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Is China Ready to Recognize and Enforce Investment Arbitral Awards?

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

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

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1. Introduction

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

China has been both a major home country of outward investment and an important recipient of FDI inflows for many years. It remains a favorite host economy to the world[3] as well as an increasingly important capital-exporting country.[4] Upon this background, China has concluded over 130 bilateral investment treaties ("BITs")[5] and various free trade agreements ("FTAs") with investment chapters[6] over the past few decades. The BITs in the 1980s and early 1990s invariably restricted investor-state arbitration to disputes concerning the amount of compensation for an expropriation. However, it was often interpreted expansively by the arbitral tribunal to cover disputes over the expropriation by either interpretation or application of the MFN clauses.[7]

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

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

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