing arrangements or practices.[101] If, as previous PRC pronouncements suggest, recognition and enforcement of foreign awards was available prior to the acceptance of the Conven-

97. FETAC "exercises jurisdiction for the arbitration of disputes arising from contracts and transactions in foreign trade, particularly disputes between foreign firms, companies, or other economic organizations on the one hand and Chinese firms, companies or other economic organizations on the other. It may also exercise jurisdiction for the arbitration of similar cases arising between foreign firms, companies, or economic organizations as well as between Chinese firms, companies or other economic organizations.

"Such disputes include all disputes arising from contracts for purchase or sale of merchandise in foreign countries or contracts for commissioning an agency to purchase or sell merchandise in foreign countries, disputes arising from transportation, insurance, safe-keeping, or delivery of the merchandise in question and disputes arising from other matters of business in foreign trade." Provisional Rules of FETAC, *supra* note 28, art. 2.

98. *See generally infra* text accompanying note 103.

99. For a "tentative list of suggestions" of how a foreign award may be refused on these grounds, *see* Cheung, *supra*, note 82, at 326-28.

100. Cheung, *supra*, note 82, at 302.

101. *See generally*, Rafferty, *supra* note 65; Pettit, *supra* note 30; Tang Houzhi, *Arbitration — A Method Used by China to Settle Foreign Trade and Economic Disputes*, 4 PACE L. REV. 519 (1984).

tion, then there should be little or no change after its acceptance. Even so, there now exist definite legal procedures and standards which can be evaluated.

A. Changes from the Previous System

1. Foreign Recognition and Enforcement of CCPIT Awards

Some of the changes created by China's accession to the Convention were among the benefits sought by China when acceding to it. For instance, China now has the ability to seek recognition and enforcement of the FETAC and MAC awards in foreign countries pursuant to the Convention.[102]

2. Standards for Recognition and Enforcement

Also, standards for the recognition and enforcement of foreign arbitral awards will at least change in terminology, if not in fact. Under the prior system, an award would voluntarily be recognized and enforced by the PRC so long as reciprocity existed and the award was "fair and not in violation of the Chinese laws and policies."[103] The requirement of reciprocity remains intact and now clearly relates to the situs of the arbitration and not to the home country of the opposing party. And while the explicit requirement of "fairness" is lost under the new regime, this ground may be subsumed under the ambiguous new standard prohibiting violation of "the basic principles of the law of the PRC or the national or social interest of the country." It may also be subsumed under the category of technical violations in the procedure and conduct of the arbitration that, according to the Convention, are grounds for non-recognition of foreign arbitral awards.[104] However, to the extent "fairness" implied the ability of a PRC recognition or enforcement organ to re-open the merits of a dispute, the new standards, which do not imply such a right, alter the pre-Convention system.

The previous system's requirement that the award not violate the PRC's laws and policies is replaced by the requirements that the award does not violate China's public policy nor the basic principles of the law of the PRC or its national or social interests. The new policy appears to be more restrictive of the abilities of PRC courts to deny recognition and enforcement. Where a violation of law previously allowed denial of recognition and enforcement, under the Convention such denial will instead require a violation of "basic principles

102. *See supra* at 116.
103. *See supra* note 30 and accompanying text.
104. *See supra* note 10 and accompanying text.

of law." However, any difference in these standards may be absorbed by the vaguely worded "policy" and "national or social interests" exceptions to recognition and enforcement. While the policy exceptions differ slightly in terminology from the pre- to post-Convention standards, the terminology is too vague to allow any substantive comparison.

3. Treaties

Although existing bilateral treaties are still a basis for recognition and enforcement of foreign arbitral awards under the new laws, they may not provide sufficiently specific or adequate procedures for recognition and enforcement of foreign arbitral awards. Any such concerns are rendered moot by the Convention, which states that the conditions for enforcement may be no more burdensome than those required for recognition and enforcement of domestic awards,[105] and provides exclusive and well-defined grounds for which such recognition and enforcement may be refused. According to article VI of the Convention, these provisions shall not override the provisions of the existing bilateral arrangements;[106] however, given the vagueness of the existing treaty provisions, the Convention will help to ensure the enforceability of awards pursuant to the treaties and provide supplementary standards for the recognition and enforcement of such awards.

4. Legal Bases for Recognition and Enforcement

Legal bases other than treaties which could be relied upon for recognition and enforcement of foreign arbitral awards prior to the PRC's accession to the Convention were China's voluntary compliance and the principle of honoring contracts. Under the Convention, these nebulous and unsturdy bases have been removed, and in their stead parties seeking recognition and enforcement may rely on the Convention and the standards contained in article 204. It is debatable, however, whether the convention really adds anything beyond that which is contained in article 204. In the event of refusal by PRC organs to recognize or enforce a foreign arbitral decision, foreign enterprises may request the aid of their own governments to redress the international delict of failing to comply with the Convention's provisions under the principle of state assumption of private claims. The bulk of foreign contracts, however, are with foreign concerns from countries which already have bilateral trade agreements with

105. *Convention, supra* note 1, art. III.
106. *Id.*

China.[107] Although the Convention may indeed provide an additional ground on which to base such actions, an international delict may have resulted from failure to recognize and enforce a foreign award pursuant to such an agreement or treaty. Thus, the Convention may be largely a gratuitous gesture for these purposes.

5. Jurisdiction and Venue

In addition to these changes in legal bases, there are now more definite jurisdictional provisions governing recognition and enforcement. Past requests were made to the relevant administrative organs, the courts, and CCPIT for recognition or enforcement of foreign arbitral awards. The Convention clarifies which organs have jurisdiction over such disputes. Undoubtedly, the foreign party may still request assistance from other official sources. It is now clear, however, that foreign parties should apply for recognition and enforcement to the intermediate level people's court in the appropriate venue.

6. Arbitration Agreements

As noted in section I above, although the Convention concerns recognition and enforcement of foreign arbitral awards, the Convention also contains an article concerning arbitral agreements. This article imposes the rule that for an arbitral agreement to be valid, it must concern a subject matter capable of arbitration, be in writing, and not "null and void, inoperative, or incapable of being performed."[108] FETAC's broad subject matter jurisdiction makes the subject matter requirement of limited significance.[109] In addition, other laws relating to foreign investment contain similarly broad scopes for arbitral disputes, and these laws possess a writing requirement similar to that contained in the Convention.[110] The "null and void" and "inoperative" provisions, while not explicitly mentioned in existing Chinese laws, may be inferred by existing jurisdictional requirements. FETAC and MAC only had jurisdiction over valid arbitral agreements; agreements which were "null and void" or "inoperative" would not be within the jurisdictional requirements. The requirement that the agreement not be "incapable of being performed" does, however, appear to present a new requirement for arbitral agreements.

107. The bulk of China's foreign investment has come from Hong Kong, Japan, and the United States.

108. *See supra* note 7 and accompanying text.

109. *See* Provisional Rules of FETAC, *supra* note 28, art. 2.

110. *See, e.g.*, FECL, *supra* note 49, art. 38; Joint Venture Law of the PRC, *supra* note 49, art. 110; Provisional Rules of FETAC, *supra* note 28, art. 3.

B. Selected Problems

As the changes in the regime of recognition and enforcement make clear, the new regime provides for greater certainty and for greater detail in the rules governing recognition and enforcement. However, the new system still contains several uncertainties. Two of these problems are the interpretation of the host country exception and the interpretation of vague standards. The resolution of these problems is integral to the PRC's achievement of its goals in joining the Convention.

1. Sovereign Immunity: Scope of the Host Country Exception

The Notice contains an exception which excludes from the Convention's coverage disputes between foreign investors and governments of host countries.[111] A possible hint that this exception may be given a broad interpretation by the PRC government is seen in its practice regarding the related issue of sovereign immunity. The scope of China's willingness to submit to foreign courts' jurisdiction may be similar to the scope of their willingness to submit to arbitration.[112] The Chinese view on sovereign immunity, as recognized by Wang Houli, is "that the restrictive view of sovereign immunity, characterized by classification of state acts into those which are 'sovereign' and 'non-sovereign' is theoretically unsound."[113] In accordance with such views, China in 1987 attempted to assert sovereign immunity in a libel suit filed in a United States federal court naming the People's Daily newspaper as defendant.[114]

On the other hand, a more restrictive interpretation is possible. China's willingness to submit to arbitration may be analogous to its willingness to submit to domestic PRC proceedings. In addition, the Code of Civil Procedure allows the parties to lawsuits to include "enterprises, offices, and organizations."[115] The FETAC Provisional Rules grant jurisdiction to FETAC to hear cases concerning "Chinese firms, companies, or other economic organizations."[116] Thus, there is at least some basis for a more restrictive reading of the host country exception.

In order to be consistent with their current developmental plans,

111. Notice, *supra* note 76, at 42.

112. *See* Gellhorn *supra* note 48.

113. Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, 1 J. CHINESE L. 23, 29 (1987).

114. Wang Bingzhang v. Renmin Ribao (D.C. Cir. 1988) (No.88-32), *dismissed on motion*.

115. Code of Civil Procedure, *supra* note 22, art. 144.

116. Provisional Rules of FETAC, *supra* note 28, art. 2.

the PRC should recognize and enforce arbitral awards rendered against such entities under the Convention. An expansive host government exception would destroy whatever incentives foreign investors would gain by China's accession to the Convention. The resolution of this question will undoubtedly affect the nonavailability of recognition and enforcement under the reciprocity exception for both foreign awards in Chinese courts and for Chinese awards in foreign courts.

2. The Interpretation of Vague Terms and Standards

Another problem under the Convention is how China's courts will interpret the vague standards under which recognition and enforcement may be denied. While terms now used in the Convention and article 204 are more concrete than past standards, there is still great latitude and discretion available to PRC courts in determining whether to recognize and enforce foreign arbitral awards.

a. Basic Principles of Law

Awards "in violation of basic principles of law" will not be recognized and enforced. Yet, at present there is no definitive statement of the "basic principles" of Chinese law. Many of these principles might be gleaned from the reasons China joined the Convention. One such reason has been the change in the role of law in Chinese politics and society.[117] Law is viewed as a means of ensuring stability, avoiding the excesses of the Cultural Revolution, and providing a basis for economic development. As a 1979 People's Daily editorial stated in commenting on efforts to evaluate and reform earlier PRC laws, such evaluation is "necessary to strengthen and perfect the socialist legal system, ensure political stability and unity and to promote China's modernization drive."[118] Similarly, Ye Jianying stated, "The people want to strengthen and improve China's socialist legal system. An improved legal system can not only effectively guarantee the people's democratic rights provided for by the Constitution but also constantly develop stability and unity and a lively and vigorous political situation in the interest of socialist construction."[119] The Constitution similarly links the socialist legal system to the protection of rights and stability, as well as to modernization.[120] These comments, then, would appear to be at least allusions to basic principles of law.

117. *See supra* notes 65-67 and accompanying text.

118. Xinhua General Overseas News Service, Nov. 30, 1979, Item No. 113011.

119. *Quoted in* Peng Zhen, *Explanation of Seven Laws*, BEIJING REV., July 13, 1979 at 8.

120. THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (Zhonghua Renmin Gongheguo Xianfa) Preamble (1982) *trans. in* CHINA L.FOR.BUS., at 4-500.

It also appears that an award could violate a specific provision of PRC law but still be capable of enforcement. Indeed, if a basic goal of legal reform and joining the Convention is to aid the modernization effort, the less restrictive reading of this phrase should apply, so as to ensure greater predictability in the recognition and enforcement of such awards.

b. National or Social Interest

The above noted fundamental principles of the legal system could also be included under the term "national or social interests." Yet this latter term is presumably broader and could include the PRC's interests in nearly all fields. Again, there is no statement available of what interests constitute the PRC's "national or social interests." These interests, however, should certainly include those embodied in the Constitution, which "defines the basic system and basic tasks of the state."[121] The "General Principles" of the Constitution cover such topics as the form of political organization, the socialist economy, and the basic tasks and functions of each element of these systems. The Preamble also includes statements concerning such goals as the "four modernizations" (military, economics, agriculture and industrial). The upholding of all of these principles and systems are presumably within the "national or social interests" of the PRC.

It is unclear, however, how far these interests extend beyond constitutional principles. If the PRC government hopes to increase investor confidence, it is important that these "interests" are not too broadly defined. It is crucial that ephemeral political and party policies be removed from the determination of such interests, and that the standards include only those elaborated in such documents as the Constitution. Perhaps the best indications that this will be China's future interpretation are the economic advisability of such a policy and China's general move towards "rule of law."

c. Public Policy

The "public policy" exception to recognition and enforcement is contained within the Convention itself. While courts in other countries have varied somewhat in their interpretations of this exception, the general trend has been to interpret it narrowly.[122] While some courts have read the exception to mean that a decision may not vio-

121. *Id.*

122. *See supra* notes 11-15 and accompanying text.

late domestic laws,[123] most courts have come to the opposite conclusion and applied the test of whether recognition and enforcement would violate "international order."[124] Again, such an interpretation is both in the interests of China's developmental plans and consistent with recent legal reforms. Indeed, given that China has stated that the foreign awards must not violate the "fundamental principles," as opposed to specific provisions of law, the narrower reading of the public policy exception should apply: an award should be denied recognition and enforcement only if it violates the most fundamental morals and principles of the PRC system.[125]

Indeed, the public policy exception will likely encompass precisely the concerns included under the rubrics "fundamental principles of law" and "national and social interests." While awards rendered in non-Convention states are only evaluated under the two aforementioned tests, awards rendered in Convention states are subject to the public policy test. It would be ironic for a convention country award to be subject to a stricter standard.

VII. CONCLUSION

By joining the Convention and by providing new standards, procedures and bases for legal claims, China has further integrated itself into the international community and has taken a significant step toward the replacement of "rule of men" by "rule of law." These acts should relieve some concerns of foreign investors regarding dispute resolution procedures. Hopefully, such relief will not be circumvented by an expansive interpretation of the Convention's exceptions to recognition and enforcement. China's implementation of the Convention represents an entrenchment of the current trend toward continued legal development.

*Bruce R. Schulberg**

123. For a Belgian case, *see, e.g.*, Int'l Council for Commercial Arbitration, 5 Y.B. COMM. ARB. 257.

124. *See supra* note 15 and accompanying text.

125. *See supra* note 14 and accompanying text.

* J.D. 1988, Columbia University.