

International Treaties in the Chinese Domestic Legal System*

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Abstract

China has made considerable progress in the past thirty years with respect to implementation of international obligations in its domestic legal system. Although China's Constitution and its basic laws do not set forth a general provision on the status of treaties in the domestic legal system, substantive treaty obligations undertaken by China, to a large extent, have been incorporated into special national laws, exerting a direct impact on the economic and social activities of the country. This article examines various forms and modalities by which China implements its international obligations at domestic level. There have been an increasing number of cases where courts apply treaty provisions to give private parties additional legal protection. In the civil and commercial areas, international treaties apply primarily to cases with foreign elements, while in the criminal law area, China has prescribed almost all of the international crimes as criminal offences under its national criminal law.

* This study focuses on the main legal system of China and does not cover the legal practice of treaty application in Hong Kong, Macao and Taiwan. Helpful sources regarding this topic include: Chinese legislation: www.lawinfochina.com/index.asp; Chinese legislation in English: www.chinalaw.gov.cn/indexEN.jsp; judicial statements on the interpretation and application of law of the Supreme People's Court: www.chinalaw.gov.cn/jsp/contentpub/browser/moreinfo.jsp?page=2&id=co5022565624; ZHU Xiaoqing and HUANG Lie (eds), *Relations between International Treaties and Domestic Law*, Papers of the Chinese-German Seminar on Relations between International Treaties and Domestic Law (World Knowledge Press, Beijing, 1st edn., 2000), ISBN 7-5012-1423-9.

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China implements its international obligations in good faith with the view that effective implementation of treaty obligations will not only serve well its own development, but also promote peace and cooperation among States.

I. Overview of the current status of treaties in the Chinese domestic legal system

A. General introduction

1. Ever since the founding of the People's Republic of China in 1949, implementation of its international obligations in good faith has been not only one of China's basic policies of foreign affairs, but also a fundamental principle of Chinese law. All international treaties shall be concluded in accordance with the provisions of the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties, promulgated in 1990 (hereinafter, "the Treaty Procedure Law")¹ and fulfil necessary domestic legal procedures. Therefore, subject to the nature of the relevant treaty and the mandate of the contracting governmental department, international treaties to which China is a party in principle have binding force in domestic law, except for those provisions to which China has made reservations. Given the extensive variety of treaties both in form and in subject, however, domestic implementation of treaties is a rather complicated issue. Under the Treaty Procedure Law, treaties can be concluded at three levels: between States; between governments; and between governmental departments. As is obvious, treaties vary in terms of their status and legal effect on the domestic legal system; not all treaties constitute part of domestic law.

2. In international law, some treaties directly provide for rights and obligations of the contracting States, whereas others lay down rights and obligations for individuals and legal persons. Although on the international plane the State assumes international responsibility for meeting its treaty obligations, at the domestic level, how to implement such obligations and realize the rights and obligations of individuals and legal persons depends on the legal system of each contracting State and the way in which it handles the relations between international law and domestic law. China is a unitary State. At present, the Chinese Constitution and basic laws² do not contain any provision on the legal status of international treaties and their hierarchy in the domestic legal system. Strictly speaking, international treaties, even after ratification, accession or approval, do not automatically become part of national law and consequently do not automatically have domestic legal effect.

1 Before the adoption of the Treaty Procedure Law, treaty practice had not been specifically regulated by law. The treaty-making power, however, had always been strictly limited under the general provisions of the Constitution. Great importance was always attached to treaty obligations in the domestic legal system.

2 The term "basic laws" in this context refers to the laws prescribed under Chapter II of the Legislation Law of the People's Republic of China.

B. The legal status of treaties in China's domestic law

3. According to the provisions of the Chinese Constitution and the Treaty Procedure Law, the Standing Committee of the National People's Congress (hereinafter "the NPC") shall decide on the ratification and denunciation of treaties and important agreements concluded with foreign States. Under Article 7 of the Treaty Procedure Law, the phrase "treaties and important agreements" includes: friendship and cooperation treaties, peace treaties and other treaties of a political nature; treaties and agreements on territories and the delimitation of boundaries; treaties and agreements on judicial assistance and extradition; and treaties and agreements that have provisions inconsistent with national laws. The State Council has the power to conclude treaties and agreements with foreign States.³ Procedurally, negotiation and conclusion of international treaties with foreign States should be approved by the State Council, or submitted to it for the record. In any case where amendment or revision to domestic laws is required for a treaty purpose, the domestic legal process for ratifying or approving the treaty should be the same as the legal procedure for the relevant domestic legislation.

4. Although the Constitution does not specifically define the relationship between the treaty-making power and the legislative power, the relevant provisions of the Constitution and the Treaty Procedure Law have established specific statutory limits on the treaty-making power, both procedurally and substantively. In other words, the nature and the subject of a treaty determine which State organ is competent to conclude the treaty and what domestic legal procedure should be followed. Governmental departments have no power to conclude treaties with foreign governments beyond their competence and the scope of their functions, unless specifically authorized or approved by the State Council or the competent departments. The internal legal procedure for the conclusion of treaties determines the status and effects of treaties in domestic law. Without proper authorization, governmental departments cannot conclude treaties on behalf of the State with foreign States. Since treaty negotiations must be conducted in accordance with the Treaty Procedure Law and follow the appropriate legal procedure from inception to conclusion, the treaty-making power is strictly delimited by law.

5. The Legislation Law of the People's Republic of China, enacted in 2000 (hereinafter, "the Legislation Law"), establishes the hierarchy of Chinese domestic law. The Constitution ranks the highest, followed in order by laws, administrative regulations, local regulations and so on. The Legislation Law also includes provisions governing the legislative power and procedures of the legislative bodies, administrative organs and agencies at different levels. Article 5, paragraph 2 of the Constitution provides

3 Under the Constitution, the State Council consists of the Premier, Vice Premiers, State Councilors, Ministers, Auditor-General and Secretary-General. The Premier has overall responsibility for the State Council, whereas the Ministers have overall responsibility for the respective ministries or commissions under their charge. For the powers and functions of the State Council, see Art. 89 of the Chinese Constitution.

that “no laws or administrative or local rules and regulations may contravene the Constitution”. Although the Legislation Law does not include any reference to the status of international treaties in the domestic legal system, it is generally accepted that treaties concluded between governmental departments should not contravene higher-level laws, and treaties concluded between governments or States should not contravene the Constitution or basic laws, unless the legislature has made appropriate amendments to the Constitution or the relevant laws.⁴

6. Under Article 8 of the Legislation Law, matters relating to certain important areas shall be governed exclusively by laws adopted by the NPC and the Standing Committee of the NPC. Such matters include, among others: national sovereignty; criminal offences and punishment; fundamental rights of citizens; expropriation of non-state assets; or matters that are related to the legal systems on civil affairs, finance, taxation, customs and trade; judicial system and arbitration. Accordingly, any treaty that affects the above-mentioned matters shall be subject to the domestic legal procedure of the Standing Committee of the NPC for ratification or accession.⁵ Therefore, for instance, China’s ratification of the 1966 International Covenant on Economic, Social and Cultural Rights and the 1966 International Covenant on Civil and Political Rights, which entail necessary amendments to the relevant Chinese domestic laws, would require a decision on the part of the Standing Committee of the NPC. As will be illustrated below, substantive treaty obligations have domestic legal effect and become applicable in domestic law only through specific provisions of national legislation. This is quite different from cooperation agreements concluded between governmental agencies, which are primarily executed by the administrative departments and do not require national legislation for the purpose of implementation.

C. The relationship between treaties and domestic law

7. The fact that the Chinese Constitution and basic laws do not contain any general provision on the relation between treaties and domestic law does not mean that this issue is totally ignored in China’s domestic laws and legal practice. On the contrary, since China adopted the open policy and economic reforms at the end of 1978, there has been a rapid development of national legislation on the legal aspects of

4 WANG Tieya, Status of Treaties in the Chinese Legal System, *Zhongguo Guojifa Niankan* [Chinese Yearbook of International Law] (1994); WANG Tieya, Introduction to International Law (Beijing University Press, 1998), 209.

5 The scope of Art. 7 of the Treaty Procedure Law and that of Art. 8 of the Legislation Law are not identical. There is a partial overlap between these two categories. Art. 7 of the Treaty Procedure Law determines which treaties shall require the approval of the Standing Committee of the NPC *before* China undertakes binding international legal obligations. Art. 8 of the Legislation Law determines what laws have to be adopted by the NPC. If a treaty requires possible amendment or repeal of pre-existing domestic laws as adopted by the NPC, it has to be submitted to the Standing Committee for consideration, even if it does not fall within the categories of treaties as prescribed in Art. 7 of the Treaty Procedure Law.

subject matters with foreign elements.⁶ In addition to numerous bilateral treaties and agreements concluded with foreign countries, China is now party to over 300 multilateral treaties. Consequently, the issue of the status of treaty obligations in the domestic legal system has to be tackled from time to time. At present, there are approximately 70 domestic laws with explicit provisions touching upon treaty obligations. These provisions, ranging from procedural laws to substantive laws, from criminal and civil laws to administrative regulations, constitute the legal basis for the application of international treaties in the Chinese domestic legal system.⁷ Generally speaking, these provisions bear the following features.

8. First, a rule of conflict has commonly been adopted in these legal provisions, specifying that if there is a difference between the relevant domestic law and the related treaty to which China is a party, the treaty provision shall prevail, unless China has made a reservation to that effect. The first national legislation with such a clause was the Civil Procedure Law of the People's Republic of China, enacted in 1982 for provisional implementation (hereinafter, "the 1982 Civil Procedure Law"). Article 189 of the 1982 Civil Procedure Law states that for civil proceedings in cases involving foreign elements, "If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of this Law, the provisions of the international treaty shall apply, except for those on which China has made reservations."

9. The same provision is maintained in Article 238 of the Civil Procedure Law of the People's Republic of China, as amended in 1991. In the General Principles of the Civil Law of the People's Republic of China, promulgated in 1986, Chapter 8 on the Application of Law in Civil Relations with Foreign Elements provides in Article 142 that:

The application of law in civil relations with foreign elements shall be determined by the provisions in this chapter. If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has declared reservations. International practice^[8] may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.

6 See the judicial statement on the term "foreign elements" issued by the Supreme People's Court, para. 10 below.

7 These domestic laws cover various areas such as economy, trade, customs, shipping, civil aviation, intellectual property, trademark, arbitration, disarmament, nuclear energy, private international law, judicial assistance, suppression of transnational crimes, etc.

8 The term "international practice" is taken from the English publication of the State Council. This term has consistently been used by the courts but, as the subsequent discussion of court judgments indicates, the term actually refers to customary rules of international trade. See below n.36.

10. According to the judicial directive⁹ on the interpretation and application of law issued by the Supreme People's Court, the term "civil relations and cases with foreign elements" means civil relations and cases in which (i) one party or both parties to the dispute are foreign nationals, stateless persons, foreign enterprises or organizations, (ii) the legal facts that establish, modify or terminate the civil legal relations between parties arise in foreign territories, or (iii) the disputed object of the lawsuit is located in a foreign country.¹⁰

11. In addition to the provisions contained in these two basic laws, similar rules are also provided for in dozens of laws dealing with particular subject matters, including, for example, the Law of Succession of 1985; the Postal Law of 1987; the Environmental Protection Law of 1989; the Trademark Law adopted in 1982 and amended in 1993; the Patent Law adopted in 1984 and amended in 1992; the Maritime Code of 1992; and the Negotiable Instruments Law of 1995.¹¹ By virtue of these provisions in domestic laws, international treaties obtain domestic legal effect and prevail over conflicting internal laws.

12. The second approach in dealing with potential or possible conflicts between international treaties and domestic law is that the latter explicitly provides that a special or specific rule in a treaty can be directly invoked so as to exclude the application of the related domestic rule or to supplement the domestic rule. For example, Article 23 of the Provisions of the People's Republic of China on the Use of Red Cross Signs, promulgated by a joint decree of the State Council and the Central Military Commission of the People's Republic of China in 1996, provides: "If there is anything concerning the protective use of Red Cross signs not covered in these Provisions, the relevant provisions of the Geneva Conventions and their Additional Protocols shall apply."

13. Another example can be found in the Regulations on Security Protection in Civil Aviation of the People's Republic of China, promulgated by a decree of the State Council in 1996. Article 2, paragraph 2 states: "These Regulations are also applicable to civil aircrafts of Chinese nationality that engage in civil aviation activities outside the territory of the People's Republic of China, unless otherwise provided in international treaties concluded or acceded to by the People's Republic of China."

14. It should be pointed out, however, that despite the widespread use of these types of provisions in Chinese law, it cannot be concluded in sweeping terms that international law prevails over domestic law under the Chinese legal system, because the prevailing force of treaties in domestic law is not derived from any legal provision of the Constitution or a national law of general application but is confined to those international obligations explicitly undertaken by China. The legislative intention

9 On the term "judicial directive", see part III of this paper.

10 Art. 304, Opinions of the Supreme People's Court on Certain Issues in the Application of the Civil Procedure Law of the People's Republic of China, 1992. See the Chinese text at www.chinalaw.gov.cn/jsp/jalor_en/disptext.jsp?recno=83&&ttldrec=291.

11 For the full titles of the laws indicated here, see www.chinalaw.gov.cn/indexEN.jsp.

behind such a conflict rule as discussed above is apparently based on the fact that as a party to the 1969 Vienna Convention on the Law of Treaties, China should comply with its treaty obligations in good faith and should not use its internal law as a justification for evading its international obligations, as provided in Article 27 of the Convention.

15. Moreover, in the Chinese legal practice, treaties acquire prevailing force over domestic law only when the relevant domestic law includes an explicit stipulation to that effect. In other words, conflict rules operate only to the extent of the specific laws concerned. Such legislative restriction on the implementation of treaty obligations in domestic law is meant to maintain a reasonable balance between national legislative power and international treaty practice and to ensure uniformity and harmonization in the domestic legal system.

16. Finally, in most cases, the above-mentioned legal provisions giving prevailing force to treaties fall within the scope of civil and commercial laws involving civil relations and disputes with foreign elements. Chinese law, however, does not have any definitive provisions on the application of treaties in regard to cases other than those with foreign elements. It is anticipated that with the deepening of reforms under its open policy, China's legal practice in this area will continue to develop but treaty obligations, by their nature, will remain a special domain in the national legal system.

II. Forms and modalities for the application and implementation of treaties in China's domestic law

17. As mentioned above, the Chinese Constitution and laws stipulate neither that treaties are automatically incorporated into domestic law (a monistic approach) nor that treaties have to be transformed into internal legislation before they are applicable domestically (a dualistic approach). In practice, most executive agreements are self-executing, in the sense that they can be implemented domestically without a requirement for legislative action. However, treaties with substantive obligations usually require special internal legislation to be transformed into domestic law and applied indirectly.

18. Generally speaking, China has adopted three forms or modalities to implement treaty obligations, namely, execution by administrative measures, transformation of treaty obligations and direct application of treaties under specific national legislation.¹² Each of these modalities will be examined below.

12 Under Chinese law, there is no statute that explicitly regulates the forms or modalities for implementing treaty provisions at the domestic level or in national courts. The issue was considered by the NPC during the drafting of the Law on Legislation, but no specific proposal was formally tabled before the People's Congress, due to the complicated nature of implementing treaties. The three forms analysed in this chapter are summarized from practice and are generally regarded as established forms in the Chinese legal system. However, it should be noted that the dichotomy between a monistic approach and a dualistic approach is more of a theoretical distinction, rather than a systemic choice. In State practice, monism and dualism are often mixed and blurred,

A. Implementation of treaty obligations through administrative measures

19. There are a large number of bilateral cooperation agreements and memoranda of understanding (MOUs) concluded by the Chinese government or governmental departments. Under the terms of the Treaty Procedure Law, they all qualify as international treaties. These treaties are normally executed through administrative decrees or measures; they typically do not require any further internal legislative action.¹³ For instance, MOUs on education and cultural exchanges between governments, agreements on cooperation in the field of public health and so on are directly implemented by the administrative departments concerned. These treaties seldom give rise to legal disputes in domestic law.

B. Transformation of treaty obligations through national legislation

20. The transformation process normally takes place in one of two ways: (i) transforming treaty obligations by special national legislation; or (ii) incorporating treaty obligations into domestic law through amendments to existing laws.

21. Transforming treaty obligations by special national legislation generally occurs when the pertinent subject matter is not covered by pre-existing domestic laws. For example, China enacted special legislation to implement treaties on diplomatic and consular privileges and immunities, disarmament and nonproliferation and the law of the sea. Given the special characteristics of treaty obligations and considerations of foreign policy, it is often deemed necessary to adopt special national laws to put treaty obligations into concrete terms for application, or to establish a national implementation mechanism for the purposes of effective compliance and enforcement at the national level. For example, after China became a party to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, the Standing Committee of the NPC promulgated the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities in 1986 and the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities in 1990 (hereinafter, "the Regulations"), thereby transforming conventional provisions into national laws. Hence, as a formal matter, courts and administrative departments are to apply the Regulations instead of the Vienna Conventions when dealing with

depending on the subject matter or the nature of the treaty concerned. This is also true with respect to China.

13 This category includes treaties that require governmental action to promote cooperation in a certain field with a foreign State. At the domestic level, however, the appropriate mechanism for implementing the agreement—whether by adopting administrative measures or domestic decrees or regulations—is left to each State party to decide. Even in the case of joint programmes, there remains substantial room for national discretion for implementation. These sorts of treaties tend to be very general in their terms and generally do not directly concern individual rights. Even if such treaties are intended to, among other things, benefit individual interests, they typically do not provide legal grounds for individual claims if an individual does not receive the expected benefit from the relevant treaty.

cases concerning diplomatic or consular privileges and immunities. Nevertheless, the Regulations also provide that if there is any matter that is not covered by the Regulations, the Vienna Conventions shall continue to apply. In other words, the provisions of the Vienna Conventions are directly applicable under certain circumstances, as a supplement to the Regulations.

22. As a follow-up to China's participation in the 1982 UN Convention on the Law of the Sea, in 1992 the Standing Committee of the NPC enacted the Law of the People's Republic of China on the Territorial Sea and Contiguous Zone, which, to a large extent, incorporates the relevant provisions of the Convention. Similarly, in 1998, the Law of the People's Republic of China on the Economic Zones and the Continental Shelf was adopted. At present, there are a series of national laws and legal regimes regulating the preservation and uses of the maritime environment and resources. All of them are in conformity with the provisions of the Law of the Sea Convention.

23. A further example relates to the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (hereinafter, "the CWC"),¹⁴ which entered into force for China in 1997.¹⁵ After it became a party to the convention, China adopted a series of laws for domestic implementation: the Regulation of the People's Republic of China on Controlled Chemicals (1995); the List of Controlled Chemicals by Category (1996); the Rules of Implementation for the Regulations of the People's Republic of China on Controlled Chemicals (1997); and the List of Items Newly Included in Category Three of Controlled Chemicals (1998). These laws serve as the legal framework for the implementation of the Convention, empowering the government to monitor production, trade, use, stockpiling and import of scheduled chemicals. Moreover, the State Council also issued the Measures for Export Control of Relevant Chemicals and their Related Equipment and Technology (including the List of Items under Export Control, 2002), further controlling China's exports of relevant chemicals and dual-use chemical equipment and technology.

24. In order to prevent acts of terrorism, including those carried out with toxic chemicals, in December 2001 the Standing Committee of the Chinese NPC passed Amendment No. 3 to the Criminal Law, which makes it a criminal offence to manufacture, transport or stockpile poisonous substances or the pathogens of infectious diseases, or to release any such substances or pathogens that endanger the public safety. Severe penalties are provided for such offences. In addition to national legislation, in accordance with the provisions of the CWC, China has also established a National Office for the Implementation of the CWC, as well as implementation offices

14 The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, adopted on 30 November 1992, by UN General Assembly Resolution 47/39. The treaty entered into force on 29 April 1997.

15 It was during the preparation period for the entry into force of the CWC that China, as a signatory State, adopted the said national laws.

around the country at the provincial level, which are responsible for supervising treaty implementation.

25. The second type of mechanism for transforming treaty obligations is to amend or revise pre-existing national laws to harmonize them with treaty provisions. This practice has become the most common way for China to implement its treaty obligations. Amendments and revisions may be made either prior to or after China's participation in a treaty.

26. In 1995, China adopted the Civil Aviation Law, which codified the same provisions on civil aircraft rights as those provided for in the Convention on the International Recognition of Rights in Aircraft, done at Geneva in 1948. After China established its national registration regime for civil aircraft, enabling it to fulfil the relevant treaty obligations, China acceded to the said Convention in 2000. Similarly, as a member of the Hague Conference on Private International Law, China participated in the negotiation of the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption. Because there were different provisions between the Convention and national adoption laws, China remained a non-party for many years after the said Convention was adopted. Only after it amended its national law on adoption did China become a party to the Convention in 2005.

27. In the area of trade law, China joined the World Trade Organization (hereinafter, "the WTO") in 2001. The Report of the Working Party on the Accession of China, which constitutes part of China's agreement with the WTO, states in paragraph 67:

The representative of China stated that China had been consistently performing its international treaty obligations in good faith. According to the Constitution and the Law on the Procedures of Conclusion of Treaties, the WTO Agreement fell within the category of "important international agreements" subject to the ratification by the Standing Committee of the National People's Congress. China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations. For this purpose, China had commenced a plan to systematically revise its relevant domestic laws. Therefore, the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.¹⁶

28. Pursuant to this international commitment, China has repealed, abrogated, revised, enacted and promulgated more than 3000 domestic laws, administrative regulations and administrative orders to ensure compliance with WTO rules. In the settlement of trade disputes, the competent authorities provide legal remedies in accordance with the

16 WT/ACC/CHN/49, Report of the Working Party on the Accession of China, 1 October 2001, UNPAN1.un.org/intradoc/groups/public/documents/APCITY/UNPAN002144.pdf.

relevant national laws. If, however, domestic remedies have proved to be insufficient, WTO rules and technical standards will be applied.

29. China is a party to all the major international conventions on counter terrorism, each of which has provisions requiring the States parties to adopt domestic legislation to establish criminal jurisdiction over such offences and to impose severe punishment under their national laws. To carry out its international obligations under these treaties and to combat international terrorism, China has revised the relevant provisions of its criminal law and criminal procedure law. In particular, China has established universal jurisdiction over acts such as hijacking of civil aircrafts, kidnapping of hostages, terrorist bombing and so on and proscribed them as criminal offences under Chinese criminal law. In 2000, China enacted the Extradition Law of the People's Republic of China.

30. Article 9 of the Criminal Law of the People's Republic of China, as revised in 1997, stipulates: "This law is applicable to the crimes proscribed in the international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction in accordance with its treaty obligations."¹⁷ Article 11 adds: "the criminal responsibility of foreigners who enjoy diplomatic privileges and immunities shall be resolved through diplomatic channels."

31. In the human rights field, international conventions on human rights do not have direct legal force in domestic law. Regardless of whether ratification or accession of human rights treaties requires amendment to or revision of domestic laws, such treaties are usually applied through domestic legislation. In 2004, the NPC amended the Constitution, adding a special clause on the protection of human rights. The new provision, Article 33, paragraph 3 of the Constitution, states that "the State respects and protects human rights". It thus provides a constitutional guarantee for the protection of human rights and for the implementation of human rights treaties in Chinese domestic law.

32. China is now a party to all the core human rights treaties, except for the International Covenant on Civil and Political Rights, which is yet to be ratified. Each of the treaties is implemented through domestic legislation. For example, the Compulsory Education Law of 1986, the Law on the Protection of Disabled Persons of 1990, the Law on the Protection of Women's Rights and Interests of 1992 and the Labor Law of 1994 all contain clauses implementing international obligations that China has undertaken under human rights treaties, but none of these domestic laws has any specific reference to the treaties.¹⁸ This means that when it becomes a party to a

17 This provision ensures that when a treaty to which China has become a party establishes universal jurisdiction over certain criminal offences, the Chinese courts can exercise criminal jurisdiction over such crimes. Normally, there are similar offences in national criminal law, but in cases such as terrorist bombing or terrorist financing, Art. 9 is intended to fill any possible gap in existing national laws. If criminal offences under a treaty are entirely new, it is still expected that special national legislation will be adopted, either before or after the ratification of the treaty.

18 This practice can also be observed in the national implementation reports for human rights conventions periodically submitted to the treaty-monitoring bodies established under each convention.

human rights treaty, China will first ensure that its national laws are in conformity with the terms of the treaty. Protection of individual human rights will thus be provided through the national laws. In judicial proceedings, courts will directly apply the relevant national laws to redress any infringement of individual rights.

C. Direct application of international treaties

33. Since it adopted the open policy and embarked on economic reforms in 1978, China has ratified or acceded to more than 200 multilateral treaties; over 90% of the treaties to which China is a party became applicable to China in the past 30 years. With respect to treaty performance, China increasingly provides for direct application in its domestic legal system of specific international standards and rules established by treaties. Strictly speaking, such direct application still bears the feature of transformation, rather than adoption, because it is only through specific national laws that substantive treaty rules can be applied as part of domestic law. In substance, however, international standards and rules as such are actually adopted and applied.

34. Pursuant to Article 142 of the General Principles of the Civil Law and Article 238 of the Civil Procedure Law, Chinese courts have directly applied a number of international treaties in the context of adjudicating civil cases with foreign elements. For example, Chinese courts have directly applied: the 1980 United Nations Convention on Contracts for the International Sale of Goods; the 1929 Warsaw Convention on the Unification of Certain Rules Relating to International Carriage by Air (hereinafter, “the 1929 Warsaw Convention”); the 1955 Hague Protocol to the Warsaw Convention (hereinafter, “the 1955 Hague Protocol”); the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier (hereinafter, “the 1961 Guadalajara Convention”); the 1951 Agreement Concerning International Carriage of Goods by Rail; and the 1974 United Nations Convention on a Code of Conduct for Liner Conferences.

35. In *Shanghai Zhenhua Port Machinery Co. Ltd v. United Parcel Service of America, Inc.*,¹⁹ the Shanghai company brought a lawsuit against UPS for delay in the delivery of documents sent by the international air carriage. The plaintiff claimed that UPS should return the carriage fees and pay compensation for the direct economic losses it suffered from the delayed service. The defendant disputed the amount of compensation owed. The Jing'an District People's Court of Shanghai stated that China is a party both to the 1929 Warsaw Convention and to the 1955 Hague Protocol. Article 11, paragraph 2 of the 1955 Hague Protocol provides:

- (a) in the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogram, unless the

19 See the Judgment made by the Jing'an District People's Court of Shanghai in 1994 (Jing Jing Chu Zi No. 14, 1994).

passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.

- (b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned.

36. These provisions are expressly stated on the back of the airway bill prepared by the defendant. Hence, the court determined that these provisions had been accepted both by the plaintiff and by the defendant. The court found that there was no legal basis for the plaintiff's claims for refund of carriage charges and compensation for economic losses. Instead, the court decided that the defendant should compensate the plaintiff's monetary loss for an amount up to the limit of the carrier's liability prescribed in the 1955 Hague Protocol.

37. Another typical case is *Abdul Waheed v. China Eastern Airlines*.²⁰ This was a dispute concerning a contract for international air passenger transport, which was tried by the People's Court of Pudong New Area in Shanghai. The plaintiff, Abdul Waheed, a Pakistani passenger, filed a lawsuit against China Eastern Airlines, claiming compensation for losses caused by the delay of the defendant's flight, which left the plaintiff stranded at Hong Kong Airport. After the defendant failed to take the necessary measures to help the plaintiff reach his destination, the plaintiff bought another air ticket at his own expense to complete his journey.

38. In accordance with Article 142 of the General Principles of the Civil Law, the court decided that the 1955 Hague Protocol and the 1961 Guadalajara Convention should apply in this case, because China and Pakistan are parties to both treaties. Under the treaties, when a passenger has paid in full the air transport charges by buying a ticket, the airline carrier has a legal obligation to deliver the contracted carriage service to the passenger. Under Article 19 of the Warsaw Convention, "the carrier is liable for damage occasioned by delay in the carriage by air of passengers."²¹ Accordingly, the court decided that the defendant should compensate the plaintiff for the loss he had suffered.

39. In maritime collision cases under Article 268 of the Maritime Code, which contains a treaty application clause, domestic courts directly apply the 1972 Convention on the International Regulations for Preventing Collisions at Sea. For example, in *Trade Quicker Inc. Monrovia, Liberia v. the Golden Light Overseas Management S.A. Panama*,²² tried by the Tianjin Admiralty Court, the plaintiff pleaded that one of its

20 See the Judgment made by the People's Court of Pudong New Area in Shanghai in 2005 (Pu Min Yi Chu No. 12164, 2005).

21 Warsaw Convention, Art. 19.

22 See the Judgment made by the Tianjin Admiralty Court in 1990 (Jin Hai Fa Shi Zi No. 4, 1990).

ships collided with one of the defendant's ships. The plaintiff sought compensation for the damage caused to its ship. The Tianjin Admiralty Court tried the case and applied the relevant treaty. The court found that the plaintiff should bear the major responsibility because its ship violated the provisions of Rule 5, Rule 8(a), Rule 15, Rule 16 and Rule 34(a) of the 1972 Convention on the International Regulations for Preventing Collisions at Sea. The court also found that the defendant should bear minor responsibility because its ship violated the provisions of Rule 5, Rule 7(b) and Rules 34(a) and (d) of the said Convention. The court delivered a judgment regarding the amount of compensation that assessed damages proportionate to fault.

40. *Yu Xiaohong v. Goodhill Navigation, S.A., Panama*²³ involved a dispute over compensation for personal injury of a ship's pilot. The Ningbo Admiralty Court found that the defendant failed to comply with the provisions of Regulation 17, Chapter V of the 1974 International Convention for the Safety of Life at Sea, which regulates the use of pilot ladders to help assure the pilot's safety when he is boarding the ship. As a result of the defendant's failure to comply with the regulations, the pilot ladder was broken and the plaintiff fell from the ladder. The plaintiff broke his spine and suffered permanent paralysis. The defendant could not prove that there was any fault or negligence on the part of the plaintiff. Hence, the court found that the defendant was liable for the injury. In accordance with the treaty provisions, the court awarded the plaintiff 3 685 581.53 yuan (Chinese *renminbi*) as compensation. This was the largest amount of compensation ever awarded by a Chinese court for personal injury at sea. The decision has exerted a significant impact on judicial practice in this field.

41. In the area of intellectual property protection, the Rules for Implementation of the Trademark Law of the People's Republic China, as amended in 1995 by the State Council, provide in Article 3, paragraph 3 that "applications filed for international registration shall be submitted in accordance with the Madrid Agreement Concerning the International Registration of Marks". The Copyright Law prescribes in Article 2, paragraph 3 that "any work of a foreigner published outside the territory of the People's Republic of China which is eligible to enjoy copyright under an agreement concluded between the country to which the foreigner belongs and China, or under an international treaty to which both countries are parties, shall be protected in accordance with this Law". In addition, Article 18 of the Patent Law states that "if a foreigner, foreign enterprise or other foreign organization having no regular residence or place of business in China files an application for a patent in China, the application shall be handled under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or any international treaty to which both countries are parties, or on the basis of the principle of reciprocity".

23 See the Judgment made by the Ningbo Admiralty Court in 1999 (Yong Hai Shi Chu Zi No. 55, 1999).

42. In *Twentieth Century Fox Film Corporation v. Beijing Superstore for Cultural and Arts Publications and AV Products Inc.*,²⁴ the plaintiff alleged that the defendant had infringed its copyrights that were entitled to protection under China's copyright law, the Memorandum of Understanding between the Government of the People's Republic of China and the Government of the United States of America on the Protection of Intellectual Property concluded in 17 January 1992 (hereinafter "the MOU on the Protection of Intellectual Property"), and the Berne Convention for the Protection of Literary and Artistic Works, which entered into force for China on 15 December 1992. Specifically, the plaintiff alleged that the defendant should be held liable because the defendant had, without the prior permission of the plaintiff copyright owner, recorded and distributed the plaintiff's copyrighted movie products. The First Intermediate People's Court of Beijing Municipality decided that the plaintiff's movie products were protected under Chinese law, even if the copyrights were obtained in the United States, because China was a party to the Berne Convention and the MOU on the Protection of Intellectual Property. Accordingly, the court ordered the defendant to halt its sales of copyrighted products and pay damages to the plaintiff.

43. In 1995, the Walt Disney Company instituted legal proceedings against the Beijing Publishing House Group for copyright infringement.²⁵ On appeal from the lower court's judgment, the Higher People's Court of Beijing considered the case. In its judgment, the court said that according to the provisions of the MOU on the Protection of Intellectual Property, "the works of USA nationals are under the protection of Chinese laws as from March 17, 1992. Walt Disney enjoys the copyright protection for its fine arts works such as cartoon images . . . involved in this case, the commercial use of which constitutes acts of tort." The Court decided that the defendants should be held liable for their tortious acts.²⁶

44. The above three forms or modalities for treaty implementation in Chinese domestic law have been developed primarily in the past 30 years. These three modalities can be seen as legal responses to China's opening process and to the challenges posed by economic globalization. International treaties were often handled in a fragmented way during the early stages of China's economic reform process. However, as more treaty provisions are incorporated into domestic law, their legal status and application in the domestic legal system have become an issue of fundamental importance. Consequently, the issue is a subject of ongoing legal studies in China. As legal practice continues to develop, it is conceivable that the domestic application of treaty obligations will be dealt with more systematically at the national level.

24 See the Judgment made by the First Intermediate People's Court of Beijing Municipality in 1996 (Yi Zhong Zhi Chu Zi No. 62, 1996).

25 See the Judgment made by the First Intermediate People's Court of Beijing Municipality in 1994 (Zhong Jing Zhi Chu Zi No. 141, 1994).

26 See the Judgment made by the Higher People's Court of Beijing in 1995 (Gao zhi zhong Zi No. 23, 1995).

III. Judicial directives on the interpretation and application of treaty obligations and related practice

45. Under the Chinese judicial system, the Supreme People's Court may issue circulars and notices to the lower courts. Such circulars and notices serve as judicial directives on the interpretation and application of law. They are authoritative and binding on the lower courts.²⁷ As economic and trade relations with foreign countries rapidly increase, civil and commercial cases with foreign elements are also on the rise. In order to ensure general compliance with treaty obligations in the judicial process, the Supreme People's Court has issued several circulars and notices to the lower courts on matters that are directly related to the interpretation and application of treaty provisions. The Supreme People's Court has also established a judicial review mechanism to supervise the enforcement of international commercial arbitral awards by the lower courts.²⁸

A. Judicial directives on the interpretation and application of treaty obligations issued by the Supreme People's Court

46. The Chinese legal system is not a case law system: there is no such legal principle as *stare decisis* in its judicial practice. Judicial directives given by the Supreme People's Court therefore play a significant role in guiding the lower courts in the interpretation and application of law. As noted above, under Article 142 of the General Principles of the Civil Law, Article 238 of the Civil Procedure Law and relevant provisions of other laws, international treaties can be directly invoked as the legal basis of judicial decisions. However, there are often occasions when lower courts raise inquiries because they are not certain about the exact meaning of some treaty term or the intention of the contracting States parties. To help resolve such uncertainties, the Supreme People's Court has issued several notices of judicial directives on the interpretation and application of international treaties on civil and commercial matters.

47. Since the middle of the 1980s, China has concluded numerous extradition treaties, as well as bilateral agreements on judicial assistance in civil and criminal matters. For the implementation of these treaties in Chinese courts, in 1988 the Supreme People's Court issued the Circular on the Implementation of Judicial Assistance Agreements Concluded between China and Other Countries. The Circular clarified the implementation procedure and the review of documents for service to the competent national authority designated to handle requests for judicial assistance with other contracting States.

27 In Chinese, such circulars and notices are termed "judicial interpretation", but they are not such as normally understood in other legal systems. In order to avoid any possible misunderstanding, the authors use the present explanatory term.

28 Circular of the Supreme People's Court on Certain Issues for the Nullification of Arbitral Awards with Foreign Elements by People's Courts, promulgated on 23 April 1998; for the Chinese text, see www.people.com.cn/zixun/flfgk/item/dwjf/falv/9/9-2-1-12.html.

48. In 1993, the Supreme People's Court published the Circular on some issues concerning the full implementation of the Copyright Law of the People's Republic of China. Article 2, paragraph 2 of the Circular provides: "The people's courts, when dealing with copyright cases involving foreign elements, should apply the Copyright Law of the People's Republic of China and other related laws and regulations. Where the domestic laws have provisions different from those of the international treaties concluded or acceded to by China, the provisions of international treaties shall prevail, except for those provisions to which China has made reservations. Given the specific circumstances of each case, if neither domestic laws nor international treaties have any provision on the matter concerned, international custom may be taken into account on the basis of reciprocity."²⁹

49. The following year, the Supreme People's Court issued another notice requiring the lower courts, when hearing intellectual property cases, to "strictly apply the Trademark Law of the People's Republic of China, the Patent Law of the People's Republic of China, the Law of the People's Republic of China on Technology Contract,^[30] the Copyright Law of the People's Republic of China, the Law of the People's Republic of China against Unfair Competition, and other laws and regulations, as well as the international treaties on the protection of intellectual property concluded or acceded to by China."³¹ These circulars of the Supreme People's Court, given their binding effects in judicial hearings, operate to ensure that the lower courts properly apply the law by strictly adhering to treaty provisions.

B. Treaty interpretation by the executive departments in the legal proceedings

50. In addition to the above judicial directives issued solely by the Supreme People's Court, the Court may circulate notices jointly with the competent authorities of governmental departments to provide guidance for lower courts on treaty implementation.

51. In 1987, the Supreme People's Court, along with the Supreme People's Procuratorate, Ministry of Foreign Affairs, Ministry of Public Security, Ministry of National Security and Ministry of Justice, jointly issued the Provisions on Certain Questions in Regard to Cases with Foreign Elements, providing guidance to the lower courts in the interpretation and application of international treaties. In 1995, the Supreme People's Court and other authorities issued another document with similar content.³² In the 1995 Provisions, Article 3 of Chapter 1 stipulates: "in the handling of cases with foreign elements, on the basis of the principle of reciprocity and mutual benefit,

29 The English translation is provided by the authors. Circular of the Supreme People's Court on Certain Issues Concerning Full Implementation of the Copyright Law of the People's Republic of China, promulgated on 24 December 1993; for the Chinese text, see www.sipo.gov.cn/sipo/flfg/bq/sfjs/200703/t20070328_147695.htm.

30 Note by the authors: The Law of the People's Republic of China on Technology Contract has been incorporated into the Contract Law of 1999.

31 The text is the author's translation.

32 This document replaces the 1987 Provisions.

international treaty obligations undertaken by China should be strictly observed. In case domestic laws or internal regulations are in conflict with China's treaty obligations, the relevant provisions of international treaties shall prevail, except for those provisions to which China has made reservations. The competent authorities shall not invoke domestic laws or internal regulations as a justification for the refusal to perform treaty obligations."³³

52. The treaties referred to above apparently mean only those concluded or acceded to by China. The 1995 Provisions has at least two important implications. First, in handling cases with foreign elements, the courts should give effect to treaty obligations as provided by relevant legislation. Second, in interpreting and applying domestic laws, the courts should give due regard to China's international treaty obligations and construe domestic laws in a way that does not conflict with those obligations.³⁴

53. In 1987, the Ministry of Foreign Trade and Economic Cooperation (now the Ministry of Commerce), which was responsible for the negotiation and conclusion of the 1980 United Nations Convention on Contracts for the International Sale of Goods, published an official document entitled "Some Issues in the Implementation of the UN Convention on Contracts for the International Sale of Goods". The document contained explanations of the applicable law for contracts for international sale of goods and identified the countries to which the Convention is applicable. The Supreme People's Court transmitted the document in the form of a notice to the lower courts.

54. In 1991, China became a party to the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, done at The Hague in 1965 (hereinafter, "Hague Service Convention"). In 1992, to help promote effective implementation of the Convention by the judiciary, and by Chinese diplomatic and consular missions abroad, the Supreme People's Court, Ministry of Foreign Affairs and Ministry of Justice jointly issued two documents: (i) the Circular on the Relevant Procedures to Implement the Convention on Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters; and (ii) the Measures on the Implementation of the Hague Service Convention. The Circular specified the competent authorities and the procedures for the service of documents through diplomatic channels and judicial channels, respectively. The Measures contained specifications, in particular, on the time limitation for service, as well as rules for translations and

33 The English text of the Provisions is not available. The translation is done by the authors; for the Chinese text, see www.chinalaw.gov.cn/jsp/contentpub/browser/moreinfo.jsp?page=2&id=co5022565624.

34 In August 2002, the Supreme People's Court issued Regulations of the Supreme People's Court on Several Issues in the Hearing of International Trade and Administrative Cases. Art. 9 of the Regulations provides that if there are two possible interpretations of a rule or provision applicable to an international trade or administrative case, and if one interpretation is in conformity with national treaty obligations, such an interpretation should be adopted, www.chinalaw.gov.cn/jsp/jalor_en/disptext.jsp?recno=2&&ttrrec=4.

communication of documents. Since Chinese national laws do not contain any special procedural rules for international judicial assistance, the above-mentioned notices issued by the Supreme People's Court help the courts to obtain proper information on the status of treaties that China has concluded with foreign countries. The notices also give legal guidance for the uniform implementation of the Hague Service Convention by domestic courts.

55. With respect to treaty interpretation, courts normally interpret treaty terms as they do domestic laws. That is, they take into account the literal meaning of the treaty terms, the relevant context and the object and purpose of the treaty, which is usually specified in the preambular paragraphs and the main clauses of the treaty. Generally speaking, courts do not directly refer to the relevant provisions on treaty interpretation in the Vienna Convention on the Law of Treaties.

56. If the lower courts think the treaty terms are ambiguous, or they need further information regarding the treaty, they may submit a request, through the Supreme People's Court, to obtain a legal opinion concerning treaty issues from the Treaty and Law Department of the Ministry of Foreign Affairs. The Department's opinions might address, for example, the meaning of certain treaty terms, the scope of treaty provisions or the status of States Parties to a treaty. In response to a request from a lower court, the Supreme People's Court would either give its opinion on the legal issues or refer the request to the Foreign Ministry. The Treaty and Law Department of the Ministry, upon receiving a request, would give its legal opinion on the interpretation and application of the treaty terms in accordance with the relevant provisions of the Vienna Convention on the Law of Treaties. In its statement, the Department may also include information regarding the Chinese practice and the reciprocal basis of application with the country concerned. In practice, this mechanism is utilized primarily to address issues related to diplomatic privileges and immunities and sovereign immunities. Opinions of the Department are normally sent back to the Supreme People's Court for consideration. In principle, these opinions are taken by the courts as dispositive, since they often involve foreign policy and the treaty-making power, matters that are entrusted to the administrative department and to the State Council under the law.

C. Recognition and enforcement of arbitral awards

57. Recognition and enforcement of arbitral awards is an important way to guarantee the legal protection of the rights and interests of parties to arbitration proceedings. Pursuant to the provisions of the Civil Procedure Law and the 1995 Arbitration Law of the People's Republic of China (hereinafter, "the Arbitration Law"), Chinese courts have jurisdiction to determine whether an arbitral award resulting from a commercial arbitration with foreign elements should be enforced, and to determine whether an arbitral award rendered by a foreign commercial arbitration tribunal should be recognized and enforced. Under Chinese law, these two types of arbitral awards are collectively referred to as international commercial arbitral awards.

58. According to the Arbitration Law, all the arbitral institutions established under Chinese law are competent to deal with commercial arbitrations with foreign elements, the awards of which are classified as arbitral awards with foreign elements. Currently, there are 185 arbitral institutions in China. In practice, if a party applies to a court for enforcement of an arbitral award, the court examines the award according to the provisions of Article 71 of the Arbitration Law and Article 260 of the Civil Procedure Law. To date, courts have ordered enforcement of awards in most cases; they have rarely refused an application for enforcement.

59. In accordance with Article 269 of the Civil Procedure Law, if a Chinese court is requested to recognize and enforce an award rendered by a foreign arbitration tribunal, the party seeking enforcement shall apply to the intermediate people's court in the place where the party against whom the award is to be enforced has his domicile, or where his property is located. The court shall resolve the matter in accordance with the international treaties concluded or acceded to by the People's Republic of China, or on the basis of reciprocity.

60. In 1987, China became a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "the New York Convention"). Under Article V of the Convention, a Chinese court may review applications for recognition and enforcement of arbitral awards delivered by a tribunal in another contracting State. With a view to implementing the New York Convention, in 1987 the Supreme People's Court issued the Circular on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to Which China is a Party. The Circular specified that, subject to the reservations made by China, the Convention applies only to disputes arising from contractual and non-contractual commercial legal relations, as defined under Chinese law. The Circular explained the meaning of the term "contractual and non-contractual commercial legal relations," specified which courts have jurisdiction to review foreign arbitral awards and clarified the legal basis of judicial review. In practice, Chinese courts generally recognize and enforce awards ordered by the International Court of Arbitration of the International Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce, the Korean Commercial Arbitration Board and the Sugar Association of London.

61. In addition to the New York Convention, China has concluded agreements on judicial assistance in civil and commercial matters with more than 30 countries. Many of these agreements include clauses on mutual recognition and enforcement of arbitral awards. Most of the agreements specify that the New York Convention serves as the legal basis for cooperation. Moreover, under Article 269 of the Civil Procedure Law, courts also have the authority to review, on the basis of reciprocity, applications for recognition and enforcement of arbitral awards delivered in non-contracting States. In reality, however, as of this writing, there has been no such legal case.

62. In practice, Chinese courts review only the procedural aspects of international commercial arbitral awards; they do not review the substance of such awards. To

date, the courts have generally been quite cautious in invoking public policy or public order as a ground to refuse recognition or enforcement.

63. The Supreme People's Court established a special reporting mechanism in 1995 for the purpose of supervising the enforcement of arbitral awards with foreign elements and the recognition and enforcement of foreign arbitral awards in the lower courts. Specifically, the Court issued a Circular on Issues Related to the Handling by the People's Courts of Arbitration with Foreign Elements and Foreign Arbitration. The Circular provides:

In cases where one party applies to the people's court for enforcement of an arbitral award with foreign elements ordered by a Chinese arbitral institution, or for recognition and enforcement of an arbitral award ordered by a foreign arbitration tribunal, . . . before the court decides to refuse an application for enforcement or for recognition and enforcement, such a decision shall first be reported to the High People's Court for review. If the High People's Court confirms the decision to refuse enforcement, or to refuse recognition and enforcement, that decision shall be subject to further review by the Supreme People's Court. A decision to refuse enforcement shall not be final until after confirmation by the Supreme People's Court.³⁵

64. Thus, the Circular clarifies that a lower court's decision refusing enforcement of an arbitral award with foreign elements, or refusing recognition and enforcement of a foreign arbitral award, can be effective only after confirmation by the Supreme People's Court. This mechanism may seem quite strict, and extraordinary, but in Chinese economic and commercial activities, commercial arbitration is one of the major forms of legal recourse for the settlement of disputes. Recognition and enforcement of arbitral awards has a direct bearing on the legal protection of the rights and obligations of natural and legal persons, and particularly of foreign persons, and thus on China's effort to secure a stable economic order and promote smooth economic relations with foreign countries. The supervision by the Supreme People's Court has served to prevent local protectionism and ensure that legal rules are applied uniformly and consistently throughout the country.

D. The application of international trade custom

65. Article 142, paragraph 3 of the General Principles of the Civil Law provides that "international practice"³⁶ may be applied to resolve issues that are not specifically addressed either by Chinese law or by any international treaty to which China is a

35 Translated by the authors.

36 As stated previously, the English term "international practice" is used by the State Council. The term *guo ji xi guan* in Chinese, if literally translated into English, is "international usage" or "international customary practice", but in the present context, the term refers to a "customary rule of international trade" or "international trade custom".

party. Furthermore, Article 145, paragraph 1 of the General Principles of the Civil Law and Article 126, paragraph 1 of the Contract Law of the People's Republic China also provide that the parties to a contract with foreign elements may choose the applicable law for the settlement of disputes arising from the contract. If the parties choose a customary rule of international trade as the applicable law, the court will apply that rule under the terms specified in Article 142, paragraph 3.

66. Chinese courts have frequently invoked the Uniform Customs and Practices for Documentary Credits 1993 (UCP 500), adopted by the International Chamber of Commerce and endorsed by the United Nations Commission on International Trade Law (UNCITRAL),³⁷ to settle disputes concerning letters of credit. In 2005, in order to provide legal guidance to the lower courts for the adjudication of disputes involving letters of credit, the Supreme People's Court issued a notice entitled "The Provisions of the Supreme People's Court on Some Issues Concerning the Trial of Cases Involving Disputes over Letters of Credit." The notice explicitly directs courts to apply the UCP 500 as a customary rule of international trade for the settlement of disputes related to letters of credit. Article 2 of the Provisions states:

When the people's court hears a case involving a dispute related to a letter of credit, if the parties have chosen an international customary rule or other provisions as the applicable law, their choice of law will govern; if the parties have made no choice on the applicable law, the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce and other relevant international practices shall apply.³⁸

67. In both *Liaoning Textiles Import and Export Corp. v. San Paolo IMI Bank of Italy*³⁹ and *Shenzhen Gaofurui Cereal, Oil and Food Co. Ltd v. Deutsche Bank*,⁴⁰ the courts referred to the UCP 500 as the applicable law in deciding the rights and obligations of the parties, on the ground that the UCP 500 has been widely accepted by banks throughout the world as a customary rule of international trade governing the rights and obligations of parties in relation to letters of credit. The courts ruled that since Chinese law does not have any provision governing letters of credit, in accordance with the General Principles of the Civil Law, the UCP 500 should be used as the applicable law for the resolution of the case. In the case of *Shenzhen Gaofurui Cereal, Oil and Food Co. Ltd v. Deutsche Bank*, the defendant moved to apply the law of the country where payment was effected, i.e. German law. However, the court denied the motion

37 www.uncitral.org/uncitral/en/other_organizations_texts.html.

38 www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/JudicialInterpretation/t20060620_51263.jsp.

39 See the Judgment made by the Second Intermediate People's Court of Beijing Municipality in 1999 (Er Zhong Jing Chu Zi No. 1636, 1999).

40 See the Judgment made by the Second Intermediate People's Court of Beijing Municipality in 1996 (Er Zhong Jing Chu Zi No. 471, 1996).

for the reason that the defendant failed to provide the court with the relevant German laws.

68. In deciding maritime disputes, the courts have also applied the Hague–Visby Rules as international trade custom. In *Shanghai E&T Intl Trans. Co., Ltd v. Sea-Land Orient (China) Ltd.*,⁴¹ the plaintiff consigned the goods to the defendant for carriage by sea, as specified in the sale contract. The “primary clause” written on the back of the Bill of Lading provided that the Bill of Lading should be subject to the provisions of the Carriage of Goods by Sea Act of 1936 (hereinafter, “COGSA”⁴²) and the Hague–Visby Rules. On 4 January 1996, the plaintiff filed the lawsuit against the defendant in the Shanghai Admiralty Court, alleging that the defendant released the goods without being presented with the Bill of Lading. The court found that, although both parties to the dispute were legal persons under Chinese law, the destination port for the carriage of goods in this case was a foreign port. Thus, the contractual relations between the two parties for the carriage of goods by sea are properly classified as “legal relations with foreign elements”. Article 269 of the 1992 Maritime Code of the People’s Republic of China provides that “the parties to a contract may choose the law applicable to such contract, unless the law provides otherwise”. The court acknowledged that the parties’ choice of COGSA as the applicable law was a valid choice. However, Section 1312 of COGSA clearly states: “This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States.”⁴³ Since the goods carried by the defendant in this case sailed from a departure port in Shanghai, China, not in the United States, the court ruled that the shipment was not “from a port of the United States” within the meaning of COGSA, and therefore COGSA was not applicable in this case.

69. The parties also chose the Hague–Visby Rules as the applicable law in their Bill of Lading. The court declared: “As China is not a party to (them), the Hague–Visby Rules as an international treaty are not binding on China. However, since they have been accepted on a world-wide basis, they can be applied as international trade custom to the case.”⁴⁴ The court finally decided that according to Article 269 of the Maritime Code of the People’s Republic of China, the Hague–Visby Rules and the agreement on the Bill of Lading between the parties, the defendant should pay the plaintiff the damages it had suffered, including loss of goods, and the interest accrued thereon. The fact that the Shanghai Admiralty Court accepted the Hague–Visby Rules as the applicable law in this case may not be taken as evidence that the Court recognized them as international treaty law or international trade custom.

41 See the Judgment made by the Shanghai Maritime Court in 1996 (Hu Hai Fa Shang Zi No. 6, 1996).

42 www.access.gpo.gov/uscode/title46a/46a_22_.html.

43 46 USC Appendix, § 1312.

44 Judgment made by the Shanghai Maritime Court in 1996 (Hu Hai Fa Shang Zi No. 6, 1996).

Article 269 of the Maritime Code of the People's Republic of China authorized the parties to choose the applicable law, and the parties chose the Hague–Visby Rules.

IV. Conclusion

70. In conclusion, China has made considerable progress in the past 30 years with respect to the implementation of international obligations in its domestic legal system. To a large extent, substantive treaty obligations undertaken by China have been incorporated into special national laws, exerting a direct impact on the economic and social activities of the country. Although there is no such maxim as “*ubi jus, ibi remedium*” (where there is a right, there is a remedy) in the Chinese legal system, there has been a rapid increase in the number of individuals and other legal persons who resort to the courts for the protection of their rights and interests. In appropriate cases, the courts apply treaty provisions that have been incorporated into domestic law to give private parties additional legal protection.

71. In the civil and commercial areas, international treaties apply primarily to cases with foreign elements in accordance with the relevant provisions of the General Principles of Civil Law and the Civil Procedure Law and judicial interpretations of those laws. Since China joined the WTO, civil and commercial interactions with the outside world have developed very rapidly. Consequently, rules established by international treaties are attracting more attention in the domestic legal system.

72. With respect to criminal law, China has prescribed almost all the international crimes as criminal offences under its national criminal law. In accordance with its international obligations, China has established criminal jurisdiction over such offences. Except for persons who enjoy jurisdictional immunities under international law, any person suspected of violating international criminal law and who is found in China will be brought to justice. Under Chinese law, a criminal suspect is entitled to all the legal rights and protections provided by law, including those incorporated into Chinese law from the human rights treaties to which China is a party.

73. Given the fact that treaties are usually the outcome of diplomatic negotiations and compromises between States parties, treaty terms tend to be vague and general in many cases. Therefore, substantive treaty obligations often need to be specified or transformed for the purpose of effective implementation at the national level. Under Chinese law and practice, generally speaking, except for those administrative agreements that can be directly executed, treaties can be applied in domestic law only after the adoption of legislation transforming a treaty into domestic law or authorizing direct application of the treaty. Although the Chinese Constitution and laws do not set forth a general provision on the status of treaties in the domestic legal system, China implements its international obligations in good faith with the view that effective implementation of treaty obligations will not only serve well its own development, but also promote peace and cooperation among States.