Effect of Treaties in Domestic Law: Practice of the People's Republic of China

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I. Introduction

During the last decade, the world has witnessed a rapid growth of China's treaty relations with other states and international organizations. Today, almost every aspect of the social life in China, ranging from civil and economic transactions of individual parties to affairs of state is increasingly regulated by international treaties. This situation gives prominence to an important question: what is the effect of treaties in China's domestic legal system?

Assume that a dispute arises concerning a commercial transaction governed by a treaty to which China is a party. In seeking to ensure that this treaty applies to the settlement of this dispute before the Chinese
court, parties to this dispute may find their case involving at least the following questions: Is that treaty valid under the Chinese domestic legal system? Can that treaty be directly applied by the Chinese court? What are the circumstances which justify invocation of that treaty in the legal proceedings in China? What will happen to that treaty if a contradictory domestic norm governing the same transaction is found in China? And last but not least, how will that treaty be interpreted by the Chinese judicial authorities?2

Answers to these questions can hardly be found from international law. While it generally imposes upon states the obligation of applying treaties in all circumstances, international law does not specify the manner in which a state’s domestic legislative, judicial and executive authorities apply and give effect to treaties. As long as a state does not invoke the rules of its domestic law “as justification for its failure to perform a treaty”,3 how it carries out its treaty obligations remains the province of its domestic law. Usually, the governing domestic law in this respect is constitutional law.4 It can also be statutory law or even rules developed through domestic court decisions.5 In view of a diversity of domestic legal systems in the world, comparative law studies are always required, if one wishes to come to understand the effect of treaties in a given domestic legal system.6

While a great amount of literature has been contributed to these studies, little, if any, has been written to address, inter alia, the effect of

2. These problems are unique not only in regard to China’s domestic legal system but also to the domestic legal systems of other nations. See Francis G. Jacobs and Shelley Roberts, eds., The Effect of Treaties in Domestic Law, (London: Sweet & Maxwell, 1987).
4. A. Cassese observes that constitutional law generally prescribes the basic principles of a state in that it sets out the guidelines for state action both in the domestic sphere and in the international arena as well. Thus, according to him, an examination of the constitutional provisions relating to international affairs may prove warranted for the purpose of inquiry into the effect of treaties in municipal law. A. Cassese, “Modern Constitutions and International Law” (1985), 192 Recueil des Cours 341.
6. In general, there are three main categories of state practice dealing with the effect of treaties in municipal law. In the first category, a treaty which has been approved by the State and which has entered into force on the international plane is automatically incorporated into the law of the state. In the second category, a treaty has, of itself, no effect in the internal legal system unless it is transformed by a legislative act in order to produce that effect. However, once parliamentary approval has been given, a treaty is binding up the state in a way as it is in the first category. In the third category, the treaty as such has no effect in municipal law. The effect is produced only by the national rules which purport to incorporate the treaty. Jacobs and Roberts, supra, note 2, at xxiv–xxv.
treaties in the Chinese domestic legal system. In order to fill in this gap, this article attempts to make a systematic inquiry into this subject. In doing so, analysis will be given to appropriate provisions of the PRC Constitution (hereinafter referred to as “the Constitution”) and other relevant sources including the PRC statutes, legislative decisions as well as judicial and diplomatic practice, which are considered to have important bearing upon this inquiry. As the question of the effect of treaties in China's domestic law arises as a result of entering treaty relations with other states and international organizations, it is closely related to the scope of treaties as defined under its legal system, the allocation of the treaty-making power among its national government institutions and the procedures for concluding treaties as required by its legal system as well. Therefore, a brief account for these issues at the outset of this inquiry would prove conducive to a good understanding of the mechanisms which govern the effect of treaties in the Chinese domestic legal system.

II. Scope of Treaties and Treaty-Making Procedure and Power

1. Scope of Treaties

In international law, the term “treaty” is used generally to cover all binding agreements which are concluded between subjects of international law and are governed by international law. Under the Constitution and the PRC Procedure Law for Conclusion of Treaties (hereinafter referenced as "the Procedure Law"), the act of conclusion of treaties is subject to the approval of the National People's Congress and the State Council of the People’s Republic of China.

7. Hungdah Chiu, supra, note 1, at 1147. As Professor Chiu observes, the question of the effect of treaties in China's domestic system was usually ignored. Discussions on this subject are always conducted within the context of a general topic, namely, the relationship between international law and municipal law. For the Chinese literature, see Zhou Gengsheng, Guoji Fa (International Law), (Beijing: Commercial Press, 1976) 16-21; Wang Tieya and Wei Min, Guoji Fa (International Law), (Beijing: Law Press, 1981), 42-47. The existing literature dealing with the PRC practice in this area primarily focuses on the pre-1970 period. It includes Hungdah Chiu, The People’s Republic of China and Law of Treaties; Jerome A. Cohen and Hungdah Chiu, People’s China and International Law: A Documentary Study; Luke T. Lee, China and International Agreements; James Chieh Hsiung, Law and Policy in China’s Foreign Relations: A Study of Attitudes and Practice. This issue has been addressed more recently by two China’s most prominent scholars. See Li Haopei, supra, note 5, 379-404; Wang Tieya, “International Law in China: Historical and Contemporary Perspectives” (1990), 221 Recueil des Cours 326-333.


9. A. D. McNair, The Law of Treaties (1938), at 3. The 1969 Vienna Convention on the Law of Treaties also uses the term “treaty” in a generic sense, which according to Article 1 of the Convention means “an international agreement concluded between States in written form and governed by international law ...”.
referred to as "the Procedure"), however, the term "treaty" is used to
denote a narrow meaning, referring to such bilateral and multilateral
international legal instruments as are entitled "treaties". International
legal instruments entitled other than "treaties" come under the appellation,
"agreements". Such distinction may serve the purpose of denoting
the solemnity of "treaties", since "treaties" as such are often classified
as more important international legal instruments. As this article at-
ttempts to address the effect of treaties in general, it uses the phrase
"treaties" in a broad sense which includes all international legal instru-
ments to which China is a contracting party.

Article 2 of the Procedure defines a comprehensive scope of coverage
of treaties to which China is a party. According to this article, whether or

10. Article 89 of the Constitution provides that the State Council, among others things,
"concludes treaties and agreements" (italic added by the authors) with foreign States". Article
67 of the Constitution provides that “The Standing Committee of the National People’s
Congress ... decides on the ratification or abrogation of treaties and important agreements
(italic added by the authors) concluded with foreign States.” By virtue of these two articles, one
may see the distinctive use of the terms “treaties” and “agreements.” This implies that the term
“treaties” should be understood in a narrow sense, i.e. international treaties as so entitled.
Otherwise, the term “agreements” would become redundant. On December 28, 1990, the PRC
Procedure Law for Conclusion of Treaties was adopted at the 17th session of the Standing
Committee of the 7th PRC National People’s Congress and came into force on the same day
upon the order issued by the PRC President. For the text, see Bureau of Legal Affairs of the PRC
State Council, 4 Zhonghua Remin Gonghe Guo Xin Fagui Huibian (Collection of the New
Laws and Regulations of the PRC), (Beijing: Xin Hua Press, 1990) 30-36. The original draft
text of Article 2 of the Procedure read: “This Statute applies to both bilateral and multilateral
treaties, conventions, agreements, protocols as well as other documents which, by their very
nature, can be characterized as treaties.” During the deliberation of this draft text, some jurists
pointed out that the Constitution makes a distinction between the terms “treaty” and “agree-
ment”. Hence, in order to be consistent with the Constitution, the final text of this article was
amended to read “This Statute applies to both bilateral and multilateral treaties and agreements
which the People’s Republic of China has concluded with foreign states and all other
documents which, by their very nature, can be characterized as treaties and agreements”
(translation and emphasis added by the authors): Renmin Ribao (People’s Daily), December
21, 1990. In other statutes, however, such a rule is not strictly observed. A glaring example of
this is the General Principles of the Civil Law adopted by the National People Congress in 1986.
Article 142 of the General Principles provides that “If any international treaty concluded or
acceded to by the People’s Republic of China contains provisions different 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 to which the People’s Republic of China has announced
reservations”(emphasis added by the authors). Here, whether the term “treaty” denotes a
generic meaning is yet to be clarified. Such inconsistency can also be found in the PRC Income
Tax Law on Foreign Investment Enterprises and Foreign Enterprises of 1991, the PRC Civil
Procedural Law of 1991, etc.

11. McNair, supra, note 9.

12. One exception to this position, however, is the case of multilateral treaties. Although a
multilateral treaty may be titled a "treaty", its status may be the same as an ordinary agreement,
if it does not satisfy the qualifications of "treaties and important agreements". See infra,
ote 21.
not an instrument can be regarded as a treaty does not depend on its name but the intention and consent of the parties concerned to be legally bound thereby. Thus, "all documents which, by their very nature, can be characterized as treaties and agreements" fall into the coverage of that statute regardless of their modality or nomenclature.\(^1\) Within this context, Article 16 of the Procedure provides that treaties to which China is a party shall be compiled by the Ministry of Foreign Affairs into the PRC Treaty Series which serves as the official collection of treaties. This, in effect, leads to the conclusion that any document which has entered into the PRC Treaty Series can be regarded as a treaty under the Chinese legal system.

An examination of the PRC Treaty Series shows that the appellations which come under the coverage of the Treaty Series include conventions, agreements, protocols, exchange of notes, exchange of correspondence, agreed minutes, minutes of talks, memorandum of understanding, measures for implementation, joint declarations, joint communiques, joint announcements, regulations, contracts and general conditions as well.\(^2\) In addition, charters, covenants, acts, arrangements, parallel unilateral states and *modus vivendi* are also used as forms of treaties.\(^3\) As of 1990, 19 volumes of the PRC Treaty Series have been published, which cover a period from 1949 to 1983 and include a total of 2,337 international treaties to which China is a contracting party.\(^4\)

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13. Whether such scope of coverage includes oral agreements is subject to subsequent clarification. The emphasis on "documents" seems to rule out oral agreements. As a matter of fact, however, international transactions are not short of treaties which were concluded in oral forms. A glaring example is "the Ihlen Declaration", which was found binding on Norway by the Permanent Court of International Justice in the Legal Status of Eastern Greenland case (1933 P.C.I.J., Ser. A/B, No. 53, at 22). Li Haopei, *supra*, note 5, at 14-18.


15. *Ibid.*, at 317. The Chinese practice in this regard seems to place emphasis on the intention and consent of the parties to be bound, which can be substantiated by the circumstances in which agreements are negotiated and reached. In other words, all agreements concluded between subjects of international law and intended thereby to create, alter or terminate rights and duties, or establish relations, which are governed by international law, become treaties with binding force notwithstanding the descriptive forms used for them. The best evidence for this conclusion can be found in China’s practice and position with regard to the legal status of joint communiques, declarations or statements. For instance, in recent years, the Chinese government has repeatedly invoked the legally binding nature of the Sino-U.S. Joint Communiques for various alleged infractions by the U.S. government. The Joint Declaration of the Government of the PRC and the Government of the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong of 1984 is a more recent example. The validity of this joint declaration derived substantially from the decision of the National People’s Congress to ratify it. This makes the binding character of the document more explicit.

16. Of these 2,337 international treaties, 2,295 are bilateral, which have involved 127 States and 42 multilateral treaties: Wang Tieya, *ibid*, at 317-318. For more recent information, see *supra*, note 1.
2. **Treaty-Making Procedure and Power**

As a state of a unitary system, the treaty-making power in China is part of the state power to conduct foreign affairs. Like most nations in the world, this power is exclusively exercised by the state organs. No local governments of China's provinces, municipalities, autonomous regions, as well as other subordinates have the competence of entering treaty relations with foreign nations.\(^1\) Under the Constitution, this power rests with the Standing Committee of the PRC National People's Congress (hereinafter referred to as the Standing Committee), the PRC State Council as well as the PRC President.\(^2\) The Procedure further specifies a series of procedures including negotiation, signing, ratification, approval and acceptance through which treaties are concluded.

### a. **Negotiation and Signature**

Article 4 of the Procedure provides that China concludes treaties with foreign states in the following three names: the People's Republic of China, the Government of the People's Republic of China and a ministry of the Government of the People's Republic of China. Corresponding to these three names, Articles 5 and 6 lay down relevant procedures for negotiation and signing of treaties.

When a treaty is negotiated and signed in the name of the People's Republic of China or in the name of the Government of the People's Republic of China, the representative who conducts the negotiation and signing will be appointed by the State Council upon the proposal submitted thereto by the Ministry of Foreign Affairs or other relevant ministries of the State Council. The full powers to undertake such

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\(^1\) On July 1, 1997, China will resume its sovereignty over Hong Kong, and from that date Hong Kong will become a special administrative region of China. Under the Basic Law of the Hong Kong Special Administrative Region which was adopted on April 4, 1990 at the Third Session of the Seventh National People's Congress, the Hong Kong Special Administrative Region (HKSAR) will be accorded the power to conclude certain types of treaties with foreign states and international organizations. However, this power is by no means an independent one under international law. It is rather the power delegated to the HKSAR by the PRC National People's Congress and guaranteed by the Sino-British Joint Declaration on the Question of Hong Kong. Moreover, the power will be exercised only within limited areas. For the Sino-British Joint Declaration, see *International Legal Materials (no.6)* 1366-1387 (1984).

\(^2\) The Standing committee of the PRC National People's Congress serves as the standing body of the national supreme legislature. The PRC State Council is the executive institution of the state power. Worthy of note is the term "Government". In China, this term is not used to include the legislative, executive and judicial bodies as some other countries do. The term "Central People's Government" has a special meaning in China, referring to the executive body, namely, the State Council only.
negotiation and signing will be signed either by the Premier of the State Council or by the Foreign Minister. Occasionally, the Premier or the Foreign Minister himself may represent China or China's Government to negotiate and sign a treaty. In this case, full powers do not become necessary.

If a treaty is to be concluded in the name of a ministry of the PRC Government, the representative to undertake the negotiation and signing will be appointed by the head of the ministry concerned. Unless full power is required, which, in this case, will be signed by the Premier or the Foreign Minister, a letter of authorization signed by the head of the ministry is sufficient.19

In the PRC's practice, initialing on a treaty by a negotiator is still used as a means to authenticate the definitive text of the instrument. Both the Sino-British Joint Declaration on the Question of Hong Kong (1984) and the Sino-Portuguese Joint Declaration on the Question of Macao (1987) were initialed by the negotiators prior to their formal signature.20 Under general international law, initialing does not constitute a valid signature of a treaty unless the negotiating states so agreed.21 This point was much emphasized by the Chinese Government during the Sino-Indian border conflicts when the validity of the so-called McMahon Line was in dispute.22

b. Ratification, Approval and Acceptance

Under international law, if the validity of a signed treaty depends on the subsequent confirmation by a negotiating state of its consent to be bound thereby, the treaty in question can not come into force until it is duly ratified, approved or accepted by the various authorities of competence of that negotiating state.23 For this purpose, the Procedure lays down the procedures for the ratification, approval and acceptance of a treaty.

19. Under Article 6 of the Procedure, unless agreed otherwise between the contracting parties, full powers are not necessary for the following people who serve as the representatives for negotiation and signing: head of a ministry, head of the Chinese embassy (if the treaty in question is to be concluded between China and the country where the embassy is stationed), and Chinese representatives to international organizations and conferences.  
20. Li Haopei, supra, note 5, at 71.  
22. Chen Tiqiang, "Zhong Yin Bianjie Wenti De Falu Fangmian" (Legal Aspect of Sino-Indian Border Questions), in Chen Tiqiang's Guoji Fa Lunwen Ji (Collected Articles on International Law), (Beijing: Law Press, 1985) at 211.  
23. However, the signature as such is not without legal effect under general international law. Article 18 of the 1969 Vienna Convention on the Law of Treaties provides that: "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty ...".
As a matter of general practice, ratification serves as the formal procedure for conclusion of important treaties.\(^{24}\) In the case of China, ratification as such is necessary for such treaties as are defined as “treaties and important agreements” by both the Constitution and the Procedure. By virtue of Article 67, the Constitution allocates the Standing Committee with the power to decide on the ratification and abrogation of “treaties and important agreements”.\(^{25}\) Article 7 of the Procedure further defines the meaning of the phrase “treaties and important agreements.” Under this article, “treaties and important agreements” embrace:

1. Political treaties, such as treaties of amity and cooperation, treaties of peace, etc.;
2. Treaties and agreements concerning territories and delimitation of boundaries;
3. Treaties and agreements concerning extradition and judicial assistance;
4. Treaties and agreements of which the provisions contravene the laws of the People’s Republic of China;
5. Treaties and agreements which must be ratified under the agreement of the contracting parties;
6. Other treaties and agreements which require the ratification.\(^{26}\)

According to this article, treaties falling into these categories, after being signed, shall be examined by the State Council. On this basis, the State Council will submit them to the Standing Committee for its deliberation. It should be noted that the Standing Committee’s decision on the ratification (or abrogation) of “treaties and important agreements” does not constitute the ratification, \textit{stricto sensu}, in international law.\(^{27}\) It is

\(^{24}\) This is because ratification usually gives a contracting party an opportunity to further deliberate the merits of a treaty which it has signed so that the final decision of its choice can be reached on a more matured basis. On the other hand, ratification as such is a solemn act of a contracting state which serves to consolidate the emotional basis for its compliance with the treaty. Li Haopei, \textit{supra}, note 5, at 76-77.

\(^{25}\) Occasionally, the decision on the ratification and abrogation of “treaties and important agreements” can also be made by the National People’s Congress proper under Article 62 of the Constitution which provides that the National People’s Congress has the power to “exercise such other functions and powers as the highest organ of state of power should exercise”. A glaring example of this is the National People’s Congress’s decision on the ratification of the 1984 Sino-British Joint Declaration on the Question of Hong Kong.

\(^{26}\) Translation was done by the authors.

\(^{27}\) The sanction given to a treaty by a domestic legislature is not required by international law. Some states, such as the United Kingdom and Canada, do not even require parliamentary sanction for most treaties. Under international law, however, a treaty, even though sanctioned by the domestic legislature, has no legal validity prior to the exchange of Letters of Ratification between the contracting parties. Li Haopei, \textit{supra}, note 5, at 74.
merely the exercise of the constitutional power by the Standing Committee to sanction (or reject) a treaty and should not be confused with the ratification as required by international law.

In China, internationally valid ratification of treaties falls within the prerogative of the PRC President accorded by the Constitution. Under the PRC Constitution, the President is designated as the nation’s supreme representative.\(^\text{28}\) Internally, statutes enacted by the Standing Committee or by the National People’s Congress proper cannot come into force unless they are promulgated by the President. On the international plane, “treaties and important agreements” will not bind China without the ratification performed by the PRC President.\(^\text{29}\) Both Article 81 of the Constitution and Article 3 of the Procedure provide that the President of the People’s Republic of China, “in pursuance of decisions of the Standing Committee of the National People’s Congress ... ratifies and abrogates treaties and important agreements concluded with foreign states”. Hence, in respect to “treaties and important agreements”, it is the ratification made by the President which constitutes a valid confirmation to the other contracting party (or parties) of the PRC’s intention and consent to be bound thereby. Under Article 7 of the Procedure, upon the President’s ratification of a treaty, the ratification is then effected by the delivery to the other party (in the case of a bilateral treaty) or the depository state or international organization (in the case of a multilateral treaty) of a Letter of Ratification signed by the President and co-signed by the Foreign Minister.\(^\text{30}\)

In accordance with Article 89 of the Constitution, the State Council exercises the power to “conclude treaties and agreements with foreign states.” In the light of the Procedure, this power includes, on the one hand,

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28. The PRC Constitution puts into effect a system of a so-called “collective head of state”, of which the function and power are exercised jointly by the Standing Committee of the National People’s Congress and the President. In performing this function and power, the Standing Committee is committed to make decisions whereas the President is responsible for having the decisions made by the Standing Committee promulgated with regard to domestic legislations and ratified with regard to “treaties and important agreements”. Wang Xiangming, Xianda Ruogan Lilun Wenti Yanjiu (A Study of Certain Theoretical Issues Concerning the Constitution) (in Chinese), (People’s University Press, 1982) at 143.

29. Ibid. It should be noted that the President’s power in this respect serves a nominal or symbolic purpose only. It merely acts to publicize the decision of the Standing Committee. Once the Standing Committee has enacted a statute or made a decision to ratify a “treaty” or “important agreement”, it is the President’s constitutional responsibility to have it promulgated or ratified. In other words, the President has no constitutional power to challenge the decision of the Standing Committee or to act against it.

30. An instrument designated as a Certificate of Exchange is usually signed at the time the exchange of Letters of Ratification takes place.
supervising negotiation and signing of all kinds of treaties, and on the
other, approving treaties other than those defined as “treaties and impor-
tant agreements” by Article 7 of the Procedure. Article 8 of the
Procedure provides that if treaties need to be approved pursuant to the
regulations of the State Council or to the agreement of the contracting
parties, they shall be submitted to the State Council for its examination
and decision. In general, treaties of this type deal with matters which fall
within the scope of business between the ministries of the contracting
parties. They are of more technical nature than those “treaties and
important agreements” and usually do not necessitate the national
legislature’s advice and consent. In order to avoid the delay in their entry
into force which may be occasioned by the legislature’s involvement in
the process of deliberation, it is the general practice of many states to use
approval as a more convenient procedure for concluding this type of
treaties. Similar to the ratification of “treaties and important agree-
ments”, the approval comes into effect by the delivery to the other party
(in the case of a bilateral treaty) or the depository state or international
organization (in the case of a multilateral treaty) of a Letter of Approval
signed by the Premier or the Foreign Minister.

In the case of a multilateral treaty to which China is not an original
contracting party, the procedure of accession is used if China wants to
become a contracting party. In this case, the treaty-making procedure is
similar to those of bilateral treaties. According to Article 11 of the
Procedure, if the instrument in question falls within the category of
“treaties and important agreements”, the decision of the Standing Com-
mittee on the accession to it is required. For a treaty which does not belong
to that category, the State Council’s decision to accede to it is sufficient.

31. Article 3 of the Procedure.
32. Article 8 of the Procedure. According to Article 3 of the Procedure, the task of adminis-
tering detailed matters related to the conclusion of treaties is assigned to the Ministry of Foreign
Affairs which is one of the functionaries directly under the State Council. This task includes
negotiating and signing a treaty, making proposals for, and drafting the text of, a treaty, forming
up a delegation for negotiations, issuing full powers to a representative for the conclusion of
a treaty, registering a treaty, notifying the other contracting party (or parties) of China’s
ratification, approval or acceptance of a treaty, and other administrative matters related to
conclusion of a treaty.
33. Under Article 8, the Letter of Approval is executed either by the Premier of the State
Council or the Foreign Minister.
34. Article 5 (2) and (3) of the Procedure.
35. Li Haopei, supra, note 5, at 128.
36. The Ministry of Foreign Affairs is responsible for the exchange of letters of approval or
sending the letter of approval to the depository state or international organization as the case
may be. Unlike the exchange of a Letter of Ratification, approval of a treaty can also be
indicated to the other party by a diplomatic note or through mutual notifications.
The difference in these two cases lies in that the Letter of Accession only needs to be executed by the Foreign Minister. Under Article 12 of the Procedure, if a multilateral treaty which has been signed by a Chinese representative or which does not require signing contains a clause of acceptance, China can become a contracting party by virtue of its acceptance. In this case, the State Council’s decision on the acceptance is still necessary and the Letter of Acceptance will be signed by the Foreign Minister.  

Although the Procedure does not articulate the legal effect of signing a treaty, Article 9 of the Procedure recognizes that there is a type of agreement of which signature can be taken as China’s consent to be bound thereby without the subsequent confirmation. The use of this simplified treaty-making procedure is necessitated by the demand of efficient and expeditious handling of the rapid increase of bilateral treaties in interstate relations. Understandably, neither ratification nor approval can satisfy this demand. In the PRC practice, the simplified treaty-making procedure is primarily applied to conclusion of agreements or protocols which fall into the categories of international trade, international payments and exchange rates; railway, air and maritime transportation; technology aid and cooperation; medical and health cooperation; arrangements for postal, telecommunication and broadcasting matters; agricultural cooperation as well as exchange of students and technical trainees.

As has been indicated above, the Chinese legal system lays down a very broad scope of coverage of treaties. Treaties are concluded through a series of procedures including negotiation, signing, ratification, approval and acceptance as well. Each may differ, depending upon the name in which a treaty is concluded and the importance of the subject matter of the treaty in question. Correspondingly, the treaty-making power is

37. Usually, acceptance is used in the case of multilateral treaties as a simplified procedure of approval by the contracting states. Some of the treaties of this type even do not need to be signed. Li Haopei, supra, note 5, at 128.
38. According to Article 9 of the Procedure, this type of treaty only needs to be registered with the Ministry of Foreign Affairs if it is concluded in the name of the PRC Government. Otherwise, it is enough to have it filed with the State Council.
39. Li Haopei, supra, note 5, at 86.
40. Ibid.
allocated among different central state organs. As far as the effect of treaties in China’s domestic law is concerned, these points have important bearing upon the current inquiry. First of all, the broad scope of coverage of treaties under the Chinese legal system may warrant the necessity to distinguish treaties which can be directly applied in the Chinese domestic legal system from those which can not be. Secondly, the distinction between “treaties and important agreements” and ordinary treaties can hardly have effect under the international legal system. A treaty, however important as envisaged by the Chinese domestic law, is equally governed by international law. On the other hand, such distinction is decisive in determining the rank of a particular treaty in the hierarchy of norms applied by the Chinese legal system.

III. Effect of Treaties in Domestic Law

1. Validity of Treaties

Depending on domestic law, a treaty which is valid and binding under international law does not necessarily have the equal effect within a domestic system. Yet, application of a treaty in a domestic legal system presupposes that the treaty in question must be valid not only under international law but also under that domestic law. Therefore, the validity of treaties under domestic law constitutes the prerequisite for the

41. An important characteristic of the treaty-making process in China is that it operates to combine and coordinate the work done by various government institutions. This helps lay a solid basis on which treaties can be well integrated into the domestic legal system without the embarrassing situation where a treaty is negotiated and signed but is subsequently rejected by the legislature. A typical example of the treaty-making process in China can be illustrated in the conclusion of the treaties on judicial assistance. Hitherto, all the treaties concerning judicial assistance have been concluded in the name of the PRC. According to an interview with a former official of the PRC Ministry of Justice, prior to the negotiation of a judicial assistance treaty, the Ministry of Foreign Affairs would first send the draft text and relevant documents to the Bureau of Judicial Assistance of the Ministry of Justice and the PRC Supreme People’s Court so as to solicit their opinions. On that basis, the Chinese text for the negotiation would be drafted and submitted to the State Council for its review and decision. After that, both the Ministry of Justice and the Supreme People’s Court would send their deputies to join the officials of Ministry of Foreign Affairs to form the Chinese delegation for the negotiation.

42. In the United Kingdom, for example, a treaty has no effect in English law unless it is made part of domestic law: Jacobs and Roberts, supra, note 2, at 125. In general, however, domestic invalidity does not itself preclude the validity of a treaty under international law. This principle has been affirmed by the Permanent Court of International Justice in its Advisory Opinion concerning Exchange of Greek and Turkish populations, PCIJ, Series B, No. 17, 1932, at 32. Also see Article 46 of the 1969 Vienna Convention on the Law of Treaties.

43. Li Haopei, supra, note 5, at 380.
inquiry into the other issues concerning the effect of treaties in domestic law.  

In general, treaties derive their domestic validity by virtue of their acceptance into the domestic law of a contracting state. Such acceptance may either take the form of transformation or that of adoption. In China, acceptance of treaties into its domestic legal system takes the form of adoption. Accordingly, the validity of treaties under the Chinese domestic law derives immediately from their validity under international law. As the procedure through which a treaty acquires its international validity may differ in various states, the Procedure provides that a treaty concluded by China and other states will not become internationally valid until the contracting parties fulfil their domestic procedural requirements and notify each other through diplomatic notes. Once a treaty enters into force under international law, it will immediately become valid under the Chinese legal system. Although the PRC Constitution is silent upon this matter, this result seems to follow from the relevant PRC statutory provisions. A typical example of this is found in the PRC Civil Procedure Law, of which Article 238 provides that:

If any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those found in this Law, the provisions of the international treaty shall prevail, except for those provisions to which China has declared its reservations.

While this provision purports to lay down the principle that international treaties can be applied in the civil proceedings in China, it also implies that application of treaties by the Chinese courts in civil proceedings does not require transformation of the treaty in question into a PRC statute.

44. John Jackson identifies a number of issues which the subject on the effect of treaties involves. Among them, three are central ones. They are direct applicability, invocability, and hierarchy of treaties in domestic legal systems Jackson, “Status of Treaties in Domestic Legal Systems” (1992), 86 American Journal of International Law, at 316-318.

45. In traditional explanations of domestic application of international treaties, commentators made a distinction between “monism” and “dualism”. For their definition, see Ian Brownlie, Principles of Public International Law, (third ed.) at 33-35. While such a distinction may help demonstrate extreme models, it cannot precisely reflect the complex reality today. A wide spectrum of positions in this respect have been given in the book edited by Jacobs and Roberts. See Jacobs and Roberts, supra, note 2.

46. Under Article 10 of the Procedure, the exchange of diplomatic notes for this purpose will be conducted by the Ministry of Foreign Affairs.

47. Wang Tieya, supra, note 14, at 326-327; Li Haopei, supra, note 5 at 383.

48. With mutatis mutandis, the current PRC Civil Procedure Law which was promulgated by the PRC President on, and effective from, April 9, 1991 has replaced the PRC Civil Procedural Law for Trial Implementation promulgated in 1982. For the Chinese text, see Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao (Gazette of the Standing Committee of the PRC National People’s Congress), 1991, No. 3, at 41.
Instead, a valid treaty on the international plane becomes automatically applicable as part of the PRC law. For, according to this provision, what the court shall apply is the treaty provision *per se* which is found inconsistent with the relevant provisions of the domestic law.49

This speculation further finds support from the Chinese diplomatic practice. In an official statement delivered by a PRC representative at the session of the UN General Assembly's Third Committee (Social, Humanitarian and Cultural Committee) on November 14, 1991 concerning China's attitude towards the prohibition of torture and other cruel treatment and inhuman punishment against prisoners, the Chinese representative spoke on record that, as a contracting party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, China will perform in good faith her international obligations based on this Convention. He continued that, under the Chinese legal system, as soon as a relevant international treaty is ratified or acceded to by the Chinese government and subsequently enters into force, thus becoming binding upon China, the Chinese government will perform these treaty-based international obligations without the further need to transform the treaty into the domestic law. In other words, this Convention has become automatically valid in China. Thus, any and all acts of torture and other cruel, inhuman or degrading treatment or punishment as defined by this Convention have been and will be sternly prohibited. The statement went on to say that China shall exercise the jurisdiction within the scope of its obligations under this Convention over all crimes as defined by this Convention whether or not they occur within China.50 It is submitted that this statement can not only be taken as demonstrating the Chinese government's attitude towards its determination to prohibit torture and other cruel treatment to criminals. It also deals, though incidentally, with the domestic legal effect of treaties to which China is a party. Therefore, it should be regarded as a valid and accountable expression of China's general position as to the issue of validity of treaties within the Chinese legal system.51

In a country where treaties are given exclusive trumping effect over the domestic law the method of adoption may also introduce the danger of altering the existing domestic rules without the consent of the legislature.

51. The PCJ, in its advisory opinion in the case of Legal Status of Eastern Greenland, declared that communication of an official character on a matter within the [Foreign] Minister's province, was regarded as "beyond all dispute ... binding upon the country to which the Minister belongs".
This concern is particularly warranted in view of the doctrine, *lex posterior derogat lex priori*. In order to avoid this consequence, most of the states where valid treaties are directly adopted into their domestic legal systems take certain measure of the legislative control over the treaty-making power by prescribing that certain categories of treaties must be approved by the legislature prior to their entry into force on the international scene.\(^5\) China also follows suit. As defined by Article 7 of the Procedure, six categories of treaties which are concluded in whatever names must be subject to the Standing Committee’s decision before they can become binding upon China. Therefore, even though the possible discrepancy between treaties and domestic law may arise, the applicability of treaties will not be jeopardized on the basis of the legislative consent.\(^5\)

2. Direct Application of Treaties

If a treaty which has entered into force on the international plane automatically becomes part of the law of a state, it seems to be a logical consequence that this treaty should be directly applicable in that state’s domestic legal system analogously to the way that the domestic law is. In other words, the courts as well as other governmental organs should apply the provisions of a treaty *per se* in the same manner as they would apply a domestic valid statute.\(^4\) However, international practice indicates that, in those states where treaties are adopted into the domestic legal systems

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\(^5\) For example, in France, the Constitution stipulates that certain categories of treaties, including those that modify existing legislation, may only be ratified or approved by the way of legislation; in Belgium, treaties which deal with commercial matters and may affect the State or become individually binding on certain Belgians, need Parliamentary approval; in the Netherlands, the Constitution requires that the State shall not be bound by treaties without prior Parliamentary approval; and that cases in which such approval is not required shall be specified by legislation; in the United States, Article 6 of the Constitution provides that, before the President ratifies a treaty, the “advice and consent” of a two-thirds vote of the Senate must be sought. Jacobs and Roberts, *supra*, note 2, at xxv.

\(^5\) Some commentators think that this requirement is justified on democratic principles of the political system of a state: *ibid.* Also, see Jackson, *supra*, note 44 at 312-327.

\(^5\) Jacobs and Roberts, *supra*, note 2, at xxvii. Jackson is of the opinion that the term “direct application” expresses the notion that an international treaty has a direct statutelike role in the domestic legal system. Thus, the term should not limited only to the situations where private parties can file a law suit on the basis of the treaty provisions, but will also cover the situations where government can use the treaty provisions as part of domestic law. Jackson, *supra*, note 44, at 310 and 321. Many times, “direct application” is mixed up with the term “self-executing treaties”, and in many cases they address similar issues. However, “direct application” is more effective in denoting the notion that treaties will become part of the domestic law like statutes.
without transformation, direct application of treaties is an extremely complicated, and sometimes, even a very confusing subject.

The problem is created partly by the necessity to distinguish treaties which are directly applicable from those which are not, and partly by the difficulty in making such distinction. With the increasing complexity of international life, it is no longer a rare phenomenon that, when states conclude treaties, they sometimes contrive a certain ambiguity into treaty provisions in order to cover up their schism. Enforcement of this kind of treaties is always contingent upon subsequent implementing legislation by various contracting states. Certainly, if a treaty obliges the contracting states to take further legislative or administrative action for its enforcement, it is not capable of being directly applied. Direct applicability of treaty obligations may also be ruled out on the grounds that the treaties in question lack mandatory quality and definiteness to form up a domestic law subject matter, or that they address political relations between contracting states—a situation akin to non-justiciability—or that they deal with matters tantamount to acts of state, thus immune from the judicial review. While the diversified characteristics inherent in treaties justify the distinction between directly applicable and non-directly applicable treaties, states' legal systems differ as to how to determine whether a treaty provision is directly applicable. For example, in the United States, only "self-executing" treaties are regarded as possessing the quality of direct applicability. Yet, what a self-executing treaty can be precisely defined as is, of itself, a question of enormous confusion. In France, a treaty is applicable only on condition that it is reciprocally applied by the other signatory state. However, according to a French commentator, this condition on reciprocity as required by the French Constitution introduces a considerable amount of ambiguity. In the Netherlands, most treaties are directly applicable but not necessarily all treaties.

55. Henry G. Schermers maintains that, if a treaty contains a provision which explicitly obliges each contracting state to directly apply it in its domestic legal system or at least can be easily interpreted to that effect, then the question of direct application would, in essence, be a question of treaty law rather than domestic law. See Jacobs and Roberts, supra, note 2, at 115. In reality, however, not all treaties possess such a straightforward quality.
56. This is particularly true when a treaty is entered by states with different ideological, political or religious systems. Li Haopei, supra, note 5 at 389-390.
57. Ibid, at 386.
58. Jacobs and Roberts, supra, note 2, gives the most recent survey.
59. Jackson in Jacobs and Roberts, supra, note 2, at 148-149. According to Jackson, the U.S. courts have been given greater latitude to determine whether a treaty is directly applicable, Jackson, supra, note 44, at 328.
60. J. D. de la Rochere in Jacobs and Roberts, supra, note 2, at 43.
In China, answers to the question concerning direct application of treaties can by no means be easily sought either. On the one hand, the Constitution remains silent on this issue. Moreover, no subsequent statute enacted by the National People’s Congress or its Standing Committee has ever stated or necessarily implied that treaties to which China is a party can be directly applied lock, stock and barrel. On the other hand, statutory-based provisions which allow direct application of treaties are not a scarcity in China’s domestic legal system. Taking into account the wide scope of treaties as defined under the Chinese legal system, more extensive studies are required in order to give proper reflections on this issue.

A typical statutory provision which allows direct application of international treaties can be found in the PRC Income Tax Law for Foreign Investment Enterprises and Foreign Enterprises. Article 28 of the statute provides that:

“Where a taxation agreement between the PRC government and a foreign government contains provisions different from provisions of this Law, matters shall be handled pursuant to the agreement.”

Provisions similar to this have also been regulated into the PRC Law on Economic Contract Involving Foreign Interest, the Rules for the Implementation of the PRC Water Pollution Control Law, PRC Environmental Protection Law, PRC Regulations Concerning Diplomatic Privileges and Immunities as well as the PRC Regulations on Consular Privileges and Immunities. Under these statutes, treaties governing the same subject matter as regulated by these statutes are capable of being directly applied in China’s domestic legal system if they are found inconsistent with the rules of these domestic statutes.

Moreover, the PRC General Principles of Civil Law, PRC Administrative Procedure Law and PRC Civil Procedure Law also provide for direct application of treaties. Each of these statutes has a special chapter

62. See the document cited supra, note 48, at 60.
64. Zhonghua Renmin Gongheguo Xin Fagui Huibian (Collection of the New Laws and Regulations of the PRC) vol. 3, at 23.
65. Ibid., vol. 4, at 26.
66. See the document cited supra, note 63, at 283.
68. It is submitted that the provisions of these statutes also raise the issue of invocability of treaties which are directly applicable in China. For the discussion of this issue, see next subsection.
69. See the document cited supra, note 63, at 291.
70. See the document cited supra, note 64, 1989, vol. 2, at 18.
which deals with application of the law in the legal proceedings involving foreign elements. Pursuant to the relevant provisions of these special chapters, if any international treaty concluded or acceded to by China contains provisions which are different from those of these statutes, the provisions of the treaty shall prevail. Noticeably, the social relations governed by these statutes are more general in nature. Therefore, these statutes, in effect, have opened a much wider spectrum of direct application of treaties in the Chinese domestic legal system. Within this context, Article 142 of the PRC General Principles of Civil Law draws a special attention. This article provides that:

If any international treaty concluded or acceded to by the People’s Republic of China contains provisions different from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall prevail, except for the provisions to which the People’s Republic of China has declared its reservations.

Worthy of note is the use of the phrase “civil laws” in the plural form, which obviously purports to cover civil law transactions in a comprehensive way. Therefore, when occasions for application of treaties arise, direct application can in effect find its way into any and all matters which, by their nature, come under the civil law jurisprudence of the Chinese legal system. A hypothetical case of this could be inheritance of property. Assume that China concluded a treaty with another state to allow citizens of one party to inherit property located in the territory of the other party. After the treaty came into effect, a citizen of the other contracting party filed a claim before the PRC court for inheriting property in China. Even if the PRC Law of Succession were silent on application of treaties, this person could still avail himself of arguing that the court should apply the treaty in question to decide the claim on the basis of Article 142 if this person could establish that the treaty provisions are different from the PRC Law for Inheritance.

Under the above-mentioned statutes, treaties can be directly applied only when the discrepancy between treaty provisions and the domestic rules occurs. Yet, without this assumed discrepancy as the condition, a treaty can still be directly applied in certain specific areas where the

71. Such plural form is not indicated in the Chinese official text.
72. This includes family (marriage) law, property law, torts, contracts, obligations, corporations, etc.
73. As a matter of fact, however, Article 35 of the PRC Law of Succession provides that if a treaty has been concluded or acceded to by China on the matter of inheritance, such treaty should be directly applied to determine the matter. For the official text of the Law, see document cited supra, note 63, at 169.
domestic rules definitely require that certain matters are directly governed by treaties. In this case, parties concerned are entitled under the relevant domestic statute to directly apply the treaty in such a manner as they apply a domestic statute. For example, Article 9 of the PRC Trademark Law provides that:

Where a foreigner or foreign enterprise applies for trade mark registration in China, the matter shall be handled in accordance with agreements its country has concluded with the People's Republic of China or international treaties to which both are parties …

Under this article, when the "matter" as defined by this article occurs, parties concerned can directly take relevant treaties to which China is a party as the governing law. In 1985, China acceded to the Paris Convention for the Protection of Industrial Property (as amended in 1967, Stockholm). Under this convention, foreign persons (natural as well as legal) whose countries have also become the members of the Convention are entitled to directly apply the relevant provisions of the Convention to their trademark registrations in China. On March 15, 1985, the State Council issued the interim rules on application for prior registration of trademarks in China. The rules made it clear that applications made by nationals of the Paris Convention's member states for prior registration of trademarks in China should be handled pursuant to Article 9 of the PRC Trademark Law and Article 4 of the Paris Convention. Another example of this is Article 35 of the PRC Law of Succession. Under this article, inheritance of property which involves foreign interests should be decided by the law of the residence of the deceased in the case of estate and by the law of the country where the property is located in the case of movable property. However, if a treaty concluded or acceded to by China governs the subject matter, the treaty should prevail whether or not there exists a discrepancy. Under both the PRC Law on Control of the Entry and Exit of Aliens, matters concerning the entry into and exit from China by nationals of China's neighboring country who live in the border areas are subject to agreements concluded by China and the foreign country. Similar provisions for the entry into and exit from China's neighboring country by Chinese citizens who live in the border areas are made in the

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74. Laws of the People's Republic of China, (1979-1982) (Beijing: Foreign Language Press) at 306. Without such treaties, the matter will be handled in accordance with the principle of reciprocity.
75. For the text of these documents, see Thomas C. W. Chiu, P.R.C. Laws for China Traders and Investors (2nd ed.), at 644.
76. It is noted that there also exist a number of bilateral agreements between China and other countries concerning trademark registration: ibid., at 663-91.
77. See the document cited supra, note 63, at 191.
PRC Law on Control of the Entry and Exit of Citizens. A more prominent area where treaties can be directly applied without the pre-conditioned inconsistency between treaties and the domestic law is judicial assistance in China. Article 262 of the PRC Civil Procedure Law provides that:

Pursuant to international treaties concluded or acceded to by the People’s Republic of China or in accordance with the principle of reciprocity, People’s Courts and foreign courts may request mutual assistance in the service of legal documents, investigation, taking of evidence, and other acts in connection with litigation, on other’s behalf.

Hitherto, China has acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Document in Civil and Commercial Matters, and has concluded a number of treaties for judicial assistance with other countries. Some of these treaties directly confer rights upon individual persons while others create rights and obligations between the contracting states. It is submitted that, under Article 262 of the PRC Civil Procedure Law, all these international treaties can be directly applied before the PRC courts. This observation can be substantiated by the judicial notices issued to the relevant courts by the PRC Supreme People’s Court. On April 10, 1987, the PRC Supreme People’s Court issued the Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to Which China Has Acceded. On February 1, 1988,

78. Ibid., at 197.
79. The 1982 statute for trial implementation also contained a similar provision in Article 202.
81. For example, Article 4 of the New York Convention confers upon a party to an arbitration the right to apply on the basis of the Convention to a court of one contracting state for the recognition and enforcement of the awards rendered by an arbitral tribunal of another contracting party. Under Chapter IV of the Sino-French Agreement Concerning Judicial Assistance in Civil and Commercial Matters, a litigant may proceed directly, without the assistance of the designated central government organs, to obtain recognition and enforcement of a final judgment or arbitration award issued by a court or arbitration tribunal of one contracting party in the relevant court of the other contracting party.
82. Some of these treaties which are regarded as not conferring rights on individual parties may nevertheless be applied by the courts so as to produce the same consequences. In this case, individual parties may be able to claim that the case in question falls into the realm of the treaty provisions.
83. For the Chinese text, see Chinese Yearbook of Law, supra, note 82.
the Supreme People's Court issued the Notice on the Implementation of Chinese-Foreign Judicial Assistance Agreements. Among other things, both these notices require that the PRC courts which receive an application or are requested for judicial assistance must conscientiously handle the matter strictly in conformity with the provisions of the treaties which China has concluded or acceded to.

Be that as it may, very few cases have ever come up with the question of direct application of treaties in the PRC judicial practice. However, with China's participation in international transactions unceasingly going into greater depth, it is the author's opinion that cases involving direct application of international treaties will increase in China in the future. One breakthrough in this respect is a case dealing with the compensation for damages incurred by theft during international air carriage. In this case, the plaintiff was a Belgium-based diamond company, and the defendant a Beijing-registered agent of a Chinese air carrier. Following a contract entered between the plaintiff and a Shanghai-based buyer for the sale of a certain amount of rough diamonds, the goods were shipped to Shanghai by international air carriage. While the diamonds were in the care of the defendant before their delivery to the buyer, they were stolen by an employee of the defendant. During the legal proceedings, neither party raised objection to the defendant's liability for compensation. The essence of the dispute between them was whether this liability was limited to the declared value of the stolen goods as provided for by Article 22 of the 1929 Warsaw Convention or unlimited under Article 25 of the 1955 Hague Protocol to Amend the Warsaw Convention. Noticeably, in the course of the litigation, both the parties based their arguments directly on the two international conventions. With the rejection of the plaintiff's
argument that Article 25 of the protocol should be applied, the court ruled that Article 22 (2(d)) of the Warsaw Convention should be applied and the defendant should be liable to pay damages to the plaintiff for the goods lost in a value corresponding to that declared by the plaintiff in the airway bill of lading.

It should be noted that the domestic law provisions which allow direct application of treaties in China’s domestic legal system are all regulated in the statutes which govern specific matters such as foreign economic contracts, taxation, trademark, inheritance, environmental protection, water pollution control, immigration, diplomatic and consular privileges and immunities, as well as rights and obligations in civil and administrative transactions. This situation suggests that international treaties which are capable of being directly applied in the Chinese domestic legal order should be confined only to those which deal with the subject matters as covered by these statutes. In other words, it is on the basis of these statutory provisions that treaties can give a party the cause of action before the Chinese courts. This is true whether direct application of treaties is occasioned by the discrepancy between treaties and domestic rules or not. Without the statutory basis, treaties may still be directly applied insofar as the treaty provisions themselves require so. In this case, however, a certain measure of acts of the Standing Committee of the National People’s Congress is required. On June 23, 1987, the Standing Committee adopted a decision which declares that the People’s Republic of China will, “within its treaty obligations, exercise criminal jurisdiction over the crimes prescribed by international treaties concluded or acceded to by the People’s Republic of China.” Attached to the decision are the relevant articles of the international treaties in question. This decision intends to let the PRC courts directly apply the provisions of these treaties which require a contracting state to take necessary measures to establish its jurisdiction over the crimes if the alleged offender is present in its

89. The court ruled that the plaintiff had failed to show that the employee’s act of theft occurred within the scope of his employment.
90. As no party appealed, this decision of the court came into legal force.
territory and it does not extradite him or her to other parties. For the purpose of this inquiry, the reason for making such decision, it is submitted, lies in that the PRC Criminal Procedure Law which was enacted in 1979 contains no provision for direct application of international treaties in so far as the question of jurisdiction is concerned. Therefore, in order to directly apply the treaty obligations which, in this case, are to exercise the jurisdiction over the crimes prescribed by the international treaties to which China is a party, it is necessary to have such a decision serving as the supplement to the PRC Criminal Procedure Law.93

In China, direct applicability of a particular international treaty does not necessarily preclude the need of the national legislature to enact a special statute on the same subject matter addressed by the treaty. Sometimes, if the national legislature considers it necessary and important to enact such statute in order to implement the directly applicable treaty provisions more efficiently or to make some supplement in accordance with the prevalent domestic practice as to the treaty provisions so as to promote the goal of the treaty, it, of course, can do so. This is a matter of domestic legislative discretion as long as the domestic rules do not contravene the treaty provisions. Therefore, even though China has acceded to the Vienna Convention on the Diplomatic Relations of 1961 and the Vienna Convention on the Consular Relations of 1963, the Standing Committee still felt it necessary to enact statutes on diplomatic and consular privileges and immunities in 1986 and 1990 respectively.94 The substance of these statutes are detailed regulations which further define the privileges and immunities enjoyed by foreign embassies and consular posts and their staff and service member in China. These regulations are strictly based on the two conventions.95 What is more is the extension of certain consular privileges and immunities to the members of service staff and their families.96 Although these statutes do not contain any provision which comes into conflict with the two conventions, they still expressly provide that the provisions of the treaties

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93. Article 67(3) of the Constitution empowers the Standing Committee to supplement as well as amend the laws enacted by the National People's Congress.
94. It is noted that both these international conventions contain provisions that persons enjoying diplomatic or consular privileges and immunities are obliged to respect the laws of the receiving states. This implies that the receiving state can enact laws governing diplomatic and consular privileges and immunities as long as these laws do not contravene the goals, principles and rules of the two conventions: Wang Tieya, supra, note 14, at 329.
95. For instance, Chapter Two of the Convention on the Consular Relations has been incorporated into the Regulations on the Consular Privileges and Immunities almost word by word.
96. Article 21 of the PRC Regulations on Consular Privileges and Immunities.
concluded or acceded to by the PRC shall prevail if they are found different from those of the statutes.97

As has been indicated earlier, the wide scope of treaties under the Chinese legal system has made it unwarranted to assume that all treaties possess equal quality of direct application within the Chinese legal order. Like other states, there must be certain types of treaties which are disqualified for the purpose of direct application in China’s domestic system. Hitherto, however, no statutory provision has been enacted which expressly draws the line between directly applicable and non-directly applicable treaties in the Chinese legal system. To the best of the author’s knowledge, as of this date, there is no case decided by the PRC courts which can be used to clarify this issue.98 Yet, the inquiry which has been so far made shows that provisions which allow direct application of treaty provisions are contained basically in the statutes which govern certain specific areas of the Chinese domestic legal order. This, under the doctrine, *affirmatio unius est exclusio alterius*, seems to suggest that direct application of treaty provisions in the PRC legal system is limited to these specific areas, thus short of a general nature. Without the statutory basis, a decision of the Standing Committee which in effect amounts to the supplement to the existing statutes is indispensable for direct application of international treaties. Taking into account the silence of the Constitution on the whole issue, all these circumstances seem to lead to the view that the question of direct application of treaties in the Chinese legal system is left to be decided through the national legislative activities on a case-by-case basis. Despite the want of a general principle, however, direct application as a matter of fact has a wide spectrum of coverage within the Chinese legal system. By virtue of the relevant provisions of the PRC General Principles of Civil Law, Civil Procedure Law and Administrative Procedure Law, direct application of international treaties has found its way into civil and administrative transactions, which essentially form a large part of the social life in China.

Based on these reflections, one may speculate that China puts into effect a system where direct application of treaties is controlled by the domestic statutes which regulate specific subject matters. Whether a treaty can be directly applied is in principle a matter of the domestic law. Under this system, direct application of international treaties in the


98. The diamond theft case as mentioned above failed to touch this question.
Chinese domestic legal order becomes practically an issue relevant to specific areas, thus avoiding the difficulty in setting up a generally applicable standard of distinction between directly applicable and non-directly applicable treaties. The advantage of this system is to use the domestic law to further guarantee direct application of treaties in the domestic legal order. Whenever a domestic statute requires treaties to be directly applied, the court is obliged to make it happen as long as the statutory-based conditions for direct application of treaties can be established. On the other hand, such a system may also create difficulties in directly applying treaties which grant private individuals direct access to an international process such as the international system on human rights. Without a domestic statutory basis, these kind of treaties can hardly reach domestic legal proceedings in China. However, this is not a problem conspicuous only in China. Nearly all those states in which valid treaties are automatically adopted into their domestic legal systems actually have to distinguish in one way or another directly applicable treaties from those which are not, thus imposing certain limitation on the scope of direct application of international treaties in the domestic legal systems. Within this context, a point must be made that non-direct application does not necessarily lead to violation of the treaty obligations. There exist alternative mechanisms of enforcement which may enable states to technically solve the difficulties.

3. Invocability of Treaties

Next to direct application of treaties comes a related but separate question, namely, invocability of treaties in the domestic legal system. It is submitted that, even though treaty provisions are recognized as being directly applicable in the domestic legal system, parties to a specific case may still face the question of whether the circumstances of their case

99. Note, in the United States, treaties of a particular category—for example “political” treaties—can not be invoked at all: Schermers, supra, note 2, at chapter 6, 118. Thus, direct application of the U.N. Charter is ruled out on the basis that the Charter is not a self-executing treaty: Sei Fujii v. California, 38 Cal.(2d) 724, 242 P.(2d) at 621-22. In the Netherlands, direct application was rejected as to Article 13 of the European Convention on Human Rights: ibid. In Germany, the Federal Constitutional Court has taken the view that treaties of a highly political character, such as the “Eastern Treaties”, could not be invoked by individuals: Frowein, supra, note 2 at 70. In France, political “actes de gouvernement” are not justiciable: R. Bernhardt, ed. Encyclopedia of Public International Law, vol. 7, at 416.

100. Li Haopei, supra, note 5, at 392. The most recent survey on this issue is done by Jacobs and Roberts: see Jacobs and Roberts, supra, note 2. For the policy reasons, see Jackson, supra, note 44, at 318-329.
justify invoking a treaty and relying on it as the governing law.\textsuperscript{101} Therefore, the concept of invocability deals with the issue of whether a party is entitled to invoke a treaty before the domestic court. As far as the case of China is concerned, most part of this issue has already been addressed in the previous section. Like the question of direct application, it is the relevant domestic statutes which basically decides the issue of invocability. The current discussion attempts to draw some specific characteristics of the Chinese practice as to this issue. Among the statutes which provide for direct application of treaties in the Chinese domestic legal order, circumstances which justify invocation of treaties include the nature of legal relations, the existence of discrepancy between treaty provisions and statutory rules as well the class of the parties concerned.

To proceed from the nature of legal relations, treaty provisions are invocable generally in the cases in which foreign elements are involved. The phrase "foreign elements" is a jargon of the Chinese jurisprudence which denotes foreign-related legal relations in which either the parties to the transactions are foreign nationals or stateless persons or the object matters of the transactions involve foreign interests such as a contract executed in a foreign country, property belonging to foreign nationals or situated in a foreign country, etc.\textsuperscript{102} The provisions of the PRC Civil Procedure Law, General Principle of Civil Law and Administrative Procedure Law which allow a party to apply treaties are all contained within the special chapter which is designated to specifically deal with the legal proceedings involving foreign elements.\textsuperscript{103} Although the subject matter of the PRC water pollution control rules primarily involves the domestic cases, Article 37 under Chapter 6 provides that:

\begin{quote}
In case of conflict between the provisions of an international treaty or agreement concerning the prevention and treatment of water pollution in rivers and lakes that are international or that are located along an international border which the People’s Republic of China has concluded or acceded to, and the laws of the People’s Republic of China, the provisions of the international treaty or agreement shall prevail ...
\end{quote}

According to this article, it is only matters related to “rivers and lakes that are international or that are located along an international border” which come up with application of international treaties. The same principle

\textsuperscript{101} Jackson is of opinion that this question should be distinguished from the situation where an international treaty purports to grant private individuals direct access to an international process such as in the European Convention on Human Rights: Jackson, \textit{ibid.}

\textsuperscript{102} Articles of 240, 241, and 242 of the PRC Civil Procedure Law.

\textsuperscript{103} They are regulated in Part Four of the PRC Civil Procedure Law, Chapter Eight of the PRC General Principles of Civil Law, and Chapter Ten of the PRC Administrative Procedure Law.
applies to the PRC Environmental Protection Law. In considering that the state of the environmental protection within one country can have a substantial impact upon that of the neighboring countries or even that of the entire globe, Article 46 of the PRC Environmental Protection Law under Chapter Six stipulates that:

When international treaties concerning environmental protection concluded or acceded to by the People's Republic of China have different provisions from the laws of the People's Republic of China, the provisions of international treaties shall prevail ...

Moreover, in many cases, foreign elements *per se* do not sufficiently justify invocation of treaty provisions. What is further required is the existence of discrepancy or difference between domestic provisions and those of treaties. In these cases, if domestic rules are not in conflict with treaty provisions, or at least can be interpreted not so, there will be no need to look upon treaty provisions. Thus, a majority of the statutes which provide for direct application of treaties make discrepancy between treaty provisions and domestic rules as the condition for direct application of treaties. This prompts another related question, namely, who decides that a given domestic rule is inconsistent with a particular treaty? On what basis is such decision made? It is submitted that this is primarily a question concerning interpretation of treaties which will be dealt with later.

To proceed from the class of parties concerned, the statutes in question usually provide who is entitled to invoke treaty provisions. Thus, under the PRC Trademark Law, only if parties concerned are foreign nationals can treaty provisions be invoked for the purpose of trademark registration in China. On the other hand, under the PRC Civil Procedure Law, parties eligible for invoking treaty provisions for the purpose of recognition and enforcement of foreign judgments and arbitral awards can be both foreign nationals and Chinese citizens, provided that a legally effective judgment or ruling made by a foreign court or an award made by a foreign arbitral tribunal requires recognition and enforcement by the PRC courts.

4. **Status of Treaties in China's Domestic Legal Order**

As earlier mentioned, in China, occasionally, the National People's Congress decides on the ratification of a treaty. Also, a certain category of treaties are ratified by the Standing Committee of the National People's Congress and others are approved by the State Council. This structure of the treaty-making power introduces another important question. Assuming that a treaty is both directly applicable and invocable in a specific case, it may happen that there are alternative norms in the legal
system which may be contradictory to this treaty. The contradictory
domestic norms at issue may be the Constitutional rules, statutes enacted
by the National People’s Congress and its Standing Committee, or
administrative measures, rules or regulations made by the State Council.
Moreover, the contradictory norms may come to the scene either prior or
subsequent to the time when this treaty came into force. Thus, when two
norms are found contradictory but both are applicable to a particular case
and, by assumption, these competing norms can not be reconciled or
adjusted to co-exist, the court is faced with the difficult question of which
norm to apply. As the essence of this question involves the status of
treaties in the hierarchy of China’s domestic legal order, answers to it can
only be sought from the constitutional principles which determine the
rank of treaties in the domestic legal system and the rank of the conflicting
domestic norms.104

Again, the PRC Constitution is silent on this issue. Nevertheless, one
may speculate as to the answers by analyzing the relevant provisions of
the Constitution concerning the structure of the PRC legislative power.
Under Article 57 of the PRC Constitution, the National People’s Con-
gress is “the highest organ of State power”, and its permanent body is the
Standing Committee. With regard to the legislative power, Article 62 of
the Constitution provides that the National People’s Congress is empow-
ered to “amend the Constitution” and to “enact and amend basic statutes
concerning criminal offenses, civil affairs, the state organs and other
matters.” The same article also provides that the National People’s
Congress possesses the power to “exercise such other functions and
powers as the highest organ of state power should exercise.” Article 67
provides that the Standing Committee, among other things, exercises the
function and power to “enact and amend statutes with the exception of
those which should be enacted by the National People’s Congress”, and
to “enact, when the National People’s Congress is not in session, partial
supplements and amendments to statutes enacted by the National People’s
Congress provided that they do not contravene the basic principles of
these statutes.” Under Article 89 of the Constitution, the State Council is
allocated the function and power to “adopt administrative measures,

104. Jacobs and Roberts, supra, note 2, at xxviii.
enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes.”

Parallel with this structure of the national legislative power is the structure of the PRC treaty-making power. Rare as it is, the National People’s Congress did once decide on the ratification of a very important international treaty, namely, the Sino-British Joint Declaration on the Question of Hong Kong of 1984. Under Article 67 of the Constitution, the Standing Committee is given the power to “decide on the ratification and abrogation of treaties and important agreements”, which are further defined by Article 7 of the Procedure. Under Article 89 of the Constitution, the State Council is empowered to conclude treaties and agreements with foreign states. Pursuant to Article 8 of the Procedure, international treaties which do not fall into the category of “treaties and important agreements” are subject to the approval by the State Council.

For the purpose of this inquiry, such parallel constitutional structures of law-making and treaty-making powers can only lead to the suggestion that, in the hierarchy of China’s domestic legal order, laws and treaties made by the same state organ stand equal to each other. In other words, the legal status of treaties made by one state organ depends on the hierarchy of the domestic system where this state organ ranks. Accordingly, the legal status of the Sino-British Joint Declaration on the Question of Hong Kong stands equal to the matters falling within the functions and powers exercised by the National People’s Congress. For the same reason, “treaties and important agreements” as defined by Article 7 of the Procedure rank equally with the statutes enacted by the Standing Committee under Article 67 of the Constitution, and treaties other than those as defined by Article 7 of the Procedure have the same status as the administrative measures, rules, regulations, etc., which come under the power of the State Council in accordance with Article 89 of the Constitution.

As has been repeatedly mentioned, though for different purposes, noticeably, at each horizontal level of the hierarchy of the domestic legal system, whenever treaty provisions come into conflict with the norms of

105. Strictly speaking, the function and power of the State Council to enact administrative rules and regulations is not the legislative power. Wu Daying and Shen Zongling, Zhongguo Shehuizhuyi Falu Jiben Lilun (Basic Theory of China’s Socialist Law) (in Chinese), (Beijing: Law Press, 1987), at 190-91. However, the rules and regulations which the State Council enacts are part of the norms of China’s domestic law. Article 1 (12) of the Sino-U.S. Consular Convention of 1980 provides that “ ‘Law’ means for the People’s Republic of China, all national, provincial, municipal, autonomous region and local laws, ordinances, regulations and decisions having the force and effect of law”: 19 International Legal Materials 1119.
the domestic law, the treaty provisions at issue will always trump the conflicting norms of the domestic law. Moreover, the statutory provisions which grant the trumping effect of international treaties do not distinguish whether the conflicting norms are previously or subsequently enacted. This implies that, in the Chinese legal system, the doctrine, *lex posteriori derogat priori*, does not apply to the conflict between a prior treaty and a subsequent statute, although it may apply to the conflict between a prior treaty and a subsequent treaty of the same rank. As a result, a treaty will always prevail over a domestic statute even though the statute is enacted subsequently to the treaty.107

An example of the trumping effect of treaty provisions is manifested in the Sino-French Agreement for Judicial Assistance in Civil and Commercial Matters of 1988. Article 20 of the Agreement provides that:

The request for recognition and enforcement of decisions rendered by the court of one Contracting Party shall be submitted directly by the party concerned to the court of the other Contracting Party.108

Under this article, the party concerned is entitled to proceed directly, without the assistance of the designated central government organs, to request in the relevant court of one contracting party the recognition and enforcement of a final judgment or arbitration award rendered by a court or arbitral tribunal of the other contracting party. By the time the agreement came into force, however, the then valid 1982 PRC Civil Procedure Law for Trial Implementation provided that judicial assistance could be provided only between a PRC court and a foreign court either on a treaty basis or in accordance with the principle of reciprocity.109

Obviously, this domestic statutory provision precluded the possibility of seeking judicial assistance by the party concerned directly from a PRC court. As a result, there existed a discrepancy between the treaty provision and that of the domestic statute. Nevertheless, Article 185 of the then Civil Procedural Law contained a provision which granted the trumping effect of treaty provisions over those of the statute. Therefore, the treaty provision should prevail in the case of requesting recognition and enforcement of a judgment issued by a French court or an arbitral award

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108. For the Chinese text, see *Zhonghua Renmin Gongheguo Guowuyuan Gongbao* (Gazette of the State Council of the People's Republic of China), vol. 8, No. 561, (April 15, 1988) at 228-34. The English translation is available in *East Asian Executive Reports*, (December 1988), at 20-22.
rendered by a French arbitral tribunal. Noticeably, a provision to allow the party concerned to directly apply to a competent PRC court for recognition and enforcement of a foreign judgment or arbitral award has been added to the present PRC Civil Procedural Law.

Worthy of note is that, within the two-tier structure of the treaty-making power, application of the hierarchy of Chinese domestic legal order to the relationship between treaties and domestic norms may introduce vertical conflicts between a statute enacted by the Standing Committee, the state organ at the higher level of the hierarchy, and a treaty approved by the State Council, the state organ at the lower level of the hierarchy. This question is of particular importance in viewing that such conflict plays no role in the international legal system. Whatever legal status is granted to a treaty under a domestic system, its legal force at international law is not affected thereby. It is an established rule of international law that a state bears international responsibility for its failure to perform the treaty obligations even though such failure is due to the rules of the domestic law. In China, this question is answered by an overriding provision which is contained in Article 7 of the Procedures. According to this provision, any and all treaties and agreements of which the provisions contravene the laws of the People’s Republic of China shall be submitted to the Standing Committee for its decision on the ratification. While this provision may purport to further restrict the treaty-making power of the State Council, one consequence which it has come up with is to accord a higher status to a conflicting international norm. Through the act of the Standing Committee, the conflicting international norm is able to prevail over the domestic norm both at the horizontal level and at the vertical level as well. Therefore, the supremacy of treaty obligations over the domestic law is further strengthened.

It must be noted that all domestic provisions which grant direct application of international treaties are contained in the ordinary statutes. Although some of them may even fall into the category of “basic laws” enacted by the National People’s Congress as provided by Article 62 of the Constitution, yet, all of them are by no means of a constitutional

110. This conclusion was reached through an interview with the head of the Bureau of Judicial Assistance of the PRC Ministry of Justice. According to her, the Standing Committee was also consulted for its advice on this problem. Thus, on the basis of the consent of the Standing Committee together with Article 185, the treaty provision was finalized as it is.
111. Article 267 of the PRC Civil Procedure Law reads: “If a legally effective judgment or ruling made by a foreign court requires recognition and enforcement by a People’s court of the People’s Republic of China, the party concerned may directly apply for recognition and enforcement of the competent Intermediate People’s Court of the People’s Republic of China.”
112. Supra, note 3.
nature, and therefore, can have no superior effect over the provisions of
the Constitution.\textsuperscript{113}

From the recent years of the legislative practice in China, one may
reasonably speculate that international treaties are given equal ranks with
the statutes if the treaties and the statutes are made by the same state
organ. In case of conflicts between treaties and the domestic statutes,
China puts into effect a system of supremacy of treaties over the domestic
statutes.\textsuperscript{114} On the basis of the statutory provisions, treaties always have
a trumping effect over the domestic law. Moreover, through legislative
acts, possible conflicts between treaties and the domestic law at a
vertical level does not affect the supremacy of treaties. This, as a Chinese
commentator has commented, manifests "the firm resolution of the
People's Republic of China to carry out in good faith the principle of
\textit{pacta sunt servanda}."\textsuperscript{115}

5. **Interpretation of Treaties**

Correct application of a treaty in a domestic legal system depends on
correct interpretation of the treaty.\textsuperscript{116} While it is almost a universal
principle that treaties must be interpreted in a domestic system in
accordance with the principles and norms of international law, questions
as to who has the authority to interpret a treaty and what technique of
interpretation applies in that domestic legal system remain the discretion
of the domestic legal systems.\textsuperscript{117} It is generally agreed that relevant
provisions for treaty interpretation as provided in the 1969 Vienna
Convention on the Law of Treaties should also be equally applied in
China.\textsuperscript{118} Therefore, the attention in this part of the inquiry will be
primarily paid to the question concerning who has the authority to
interpret a treaty in China.

The answer to this question depends on the allocation of the power to
interpret law. In general, the PRC local courts do not confront themselves
with the task to interpret the law which they apply in the legal proceed-

\begin{itemize}
  \item \textsuperscript{113} Wang Tieya, \textit{supra}, note 14, at 332.
  \item \textsuperscript{114} \textit{Ibid.}, at 333. Also, see Li Haopei, \textit{supra}, note 5, at 393.
  \item \textsuperscript{115} Li Haopei, \textit{ibid.}
  \item \textsuperscript{116} According to Jackson, interpretation of international treaties by domestic authorities is
far more common and in many cases more important than the interpretation by international
tribunals: Jackson in Jacobs and Roberts, \textit{supra}, note 2, at 164.
  \item \textsuperscript{117} Jacobs, \textit{supra}, note 2, at xxix.
  \item \textsuperscript{118} Wang Tieya, ed., \textit{Guoji Fa} (International Law), (in Chinese), (Beijing: Law Press, 1982)
at 349.
\end{itemize}
Under the doctrine, *ejus est interpretation ejus est condere*, the authority to interpret a statute or a regulation rests with the state organ which enacts it. In accordance with the Chinese jurisprudence, such interpretation is called the legislative interpretation which gives the most authentic and overall binding force upon the local courts and other government institutions as to the substantive meaning of the law.\(^{119}\) Under Article 67 of the Constitution, the Standing Committee exercises the function and power to "interpret statutes"\(^{121}\) and to "annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or the statutes."\(^{122}\)

Through the inquiry that has been made earlier, directly applicable treaties are accorded the equal force of the domestic norms at the horizontal level of the hierarchy of the domestic legal system. Therefore, it is submitted that the Standing Committee’s power to interpret statutes and to annul the legal norms enacted by the State Council should be analogously extended to the interpretation of treaties which it decides to ratify and thus become directly applicable on a statutory basis. This, of course, includes the decision on whether there exists a conflict between a treaty and the domestic law both at the horizontal level and vertical levels. This proposition appears to be in line with the provision of Article 7 of the Procedure concerning the Standing Committee’s power to decide on the ratification of a treaty of which the provisions are found to contravene the PRC laws. Equally, the State Council possesses the power to interpret the treaties which it approves or accepts on behalf of China and stand in the rank of the administrative measures, rules and regulations which fall within its jurisdiction under Article 89 of the Constitution.

Up to this date, however, no information on the exercise of this power of legislative interpretation in a specific case is available. Nevertheless, one can get a hint from a recent decision of the Standing Committee on the ratification of the 1965 Hague Convention on the Service Abroad of

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119. *Supra*, note 105, at 261. According to the PRC Law for the Organization of the People’s Courts of 1979 and the Standing Committee’s decision on strengthening the work of interpretation of laws of 1981, all questions arising from application of laws in a specific case must be subject to the interpretation made by the Supreme People’s Court. The local courts have no competence to render judicial interpretation.

120. For the same reason indicated *supra*, note 110, while legislative interpretation primarily refers to the interpretation made by the Standing Committee of the National People’s Congress as to the meaning of the statutes it enacts, it, by analogy, also refers to the interpretation by the State Council as to the meaning of the administrative measures, rules, regulations, decisions and orders. In this case, the term “administrative legislation” is more appropriate: *ibid.*, at 262–63.

121. Article 67(4) of the Constitution.

122. Article 67(7) of the Constitution.
Judicial and Extrajudicial Documents in Civil or Commercial Matters.\textsuperscript{123} While ratifying the Convention, the decision makes statements about the method to serve documents within the territory of China and the time limitation applied to the service.\textsuperscript{124} These statements, in this author's opinion, can serve, among other things, as the legislative interpretation of the Convention which is directly applicable in China.

In addition, the Supreme People's Court is empowered to render judicial interpretation of the laws which are applied by the local courts.\textsuperscript{125} Such power of judicial interpretation equally covers the interpretation of international treaties which can be directly applied by the PRC courts. Noticeably, the statutory provisions which allow direct application of international treaties were written in a very rudimentary language. With regard to application of a particular treaty, the PRC Supreme People's Court will, as may be necessary, issue to all relevant courts notices tantamount to the judicial interpretation of treaty provisions so as to direct these courts in a substantive manner to apply the treaty in the potential legal proceedings.\textsuperscript{126}

An example of this is the notice of the Supreme People's Court on the implementation by the PRC courts of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{127} Upon the decision made by the Standing Committee of the National People's Congress, China acceded to the Convention on December 2, 1986. On April 10, 1987, shortly before the Convention entered into force upon China, the Supreme People's Court issued a notice to all the high and intermediate courts, maritime courts and intermediate railway transportation courts on the implementation of the Convention.\textsuperscript{128} This notice requires all the judges and court officials concerned to "study this important international convention seriously and have it enforced strictly as it requires."\textsuperscript{129} Following that, the notice reiterates the principle of the PRC Civil Procedure Law which, in this case, means that the Convention shall prevail if its provisions are found different from those of the Civil

\begin{enumerate}
\item The decision was adopted on March 2, 1991 at the 18th session of the Standing Committee of the 7th National People's Congress. See document cited \textit{supra}, note 48, 1991, No. 1, at 19.
\item For the text of the Convention, see UN Treaty Series, vol. 658, at 165-95.
\item Wu Daying and Shen Zongling, \textit{supra}, note 110, at 261.
\item Under the PRC Law on the Organization of the People's Courts, courts in China are divided into four levels, namely, the basic, intermediate, high and supreme levels.
\item For the text of the Convention, see 21.3 United States Treaties and Other International Agreements, at 2518.
\item Under the PRC Civil Procedural Law, the intermediate courts are the courts of first instance to hear most of the cases involving foreign elements.
\end{enumerate}
Procedure Law. For the purpose of the interpretation, the most noticeable feature as outlined in this notice is the detailed substance added by the Supreme People’s Court to the meaning of the disputes which may arise from commercial transactions of a contractual or non-contractual nature as contemplated in the reservations made by China to the Convention and to the exercise of the jurisdiction as required by Article 4 of the Convention. By virtue of the interpretation made by the Supreme People’s Court in this notice, the enforcement of the Convention in the relevant courts of PRC has been guaranteed in a substantive manner.130

In practice, application of a treaty by the court in deciding a case can also provide hint as to how a treaty is interpreted. This is particularly the case when interpretation of a treaty provision is part of the controversy between the two contentious parties. Thus, in the diamond theft case, the court faced the question of how to interpret the period of limitation as provided for in the Hague Protocol. Although the decision did not discuss this issue, it clearly showed that the court did not accept the notion of an absolute period of limitation which was argued by the defendant.131

IV. Conclusion

As pointed out in the outset of this article, each nation is entitled to determine by itself how treaties are given effect in its own domestic system as long as it does so in good faith for its treaty obligations. On the other hand, how a treaty is directly applied in the domestic system reflects the policy considerations of that state. These policy considerations may include the degree of its trust in the international system, the weight of the value of the domestic law as assessed against that of international treaties, the balance of the treaty-making powers as allocated between the government institutions, the emphasis on the democratization of the treaty-making process, the extent of the leeway which it cares to retain in its legal system vis-a-vis the requirement of its international obligations and the attitude it holds towards its international treaty obligations.132 This current inquiry, while trying to draw a complete picture of how treaties are given effect in China’s domestic legal system, may serve as a window through which one may discern how these considerations play a role in China’s domestic legal order.

130. Similar notice, though on a different subject matter, is the Notice on the Implementation of Judicial Assistance Treaties issued by the Supreme People’s Court on February 1, 1988.
131. Supra, note 86.
In general, the allocation of the treaty-making power in China is not based on the idea of the separation of powers. China always enters into treaty relations with other nations as a result of joint and coordinated efforts made by the government institutions of different functions and at different levels. This may mitigate from the very outset the problems and difficulties introduced by direct application of treaty provisions in China’s legal system. While adopting a monist approach to the relationship between treaties and domestic law in principle, the way in which the Chinese domestic system allows direct application of international treaties in China is somewhat based on practical considerations. On the one hand, the Constitution is silent on this issue, thus leaving it to be decided case by case.\(^{133}\) On the other, by virtue of the relevant statutory provisions, direct application in reality covers considerably wide areas of transactions. Moreover, all treaty provisions which are directly applicable in China have a trumping effect over the conflicting domestic norms.

All roads lead to Rome. The Chinese practice as to the effect of treaties in its domestic legal system represents one of the avenues leading to enforcement of treaty obligations in domestic law. It may vary from those taken by other nations. Yet, the consequences it achieves may not substantially differ from those of the other nations. To sum up, China’s attitude towards its international treaty obligations is always earnest, serious as well as circumspect. This may be traced back to its historical legacy. Indeed, Confucius once said that “Of the three essentials, the greatest is good faith. Without a revenue and without an army, a state can still exist, but it can not exist without good faith.”\(^{134}\) This historical value has been carried forward by the PRC since its founding in its practice as to the effect of treaties in its domestic legal system.\(^{135}\)

\(^{133}\) In drafting the present Constitution, the question of the relationship between domestic law and international law seemed to be considered. However, in the end, it was chosen not to have any provision in the Constitution to that effect: Wang Tieya, *Falü Jiben Wenti Xilie Jiangzuo* (A Series of Lectures on Basic Issues of Law), (in Chinese) (Beijing: Peking University Press, 1987) at 462. The author had an opportunity to raise this question to a constitutional law professor of the Law Faculty of Peking University who participated in the drafting of the PRC’s 1982 Constitution. When he was asked whether considerations of the relationship between international law and domestic law had ever been given to the pending Constitution, this professor simply shook his head and said “No” without further comment. Explanations for the lack of the provisions in this respect in the Constitution seem to be the following: shortage of previous experience, no urgent need to do so, no precedent from other socialist states for reference, not a concern of the Constitution as envisaged by the drafters, not a matured issue thus leaving it to be decided case by case. The author inclines to the last one.


\(^{135}\) In practice, it appears that there has not been a single instance of an arbitrary breach of an international treaty to which the PRC is a party. Wang Tieya, *ibid.*, at 316.