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PART VI IMMUNITY, COMITY, AND RELATED ISSUES

CHAPTER 31

INTERNATIONAL LAW IN CHINESE COURTS

CONGYAN CAI

I. INTRODUCTION

THE application of international law in Chinese courts has received little attention,[1] except perhaps with respect to the treaties regulating private relations like the UN Convention on Contracts for the International Sale of Goods (CISG),[2] which are not the focus of "public" international law. Some commentators thus look down on the role of the Chinese judiciary in the enforcement of international law. For instance, André Nollkaemper argued that Chinese courts did little in coordinating the international and national legal systems and in ensuring that China comply with international law.[3] This accusation is not unfounded because courts in China, a permanent member of the UN Security Council (UNSC), are quite moderate in their application of international law, especially when one considers that China might have the largest number of judges in the world.[4]

This chapter offers a perspective on how international law is understood and applied in a country with a unique history, ideology, and governance, and, more generally, to

[1] For instance, China is the only permanent member state of the UN Security Council that was not included in a large comparative survey on how domestic courts in thirteen countries enforce treaties. *See* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009).

[2] *See,* e.g., Jie Huang, *Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation*, 5 MANCHESTER J. INT'L ECON. L. 105 (2008); Xiao Yongping & Long Weidi, *Selected Topics on the Application of the CISG in China*, 20 PACE INT'L L. REV. 61 (2008).

[3] ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 13, 55 (2011).

[4] It was reported that in 2013 there were about two hundred thousand judges in China, *available at* http://news.sohu.com/20130725/n382586635.shtml (in Chinese) (last visited Aug. 10, 2017).

add a Chinese perspective on comparative foreign relations law. The chapter aims not merely to present a piecemeal analysis based on concrete cases, which, although it might be useful, could mislead observers. Instead, the chapter will explore the context, dynamics, and emerging trends concerning the application of international law in Chinese courts.

The chapter begins in Section II by investigating several major factors relevant to the judicial application of international law in China. Section III explores how Chinese legal policy influences the judicial administration in regard to international law. A case study is presented in Section IV to illustrate the changing context in which Chinese courts apply international law and the delicate strategy that Chinese courts employ toward applying international law.

II. Major Factors Affecting the Application of International Law in Chinese Courts

Generally speaking, states under international law have great discretion to decide on issues like which organ is authorized, and which method is employed, to honor their international legal obligations. This implies that, in addition to the international legal rules themselves, there are domestic variants affecting the actual application of international law in domestic courts, including legal culture.[5] Therefore, it is necessary to investigate what these domestic variants are, thereby revealing the context in which, and dynamics underlying, how Chinese judges interact with international law. Three major factors will be addressed in turn.

This first factor concerns China's ambivalence toward international law. China's ambivalence can be attributed to its special state identity. On the one hand, during the first thirty years after the founding of People's Republic of China (PRC) in 1949, China, as a country with a century-long national humiliation since the nineteenth century and an orthodox socialist state, was critical of the international legal order that had been crafted by a handful of Western powers.[6] As a result, it had little interest in concluding treaties with foreign states except a limited number of other socialist states. Nor was it willing to accept international customs.[7] On the other hand, in order to implement the

[5] *See generally* Rosalyn Higgins, Problems and Process: International Law and How We Use It ch. 12 (1994).

[6] Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110 Am. J. Int'l L. 269, 272 (2016).

[7] Interestingly, although China, in defining the minimum standard of investment treatment in a recently concluded investment treaty, accepted the two recognized constituent elements of state practice and *opinio juris*, it avoided mentioning the phrase "international custom" or "customary international law." *See* China-Mexico BIT (2008), art. 5(2).

Reform and Opening-up Policy starting in the late 1970s with the aim of remedying the political, economic, and social catastrophe brought about by the "Cultural Great Revolution" (1966–1976), China had to attract political support and economic resources from the Western states by integrating itself into international legal order that it had condemned. For instance, since the 1980s, China has concluded more than one hundred investment treaties,[8] which increase the confidence of transnational corporations to make investment in China.

Moreover, as China is recently rising as a new great power, there is a clear trend of it seeking to rely more heavily upon international law to expand and protect its national interests. In 2014, China pledged to "actively participate in international rule-making" and to "increase China's power of discourse and influence in international legal affairs."[9]

Such an instrumental approach has led to an ambiguous and fragmented status of international law in Chinese domestic legal order. Sharply different from constitutions of most of other countries, China's Constitution provides nothing about the domestic status of international law. Instead, it leaves this issue to be decided on a case-by-case basis, based on nonconstitutional law. Such an omission in the Constitution discourages many secondary laws from defining the status of international law. As a matter of fact, many Chinese laws do not have provisions concerning international law. For instance, in preparing for the amendment of the Legislation Law (2000), several members of the Standing Committee of the National People's Congress (NPC) once suggested that the new law include a provision clarifying the status of treaties in the Chinese legal system, but the suggestion was rejected.[10] Similarly, although the General Principles of Civil Law adopted in 1986 (GPCL), in defining the applicable law to foreign-related civil relations, included a provision for international law,[11] a similar provision did not appear in the Choice of Law for Foreign-Related Civil Relations enacted in 2010.[12] Furthermore, some references to international law have been removed from particular laws. For instance, Article 72 of the Administrative Procedure Law (APL) adopted in 1990 provided, "If an international treaty concluded or acceded to by the People's Republic of China contains provisions different from those found in this law, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's

[8] *See A List of Bilateral Investment Agreements Concluded by China*, *available at* http://tfs.mofcom.gov.cn/article/Nocategory/201111/20111107819474.shtml (last visited July 10, 2017).

[9] Central Committee of CCP, Decision on Some Major Issues Concerning Comprehensively Enhancing the Rule of State by Law (Oct. 23, 2014), Part VII.7, *available at* http://news.cnwest.com/content/2014-10/28/content_11767768_7.htm (last visited Aug. 24, 2017).

[10] Cai, *supra* note 6, at 272–273.

[11] GPCL (1986), art. 142(2).

[12] This provision, however, was included in a Judicial Interpretation issued by the Supreme People's Court (SPC) in 2012. *See* SPC, Interpretation (First) on Certain Issues Concerning the Application of the Choice of Law for Foreign-Related Civil Relations of the People's Republic of China, December 2012, art. 4, *available at* http://www.court.gov.cn/shenpan-xiangqing-5273.html (last visited Aug. 10, 2017).

Republic of China has announced reservations." But this provision was repealed in 2015 without any explanation.[13]

It should be stressed that those provisions of international law in laws like the APL (1990) and the GPCL (1986) refer to "treaties" only and do not include other sources of international law—for instance, international customs or decisions of international organizations. In recent years, however, some central-governmental organs, such as the Ministry of Foreign Affairs (MFA), have adopted a number of legal instruments requiring that the relevant governmental organs and private entities implement the sanction decisions approved by the UNSC. For instance, the MFA, in 2001, issued a note requiring the implementation of Resolution 1267 and Resolution 1333 of the UN Security Council.[14]

China's ambivalence toward international law appears to have discouraged judges from applying it. As a matter of fact, according to a Judicial Interpretation issued by the Supreme People's Court (SPC) in 2009, the normative instruments that can be invoked as the basis for "legal conclusions" do not include international law. Instead, international law belongs to "other normative instruments," which may be invoked to sustain "legal reasoning."[15] Although some judges still explicitly invoke certain treaty provisions as the basis for legal conclusions, many judges do not, even though the legal reasoning heavily relies on the relevant treaty provisions.

More seriously, the absence of a provision for international law in China's constitution and the above-mentioned Judicial Interpretation may be invoked by some judges to justify nonapplication of international law. In practice, it is believed that some treaties that should have been applied were not applied.[16] For instance, although China has ratified the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), China's representative to the Committee Against Torture stated explicitly that the CAT "could be invoked before the Chinese courts,"[17]

[13] Similarly, art. 46 of the Environmental Protection Law (1989), which provides, "If an international treaty related to the environmental protection, which have been concluded or acceded to by the People's Republic of China, contains provisions different from those found in Chinese laws, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations," was removed in its amendment in 2014. *See* the Environmental Protection Law (1989, as amended in 2014).

[14] *See,* e.g., MFA, Note on Imposing Financial Sanctions towards the Relevant Individuals and Entities in Order to Implement Resolution 1267 and Resolution 1333 of the Security Council, Oct. 17, 2001, *available at* http://www.gov.cn/gongbao/content/2002/content_61464.htm (last visited Aug. 10, 2017).

[15] SPC, Rules on the Invocation of Normative Instruments Including Law and Regulations in the Adjudicatory Decisions, art. 6 (July 3, 2009), *available at* http://www.court.gov.cn/fabu-xiangqing-73.html (last visited July 10, 2017).

[16] Yu Zhijing & Li, Jian, *On the Dilemma and Way out of Judicial Application of Treaties in China*, 8 POL. & L. 138, 139–140 (2016).

[17] Committee Against Torture, Summary Record of the 419th Meeting, para. 9, UN Doc. CAT/C/SR.419 (May 12, 2000).

and torture has been rampant in China,[18] the CAT has never actually been applied by Chinese courts.[19]

The second factor is the role of the judiciary in Chinese national governance. According to China's Constitution (2004), courts "exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organs, public organizations or individuals."[20] The Law of Organization of Courts (2006) and the Judges Law (2001) have the same provisions.[21] However, the judiciary, together with the executive branch, is created by, and is supervised by, the People's Congress,[22] a parliamentary body. Furthermore, there is a "living constitution" established by, and centered on, the Chinese Community Party (CCP).[23] That is, although not being accorded with any special powers, the CCP has been declared as the sole ruling party in China.[24] In practice, the CCP controls the operation of legislative, executive, and judicial organs at both central and local levels through its Party committees or groups at these organs.[25] As a result, the CCP fully integrates itself with the state, creating the Chinese Party State constitutional order.[26] So, it comes as no surprise that all governmental organs in China are encouraged to implement the policies that the CCP proposes or supports.

As far as the judiciary is concerned, Chinese courts, in accordance with the Law of Organization of Courts (2006), shall "protect the regimes of dictatorship of the proletariat . . . and guarantee the successful conducting of the course of socialist revolution and socialist construction."[27] For this purpose, the SPC has taken numerous judicial measures to materialize and consolidate this supportive role. For instance, as China's President Xi Jinping proposed the "One Belt One Road" Initiative (BRI),[28] the

[18] *See* Committee Against Torture, Concluding Observations of the Committee Against Torture: China, para. 11, UN Doc. CAT/C/CHN/CO/4 (Dec. 12, 2008).

[19] Interestingly, the Ministry of Public Security (MPS) once explicitly required, perhaps rhetorically, that its local branches strictly abide by the CAT. Ministry of Public Security, Note on Strictly Implementing Provisions in International Conventions Related to Public Security (Mar. 24, 1989), *available at* http://www.chinalawedu.com/falvfagui/fg22598/22828.shtml (last visited Aug. 24, 2017).

[20] Constitution (1982, amended in 2004), art. 126.

[21] Law of Organization of Courts (1979, amended in 2006), art. 4; Judge Law (1995, amended in 2001), art. 8(2).

[22] Constitution (2004), arts. 3, 92, 96, 111, 128, and 133. *See also* Law of Organization of Courts (1979, amended in 2006), art.16.

[23] Xin He, *The Party's Leadership as a Living Constitution in China*, 42 HONG KONG L.J. 73 (2012).

[24] Constitution (2004), Preamble.

[25] Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 535, 538 (2006–2007); Zhu Suli, *The Party and the Courts*, *in* JUDICIAL INDEPENDENCE IN CHINA ch. 4 (Randall Peerenboom ed., 2010).

[26] Shucheng Wang, *Emergence of a Dual Constitution in Transitional China*, 45 HONG KONG L.J. 819 (2015).

[27] Law of Organization of Courts (1979, as amended in 2006), art. 3(1).

[28] National Development and Reform Commission (NDRC), Ministry of Commerce (MOC) and Ministry of Foreign Affairs (MFA), Preamble, Vision and Actions on Jointly Building the Silk Road Economic Belt and the 21st-Century Maritime Silk Road, *available at* http://gb.cri.cn/42071/2015/03/28/6351s4916394.htm (last visited Aug. 2017).

SPC recently required that courts should "effectively serve and guarantee the successful implementation of 'One Belt One Road' Initiative" through, among other things, more active application of international treaties.[29] Judge He Rong, then vice president of the SPC, also wrote that, as China increases its international status and, in particular, advocates the BRI, Chinese courts should enhance their participation in the international economic rule-making through more active application of international law.[30]

According to the conventional wisdom in the Western world concerning the rule of law, the unique role of the Chinese judiciary in China's constitutional framework and public governance seriously damages the judicial independence and power indispensable to resolve disputes fairly and impartially.[31] A commentator once suggested that the lack of judicial independence is a major reason why Chinese courts fail to secure China's compliance with international law.[32] While the extent of judicial independence in China is debatable, there has been a consensus that it needs to be improved.[33]

The unique role of the Chinese judiciary has in fact greatly influenced the application of international law in Chinese courts. As examined below, Chinese courts follow a structural approach to international law, pursuant to which international legal rules are applied in a way that does not meaningfully challenge the executive.[34] Indeed, even in applying international legal rules that have little to do with executive authority—for instance, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)—judges sometimes are still not immune from the interference from the executive branch. This is because, for instance, although the application of the New York Convention in and of itself does not challenge executive authority, some local executive organs are still likely to intervene out of consideration of narrow interest, for instance, the protection of state-owned enterprises (SOEs). Presumably, this is one of the reasons why the SPC requires that the refusal of recognition and enforcement of foreign arbitral awards under the New York Convention must be finally decided by the SPC,[35] which helps reduce the "local protectionism" once rampant in China.

Nevertheless, as China enhances its rule of law[36] and increasingly embraces international regimes that either provide private rights (for instance, investment treaties or the UN Convention on Jurisdictional Immunities of States and Their Property[37]) or influence private interests (for instance, the UN sanction resolutions), international law

[29] SPC, Opinions on the Provision of Judicial Service and Guarantees to "One Belt One Road" Initiative (June 16, 2015), *available at* http://www.court.gov.cn/fabu-xiangqing-14900.html (last visited July 10, 2017).

[30] He Rong, *On China's Judiciary Participation in the Formation of International Economic Rules*, 1 INT'L L. STUD. 3 (2016).

[31] RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 280 (2002).

[32] NOLLKAEMPER, *supra* note 3, at 53–55.

[33] *See* JUDICIAL INDEPENDENCE IN CHINA, *supra* note 25, chs. 2, 4–6.

[34] *See infra* Part III.

[35] SPC, Note on the Dealing with Issues Concerning the Foreign-related Arbitration and Foreign Arbitration, Aug. 28, 1995.

[36] CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 208–221 (John Garrick & Yang Chang Bennett eds., 2016).

[37] China signed this convention on September 14, 2005, but has not yet ratified it.

is more likely to be applied in Chinese courts. Equally importantly, it appears that Chinese courts themselves seek to increase their role in national governance by applying international law more actively. For instance, Wang E'xiang, while acting as a vice president of the SPC, suggested that the role of Chinese courts in foreign relations should be enhanced—for instance, in deciding whether a treaty is self-executing or non-self-executing.[38] Recently, the SPC pledged that Chinese courts should increase their "international judicial power of discourse."[39]

The third factor is the professional competence of judges. A good judicial administration is preconditioned on judges with highly professional competence. Unfortunately, the Chinese judiciary has long been notorious for its lack of professionally competent judges. Prior to 1995 when the Judge Law was adopted, there were no compulsory qualifications required to be a judge in China. Officials from the executive branch, the CCP, and military units were often appointed as judges. Most judges did not have a law degree or sufficient legal knowledge.[40] The Judge Law (1995) for the first time provided that judges shall be appointed from those receiving education at law schools or receiving education at nonlaw schools but having legal knowledge. Those incumbent judges who did not meet such a requirement were to receive legal training.[41] The Judge Law (2001) provided even stricter qualifications. According to this law, any person who would be appointed as a judge shall receive a bachelor degree in law, or a nonlaw bachelor degree but having legal knowledge. More importantly, all would-be judges shall pass the Unified National Judicial Examination (UNJE). Still, those incumbent judges failing to meet such requirements could qualify themselves through receiving legal training.[42] The poor professional competence has often resulted in wrongly adjudicated cases, which seriously damaged the legitimacy of the judiciary.[43]

Application of international law is especially demanding for Chinese judges. First, language is a big obstacle for most Chinese judges. Many treaties that China has concluded either have no Chinese authentic texts or stipulate that English authentic texts prevail over Chinese authentic texts in case of any divergence. Most Chinese judges do not have a sufficient command of English to ensure a correct understanding of treaty provisions.[44] Second, the identification and interpretation of international legal rules is a complicated process.[45] It requires practical capability much more than legal theories. However, Chinese law school students were traditionally taught what international law was, not how international law was used. As the result, although some

[38] A STUDY ON THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND NATIONAL LAW 476–481 (Wang E'xiang et al. eds., 2011) (in Chinese).

[39] SPC, Opinions on the Provision of Judicial Service and Guarantees to "One Belt One Road" Initiative (June 16, 2015), *available at* http://www.court.gov.cn/fabu-xiangqing-14900.html (last visited July 10, 2017).

[40] PEERENBOOM, *supra* note 31, at 290.

[41] Judge Law (1995), art. 9.

[42] Judge Law (1995, as amended in 2001), arts. 9 and 12.

[43] PEERENBOOM, *supra* note 31, at 290.

[44] Qingjiang Kong, *International Law Teaching in China: Emerging in a Pedagogical Reform or Embracing Professionalism and Internationalization?*, 12 CAMBRIDGE J. CHINA STUD. 11, 20 (2017).

[45] *See* Statute of the International Court of Justice, art. 38(1); Vienna Convention on the Law of Treaties of 1969 (VCLT), arts. 31 and 32.

Chinese judges know international legal theories well, they may find that the theories they learned in law schools are of little help in applying international law. Third, the fact that China, generally speaking, adopts the transformation method rather than automatic incorporation to enforce its international legal obligations, as examined below, discourages Chinese judges from learning international law. As noted by Rosalyn Higgins, however, this is a common phenomenon in many countries that embrace a dualist approach to international law.[46]

The issue is more serious in the vast Middle and Western areas of China. It is suggested that many judges in those areas do not consider international law as "law" and they should apply domestic law only.[47] In practice, nearly all the application of international law happens in the Eastern part of China, especially in Shanghai, Beijing, and Guangdong, and judges in the Western areas, for instance, Xinjiang and Yunan, hardly have the experience of applying treaties.[48]

The SPC recognized the lack of professional competence of judges and directed that judges shall improve their knowledge of international law.[49] It has also taken many additional measures to improve the competence of judges.[50] In particular, it proposed a variety of important measures in 2015—for instance, the establishment of Judicial Selection Committees (JSC) at the national and provincial levels, more appointment of attorneys, legal scholars as judges, and more cooperation with law schools.[51]

In short, there are some positive developments with respect to the major factors that once discouraged Chinese judges from applying international law.

III. Methods and Structure for the Application of International Law in Chinese Courts

Methods

Generally speaking, international law requires that a state enforce legal obligations imposed on it, leaving issues such as who are authorized to perform obligations and

[46] Rosalyn Higgins, Problems and Process: International Law and How We Use It 206 (1994).

[47] Zhijing & Jian, *supra* note 16, at 142.

[48] Du Jing, *The Application of International Treaties by Courts in Shanghai 1990–2012*, 2 Theory Learning 82 (2015); Zhijing & Jian, *supra* note 16, at 142.

[49] *See*, e.g., SPC, Notice of the Supreme People's Court on Several Issues Concerning the Trial and Enforcement of Foreign-Related Civil and Commercial Cases, Apr. 17, 2000, *available at* http://www.tpan.cn/html/5196.htm (last visited Aug. 24, 2018).

[50] Peerenboom, *supra* note 31, at 292–293.

[51] SPC, Opinion on the Comprehensively Deepening the Reform in People's Courts—Outline of the Fourth Five-Year Reform (2014–2018), Feb. 2015, *available at* http://www.court.gov.cn/fabu-xiangqing-13520.html (last visited July 10, 2017).

how to perform obligations to be decided by the state. For instance, the Vienna Convention on the Law of Treaties of 1969 (VCLT) only provides that a contracting state perform a treaty that has come into force for it "in good faith,"[52] not stipulating which method it should choose.

As far as treaty obligations are concerned, there are two major methods to enforce them: automatic incorporation and transformation. Under automatic incorporation, domestic courts are empowered to directly give effect to a treaty without a further implementing legislation. By contrast, the transformation method requires a legislative action to be taken before domestic courts enforce treaty obligations. Each method has its own merits and weaknesses. It is therefore legitimate for a state to adopt automatic incorporation or transformation, and the choice is likely to be affected by a number of factors, such as the national constitutional order and the characteristics of particular treaties.[53]

According to incomplete statistics, the automatic incorporation method has been used for about eighty laws passed between 1978 and 2004 in China.[54] In this regard, a frequently mentioned example is Article 142 of the GPCL.[55] Article 142 provides that "[i]f 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 announced reservations."

Since China's Constitution is silent on the status of international law and only a small number of secondary laws include provisions concerning international law, it is right to contend that transformation is the primary method for China to implement treaty obligations.[56] Interestingly, while doctrinal debates on the automatic incorporation and transformation had continued for years in China, it was not until China's accession to the World Trade Organization (WTO) in 2001 that there was heated discussion on the potential legal significance of adopting different methods of application of international law in China. At that time, most Chinese lawyers suggested that Chinese courts could directly apply at least some WTO rules.[57] The proposition failed, however, when the SPC adopted the Regulations on Issues Concerning the Trial of Administrative Cases Relating to International Trade (Trade Case Regulations) in 2002.[58] In introducing that judicial instrument, Judge Li Guoguang, the SPC's deputy president at that time, clarified that WTO rules could not be invoked by courts

[52] VCLT, art. 26. [53] NOLLKAEMPER, *supra* note 3, at 73–81.

[54] WANG YONG, FUNDAMENTAL THEORY OF THE APPLICATION OF TREATIES IN CHINA 146 (2007) (in Chinese).

[55] The GPCI was promulgated by the NPC on April 12, 1986, and came into force on January 1, 1987.

[56] Xue Hanqin & Jin Qian, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299, 308 (2009).

[57] *See* CAI CONGYAN, PRIVATE STRUCTURAL PARTICIPATION IN THE MULTILATERAL TRADE SYSTEM 265–268 (2007).

[58] SPC, Regulations of the Supreme People's Court on Issues Concerning the Trial of Administrative Cases Relating to International Trade, Aug. 27, 2002.

as the applicable law to decide disputes.[59] The judicial instrument has been affirmed in several cases. In the *Shengzheng Chengjie'er Trade Co., Ltd.* case (2012), for instance, the respondent, Tianjin Customs authority, detained the imported goods of Plaintiff, Chengjie'er. The plaintiff argued that the prolonged detention breached Article 55 of Agreement on Trade-Related Aspects of Intellectual Property Right (TRIPS Agreement). A Tianjin court ultimately held that, according to the Trade Case Regulations, Chinese laws rather than the TRIPS Agreement should be applied.[60] Similarly, in *Longines Co. v. Trademark Review & Adjudication Board*, a Beijing court affirmed that the defendant was justified in not relying directly in its decision upon the TRIPS Agreement because the relevant TRIPS provisions had been "included in the current Trademark Law."[61]

Obviously, automatic incorporation gives domestic courts ample opportunities to invoke international law while transformation seriously limits the ability of domestic courts in this regard. Notably, China several times clarified its position in favor of the method of transformation. For instance, in its second periodic report to the Committee on Economic, Social and Cultural Rights, China argued that human rights treaties "do not directly function as the legal basis for the trial of cases in Chinese courts,...; rather, they are applied after being transformed into domestic law through legislative procedures."[62] Also, as noted above, the provision concerning international law was removed from the APL (2015). While it remains to be seen whether these events represent a trend, they are not an encouraging development for the role of Chinese courts in applying international law.

In case of the absence of legislative action, domestic courts still may apply international law by interpreting national law in conformity with an international obligation. This is the principle of consistent interpretation.[63] Chinese courts sometimes employ the principle even when the relevant domestic laws do not explicitly provide for it. For instance, in *Nanning XX Service LLC v. Nanning XX Bureau*, there was disagreement regarding the meaning of "workplace."[64] China's Work Injury Insurance Regulations of 2010 fail to provide a definition. A Chinese court held that the Regulations should be interpreted in conformity with Article 3(c) of the Convention Concerning Occupational Safety and Health and the Working Environment (to which China is a contracting party), which provides that "the term workplace covers all places where workers

[59] *See* Li Guoguang, A Speech given at the brief on the Regulations of the Supreme People's Court on Issues Concerning the Trial of Administrative Cases Relating to International Trade, *available at* http://www.lawxp.com/statute/s898388.html (last visited Aug. 24, 2018).

[60] Selected Collection of People's Court Cases 368 (Shen Deyong ed., 2013).

[61] Longqinbiao Co. Ltd. v. Trademark Review & Adjudication Bd., *available at* http://www.pkulaw.cn/case/pfnl_118497741.html?match_Exact (last visited Aug. 24, 2018).

[62] Committee on Economic, Social and Cultural Rights, Second Periodic Report Submitted by States Parties Under arts. 16 and 17 of the Covenant: China, UN Doc. E/C.12/CHN/2, at 9 (July 6, 2012).

[63] NOLLKAEMPER, *supra* note 3, at 73–81.

[64] Nanning XX Serv. LLC. v. Nanning XX Bureau, *available at* http://www.pkulaw.cn/case/pfnl_118505863.html (last visited Aug. 24, 2018).

need to be or to go by reason of their work and which are under the direct or indirect control of the employer."

In addition, treaties that China has not entered into are still likely to be applied by Chinese courts. For instance, in a Judicial Interpretation issued in 2012, the SPC noted that Chinese courts, in determining the rights and obligations of parties to a contract, could rely on provisions of a treaty that has not come into effect but is invoked by parties to a dispute, except those provisions in breach of the public interest, laws, and compulsory provisions of administrative regulations in China.[65]

Structure

"Selective adaptation" was considered as a pragmatic strategy that China adeptly maneuvers to maximize the benefits and to minimize the risks arising from the engagement with international regimes.[66] I do not want to join in the debates over the legitimacy of this legal strategy, but instead will simply offer new evidence for this observation.

It has been found that more than thirty treaties have been applied in Chinese courts, including the Convention on the Contract for the International Carriage of Goods by Road (1955), the Convention on International Bill of Exchange and International Promissory Note (1988), and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (1924) to which China was not a Contracting Party.[67] Furthermore, according to my own survey in 2016, most of these treaties deal with relations between private actors, such as the CISG, and those are the types of treaties most frequently invoked. For instance, as of January 18, 2016, the CISG has been invoked in 198 cases; the New York Convention, 66 cases; the Paris Convention for the Protection of Industrial Property (Paris Convention), 381 cases; the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), 622 cases.[68] However, treaties that are concerned with executive authority have rarely been applied. For instance, Chinese courts have never applied any "core" human rights conventions that it entered into, such as the CAT or the International Covenant on Economic, Social and Cultural Rights (ICESCR).

This structure of treaties applied in Chinese courts is rooted in Chinese national development strategy in the past thirty years. That strategy, which has sometimes been

[65] SPC, Interpretation (First) on Certain Issues Concerning the Application of the Choice of Law for Foreign-Related Civil Relations of the People's Republic of China, Dec. 2012, art. 9, *available at* http://www.court.gov.cn/shenpan-xiangqing-5273.html (last visited Aug. 10, 2017).

[66] Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119 (2003); Pitman B. Potter, *Selective Adaptation and Institutional Capacity*, 61 INT'L J. 389 (2005–2006); Ljiljana Biukovic, *Compliance with International Treaties: Selective Adaptation Analysis*, 44 CAN. Y.B. INT'L L. 451 (2006).

[67] Zhijing & Jian, *supra* note 16, at 138.

[68] *See* Cai, *supra* note 6.

called the Beijing Consensus,[69] is characterized by two core elements: (1) a focus on economic growth over political democracy and social justice, and (2) an authoritarian regime with an executive branch that can pursue public policies as efficiently as possible.[70] On the one hand, the primary consideration of the Reform and Opening-up Policy was to attract capital and technology from Western states to repair the collapsed economy that followed the Cultural Revolution (1966–1976). However, China's "command economy" as the basic economic regime of a socialist state[71] discouraged Western investors and traders who operated in market economies, and China could not create a legal regime to support a fully fledged market economy in a short period of time. Therefore, it became expedient for China to incorporate international regimes into its domestic legal system with the aim of increasing foreign confidence on Chinese business environment. The infusion of massive amounts of foreign capital and technology into China accelerated the country's rapid economic growth. On the other hand, "efficiency" has always been considered as a great advantage inherent in the socialist regime.[72] This efficiency advantage often justifies the maintenance of executive authority and discretion. As the result, it comes as no surprise that, on the one hand, treaties like the CISG are allowed and encouraged to be invoked in Chinese courts because those treaties merely provide rights between private individuals; on the other hand, Chinese courts are reluctant to apply treaties like the CAT, even though China entered into these treaties, because executive authority would thus be seriously challenged.[73]

Nevertheless, as China rises as a new great power, it is likely that Chinese courts will apply, in addition to those treaties dealing with relations between private actors, other treaties in order to protect China's increasingly expanding interests. For instance, whenever China eventually ratifies the State Immunity Convention, which it signed in 2005, it is expected that the Convention will be applied in Chinese courts in some manner.[74]

IV. Application of International Law in Chinese Courts in the Chinese Context of Foreign Relations Law: A Case Study

If we agree with the proposition that foreign relations law serves as "an internal constraint on the unilateral exercise of foreign relations powers through the distribution

[69] *See* Bradley Klein, *Democracy Optional: China and the Developing World's Challenge to the Washington Consensus*, 22 UCLA Pac. Basin L.J. 89 (2004).

[70] Cai, *supra* note 6, at 286–287. [71] Constitution (1982), art. 15.

[72] Deng Xiaoping, Selected World of Deng Xiaoping, Vol. 3, at 187–183, 188 (1994).

[73] Cai, *supra* note 6, at 284. [74] *Id.* at 279.

of authority within the national government,"[75] it appears that Chinese courts have failed to live up to the expectations of many persons. A recent case, however, might provide a new perception of the role of Chinese courts in the Chinese context of foreign relations law. This case was filed before a Beijing court by Chinese individuals against two Japanese companies, accusing them of involvement in forced labor organized or supported by the Japan government during World War II. This case merits a close examination because it concerns the interpretation of a Communiqué signed between China and Japan in 1972 (China-Japan Joint Communiqué), which deals with the war-related compensation arising from Japan's aggression in China.

Since the mid-1990s, some Chinese war victims and their descendants had begun to file lawsuits in Japan, arguing that Japan's government and some Japanese companies should be liable for using forced labor and "comfort woman" (i.e., sexual slavery) during World War II. Chinese plaintiffs did not win any of these cases. One of justifications given by Japanese courts for ruling against the plaintiffs was that China's government had waived the right of China's government and its nationals to claim compensation, in Paragraph 5 of the China-Japan Joint Communiqué.[76] Paragraph 5 provides that "the Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan." The *Nishimatsu Construction* case and the *Second Chinese "Comfort Women"* case[77] are decisive. In two judgments both issued on April 27, 2007, Japan's Supreme Court (JSC) held that "[i]t should be out of doubt that, all claims arising from the war, including the claims by private individuals, are abandoned mutually."[78] This was the first time that JSC came to such a definite conclusion. Chinese leaders argued, however, that China, under Paragraph 5 of the China-Japan Joint Communiqué, merely waived the right of the Chinese government to bring war reparations claims and that Chinese nationals could be not barred from bringing such claims.[79] Although China condemned the JSC's interpretation as "void" and "invalid" and asserted that the Japanese government should "take Chinese

[75] Daniel Abebe, *Great Power Politics and the Structure of Foreign Relations Law*, 10 CHI. J. INT'L L. 125, 125 (2009–2010).

[76] Zhang Xingjun, *Evolution of Compensation Claims by Chinese War Victims in Japanese Courts and the Response of China's Government*, 4 TSINGHUA L.J. 96 (2007) (in Chinese); GUANG JIANQIANG, EQUITY, JUSTICE, AND DIGNITY—LEGAL FOUNDATION OF CLAIMS AGAINST JAPAN BY CHINESE VICTIMS OF JAPAN'S AGGRESSION TO CHINA (2006) (in Chinese).

[77] For the description of the two cases, *see* Masahiko Asada & Trevor Ryan, *Post-War Reparations Between Japan and China and the Waiver of Individual Claims: Japan's Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese "Comfort Women" Case*, 19 ITALIAN Y.B. INT'L L. 207 (2009).

[78] 中国人強制連行広島訴訟等上告審判決, 平成17年(受)第1735号, 平成19年4月27日.

[79] *See Experts Advise Chinese WWII Laborers to File Class Action*, PEOPLE'S DAILY ONLINE (Jan. 15, 2002), *available at* http://en.people.cn/200201/15/eng20020115_88683.shtml (last visited Aug. 24, 2018).

concerns seriously and properly resolve this issue,"[80] it could not do anything to overturn the judicial decision of the JSC.

Chinese victims and their descendants shifted their focus back to China, seeking to bring claims against the Japanese government and the relevant companies before Chinese courts. For example, in September 2012, some Chinese victims of the Chongqing Grand Bombing by the Japanese air force from 1938 to 1945 brought claims against Japan at a Chongqing court.[81] Similarly, in March 2014, a group of Chinese forced laborers and their descendants filed cases against Japan and several Japanese companies at a Hebei court.[82] The Japanese government was a defendant in both proposed lawsuits, and the two Chinese courts declined to register the cases.

In March 2014, however, a Beijing court registered a case filed by thirty-seven Chinese forced workers and their descendants against two Japanese companies, arguing that Japanese companies should be liable for their involvement in forced working programs during World War II. This is the first time that Chinese courts have exercised jurisdiction over disputes arising from the aggression of Japan in China.[83] Interestingly, this time the plaintiffs did not add the Japanese government as a defendant. This case is still pending.

This case between private parties provides Chinese courts an opportunity to clarify the meaning of Paragraph 5 of the China-Japan Communiqué, potentially rebutting the interpretation of the JSC. It should also be noted that this case is taking place in the context of continuous confrontations between two great powers. In the past decade, China–Japan bilateral relations have tended to worsen. For instance, in September 2012, Japan's government decided to "buy" the Diaoyu Islands, concerning which both states claim their sovereignty from a Japanese family who, under Japanese law, is the owner. China has responded with a set of measures, including issuing a white paper on Diaoyu Islands,[84] establishing the East China Sea Air Defense Identification Zone (ADIZ),[85] and publicizing confessions by forty-five Japanese war convicts.[86]

[80] *China Strongly Opposes Japan's Supreme Court's Arbitrary Interpretation of the Relevant Provisions of China-Japan Communiqué*, XINHUANET (Apr. 28, 2007) (China), *available at http://www.cnr.cn/news/200704/t20070428_504454131.shtml* (last visited Aug. 24, 2018).

[81] *Fifteen Victims of "Chongqing Grand Bombing" Bring Lawsuit against Japan* (Sept. 11, 2012), *available at* https://news.qq.com/a/20120911/000158.htm?pgv_ref=aio2012&ptlang=2052 (last visited Aug. 24, 2018).

[82] *Following up Lawsuits Brought by Chinese Laborers against Japanese Government and Enterprises* (Mar. 27, 2014), *available at http://news.163.com/14/0326/17/9O9F6D4E00014JB5.html* (last visited Aug. 24, 2018).

[83] *Court Accepts Chinese WWII Forced Labors Lawsuit, available at* http://english.cri.cn/6909/2014/03/19/3521s818167.htm (last visited Aug. 15, 2017).

[84] State Council Information Office of the People of Republic of China, *Diaoyu Dao, an Inherent Territory of China*, Sept. 2012, *available at* http:// http://www.scio.gov.cn/zfbps/ndhf/2012/Document/1225271/1225271.htm (last visited Dec. 12, 2018).

[85] *Defense Ministry Spokesman on China's Air Defense Identification Zone, available at* http://www.mod.gov.cn/affair/2013-11/23/content_4476908.htm (last visited Dec. 12, 2018).

[86] *Confessions of Japanese War Criminals, available at http://jishi.cntv.cn/special/ribenzhanfanchanhuibeiwanglu/index.shtml* (last visited Dec. 12, 2018).

The Beijing court exhibited its judicial wisdom in this case. It is expected that the two Japanese defendants would defend themselves against the plaintiffs' claim by invoking the above-mentioned judicial decision made by the SPC concerning Paragraph 5 of China-Japan Joint Communiqué. The Beijing court would thus have a good opportunity to give its own interpretation, affirming the Chinese position and refuting the SPC's judgments. On the other hand, in contrast with the two lawsuits initiated in Hebei and Chongqing, Japan's government is not listed as a defendant in this case, which could reduce the risk of diplomatic confrontations between China and Japan.

According to an instrument jointly issued by the SPC, MFA, and several other Chinese governmental organs,[87] the Beijing court was not likely to hear this case without the consent from the SPC and the MFA. Thus, it is fair to suggest that this case was deliberately included by China in its systematic diplomatic "struggles" with Japan. In other words, Chinese courts were mobilized to coordinate with and support other Chinese governmental organs in conducting foreign relations.

V. Conclusion

Generally speaking, international law merely requires that a state honor its international legal obligations, leaving the issue of how to honor them to be decided by the state itself. Any state thus has the right to decide on the method of automatic incorporation or transformation in light of domestic considerations. The automatic incorporation approach, compared with the transformation approach, gives domestic courts more say in enforcing international law by directly invoking specific legal rules, but the preference for transformation in and of itself does not necessarily mean that a state is less willing to conform to international law. Nevertheless, if a state fails to transform its international obligations into the domestic legal order, domestic courts can do little to make their home state honor its commitments.

A close examination of the application of international law in Chinese courts might frustrate those who endeavor to build a theoretical edifice applicable to most, if not all, states.[88] This examination can be helpful, however, for understanding the diversity of judicial application of international law among states. The application of international law in Chinese courts has its own context and dynamic that has changed somewhat over time. Such a context and dynamic fundamentally affect the method that is chosen to enforce international law and the structure of international law that is judicially

[87] MFA, SPC, the Supreme People's Procuratorate (SPP), Ministry of Public Security (MPS), Ministry of State Security (MSS), and the Ministry of Justice (MOJ), *Rules on Concerning Resolving Foreign-Related Cases*, June 20, 1995, *available at* http://www.chinalawedu.com/news/1200/22598/22604/22717/2006/3/ga31631653541313600219936-0.htm (last visited Aug. 10, 2017).

[88] *See* Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 Eur. J. Int'l L. 59 (2009).

applied. The Chinese example also provides a good illustration of how domestic courts function to contribute to national development through strategically applying international law, rather than of how domestic courts, by applying international law, enhance domestic governance and, in particular, enforce individual rights against public authority, which has become regular practice not only in many Western countries that were major crafters of international law but also in some other countries that were once less friendly to international law, such as Japan and South Africa. Furthermore, it should be noted that some factors discouraging the judicial application of international law in China might also exist in some other countries, including the lack of professional competence of judges. They merit serious consideration in a larger context of comparative foreign relations law.