

## China and the Future of International Adjudication

Julian Ku

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Law Commons](#)

---

### Recommended Citation

Julian Ku, *China and the Future of International Adjudication*, 27 Md. J. Int'l L. 154 (2012).

Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol27/iss1/12>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

---

ESSAY

## China and the Future of International Adjudication

JULIAN KU<sup>†</sup>

---

---

### ABSTRACT

*Traditionally, the People's Republic of China (PRC) has shunned participation in international adjudication, preferring to settle all disputes through direct negotiations. But in the past two decades, this wholly negative approach to international courts and arbitration tribunals has begun to shift. In addition to the PRC's acceptance and active participation in the Dispute Settlement Body of the World Trade Organization, the PRC has also accepted limited jurisdiction for arbitration under the International Center for the Settlement of Investment Disputes (ICSID) and the International Tribunal for the Law of the Sea. Despite this shift, the PRC still follows a policy of strictly limiting its exposure to international adjudicatory mechanisms. This strategy, which is similar to that practiced by the United States, suggests that international adjudication faces difficult prospects in the long term.*

### INTRODUCTION

The rise of international adjudication is one of the distinctive features of the international legal order over the past half century. While states remain the central players in international law and

---

<sup>†</sup> Professor of Law, Maurice A. Deane School of Law at Hofstra University. The author is grateful to Michael Van Alstine for his invitation to participate in this symposium, and Sean Aughey, John Balzano, David Law, Eric Posner, and John Yoo for their comments on earlier drafts of this article. Michael Chen, Hofstra Law Class of 2012, and Han Yichou, Ph.D. Candidate at the East China University of Politics and Law, both provided excellent research assistance. Part of the research related to this article was undertaken while the author was a Fulbright Distinguished Lecturer in Law at East China University of Politics and Law in Shanghai, China. The author is grateful to both Hofstra University and the Fulbright program for supporting his research. Finally, the author thanks his late "Uncle" Hungdah Chiu, whose life and work continues to be an inspiration.

politics, states increasingly rely upon international judicial institutions of all kinds to manage and resolve disputes. In the past two decades the world has witnessed the creation of five new international criminal tribunals, including the permanent International Criminal Court. Additionally, the creation of the World Trade Organization's Dispute Settlement Body has strengthened binding settlements of international trade disputes. Finally, long-standing international tribunals such as the International Court of Justice (ICJ) have enjoyed a busier docket than at any time in their history.<sup>1</sup>

The rise of international adjudication has coincided with the rise of the People's Republic of China (PRC) as a leading economic and political power. Since 1978, the PRC's economy has grown to become the second largest in the world.<sup>2</sup> Along with newfound economic power and influence, the PRC is also an increasingly important participant in global politics. From its permanent seat on the United Nations Security Council, the PRC has extended its influence on a number of global issues ranging from climate change to the intervention into Libya.

As the PRC's economic and political influence grows, it also faces serious international disputes over a wide range of issues. For instance, the PRC's trade policies are sharply criticized by many of its largest trading partners, including the United States. Similarly, China's territorial claims over Taiwan, the Diaoyu Islands, and the South China Sea have the potential to create serious territorial conflicts with neighboring states.

Traditionally, the PRC has shunned participation in international adjudication. As one PRC publicist argued in 1958:

Since the subjects of international treaties are sovereign states, there cannot be a supra-national organ in international affairs to interpret international treaties and compel the contracting parties to accept its interpretation. Consequently, the interpreters of international treaties can only be the contracting states themselves, and the best

---

1. See, e.g., STEPHEN M. SCHWEBEL, *JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS* 24 (2011) (describing ICJ's busy docket).

2. Kevin Hamlin & Li Yanping, *China Overtakes Japan as World's Second-Biggest Economy*, BLOOMBERG NEWS, Aug. 16, 2010, <http://www.bloomberg.com/news/2010-08-16/china-economy-passes-japan-s-in-second-quarter-capping-three-decade-rise.html>.

method of settling this problem is through diplomatic negotiations.<sup>3</sup>

Today's more globally-integrated PRC, however, is less categorically hostile to international adjudication. In addition to the PRC's acceptance and active participation in the Dispute Settlement Body of the World Trade Organization (WTO), it has also begun to accept limited compulsory jurisdiction for arbitration under the International Center for the Settlement of Investment Disputes (ICSID) and the UN Convention for the Law of the Sea.<sup>4</sup>

The PRC's relationship with international adjudication is part of a larger conversation about contemporary China's engagement with international law and politics.<sup>5</sup> The PRC's relationship with international law was exhaustively and brilliantly compiled by Jerome Cohen and Hungdah Chiu, but both international law and the PRC have changed dramatically since their magnum opus was published in 1974.<sup>6</sup> Legal scholarship in the United States has only recently directed its attention to the contemporary PRC's approach and impact on international law.<sup>7</sup> The PRC's approach to international law is worthy of a fresh look, if for no other reason than that the PRC's role in world politics has changed so much in the intervening decades. The rise of the PRC has been so dramatic that international relations scholars in the United States have increasingly

---

3. GARY L. SCOTT, CHINESE TREATIES: THE POST-REVOLUTIONARY RESTORATION OF INTERNATIONAL LAW AND ORDER 132 (1975).

4. *See infra* Part II.A.

5. *See, e.g.*, Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 CHI. J. INT'L L. 1, 3 (2006) ("The geopolitics of the future US-China relationship has received a great deal of attention. Less attention has been directed to another topic—the role of international law in any future US-China confrontation."). *See also* Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?*, in MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT 153 (Carolyn Deere-Birkbeck ed., 2011). There has been very little discussion of China's relationship with international tribunals and courts. *But see* Dapo Akande, *Is China Changing its Views of International Tribunals?*, EJIL TALK (Oct. 4, 2010), <http://www.ejiltalk.org/is-china-changing-its-view-of-international-tribunals/> ("It remains to be seen whether this trend in investment protection and a greater willingness to engage in advisory proceedings will lead to a greater acceptance of the contentious jurisdiction of international tribunals dealing with inter-State cases.").

6. *See generally* JEROME ALAN COHEN & HUNGDAH CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW (1974).

7. *See, e.g.*, Posner & Yoo, *supra* note 5, at 3.

devoted attention to the PRC's replacement of America as the world's leading power.<sup>8</sup>

This short essay is intended as the first of several contributions to that larger conversation. This essay focuses on one key aspect of the PRC's contemporary relationship with international tribunals: its willingness to expose itself to the jurisdiction of independent international tribunals. Based on a review of existing PRC treaties, this essay observes that the PRC has carefully chosen to limit its exposure to international tribunals in two ways. First, the PRC has generally eschewed any treaty that requires it to submit to the compulsory jurisdiction of an international tribunal.<sup>9</sup> Second, where the PRC has submitted to such jurisdiction, it has sought to maintain as much control and influence over the selection of arbitrators or judges who might be deciding their cases as possible.<sup>10</sup> On the other hand, the PRC has showed a markedly friendlier attitude toward trade and investment tribunals than toward other kinds of tribunals.<sup>11</sup>

This pattern of limited involvement in international adjudication is hardly unique to the PRC; its pattern of limited participation is very similar to that of another key global power: the United States. These parallels between American and Chinese participation in international adjudication may limit the growth and influence of international adjudication in the long term.

This essay begins by sketching out the history of China's relationship with international tribunals prior to its process of reform and opening in 1978.<sup>12</sup> It will then offer a description of the PRC's contemporary approach to participation in international tribunals.<sup>13</sup> Finally, the essay concludes by speculating about the PRC's future policies, its implications for the future of international adjudication as a whole, and questions that deserve further research and study.<sup>14</sup>

---

8. *E.g.*, MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* (2009); AARON L. FRIEDBERG, *A CONTEST FOR SUPREMACY: CHINA, AMERICA, AND THE STRUGGLE FOR MASTERY IN ASIA* (2011). *See also* G. JOHN IKENBERRY, *LIBERAL LEVIATHAN* 342–49 (2011) (addressing China's ascendancy as a nonliberal and non-Western alternative to the US led global order). *Cf.* JOSEPH NYE, *THE FUTURE OF POWER* 177–86 (2011).

9. *See infra* Part II.B.

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. *See infra* Part I.A.

13. *See infra* Part I.B.

14. *See infra* Part III.

## I. CHINA AND INTERNATIONAL ADJUDICATION: A HISTORICAL SKETCH

China's historical encounter with the Western system of public international law began in the middle of the 19th century in the form of a series of treaties with Western powers.<sup>15</sup> Such treaties, which guaranteed Western trading rights and imposed certain extraterritorial protections for Western and Japanese nationals, were later denounced by Chinese leaders as "unequal."<sup>16</sup> Despite this suspicion of international law, China was a founding member of the first two global efforts to establish a system of international adjudication: the Permanent Court of International Arbitration and the Permanent Court of International Justice (PCIJ).<sup>17</sup> One of China's leading jurists, Wang Chonghui (王寵惠) served as a founding judge of the PCIJ during its first sessions in 1923 to 1925.<sup>18</sup> During this period, China accepted the jurisdiction of the PCIJ under the Optional Protocol to the League of Nations.<sup>19</sup> This Protocol gave the PCIJ compulsory jurisdiction over certain kinds of disputes.<sup>20</sup>

China was itself the subject of a PCIJ decision relating to its denunciation of an 1865 treaty with Belgium.<sup>21</sup> China had denounced the treaty, but Belgium, invoking the PCIJ's compulsory jurisdiction, disputed China's right to do so.<sup>22</sup> In 1927, Belgium won an interim measure from the PCIJ requiring the Chinese government to preserve certain protections Belgian nationals enjoyed under the treaty until a

---

15. For a powerful historical study of the concept of "unequal treaties" in nineteenth century China see DONG WANG, *CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY* (2005).

16. *Id.*

17. MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1942* 665–69, 677, 681, 685–86 (1943) (describing China's accession to Conventions requiring compulsory jurisdiction of the PCA and PCIJ and China's subsequent role at those courts).

18. See Ole Spiermann, *Judge Wang Chung-hui at the Permanent Court of International Justice*, 5 *CHINESE J. INT'L L.* 115, 118–19 (2006) (reviewing the work of the PCIJ during Wang Chung-hui's tenure as a deputy justice).

19. See HUDSON, *supra* note 17, at 685–86.

20. Revised Statute of the Permanent Court of International Justice, art. 36(2) 2, P.C.I.J. (ser. D) No. 1, at 13 (4th ed. 1940), available at [http://www.icj-cij.org/pcij/serie\\_D/D\\_01\\_4e\\_edition.pdf](http://www.icj-cij.org/pcij/serie_D/D_01_4e_edition.pdf).

21. Denunciation of the Treaty of November 2nd, 1865, Between China and Belgium (Belg. v. China), Order, 1927 P.C.I.J. (ser. A) No. 8, at 6–8 (Jan. 8), available at [http://www.icj-cij.org/pcij/serie\\_A/A\\_08/25\\_Denonciation\\_du\\_traite\\_sino\\_belge\\_Ordonnance\\_19270108.pdf](http://www.icj-cij.org/pcij/serie_A/A_08/25_Denonciation_du_traite_sino_belge_Ordonnance_19270108.pdf)

22. *Id.*

final decision by the PCIJ.<sup>23</sup> This decision was a victory for Belgium, although a final decision was never issued in the case because Belgium withdrew its application in 1927 after reaching a settlement with China.<sup>24</sup>

Despite its somewhat negative experience with international adjudication, China maintained its membership in the PCIJ and was an original member of the new ICJ that replaced the PCIJ in 1945.<sup>25</sup> As with the PCIJ, a Chinese jurist, Hsu Mo (徐莫), served as one of the founding judges of the ICJ.<sup>26</sup> The Republic of China (ROC) government continued its policy of embracing international adjudication by accepting the compulsory jurisdiction of the ICJ in 1946.<sup>27</sup> The ROC government generally supported other forms of international adjudication as well, serving as an original member of the General Agreement on Tariffs and Trade and also participating in the GATT's dispute settlement system, although it withdrew in 1950 before ever participating in a dispute under GATT.<sup>28</sup>

The replacement of the ROC with the PRC on the world stage, however, ended the first period of China's participation in international adjudication. Unlike the ROC, the PRC initially adopted

---

23. *Id.*

24. Ole Spiermann, *Twentieth Century Internationalism in Law*, 18 EUR. J. INT'L L. 785, 796 (2007) (citing *Belg. v. China*, Order, 1927 P.C.I.J. (ser. A) No. 8, at 6–8 (Jan. 8)).

25. See R.Y. Jennings, *The International Court of Justice after Fifty Years*, 89 AM. J. INT'L L. 493, 493 (1995) (describing the effect of the PCIJ decisions on international law).

26. Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 AM. J. INT'L L. 209, 250 (2009).

27. 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at 18 n.1 U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) (“A declaration recognizing as compulsory the jurisdiction of the International Court of Justice had been deposited on 26 October 1946 with the Secretary-General on behalf of the Republic of China (registered under [Art. 36(5)]”). In 1972, the PRC “indicated that it does not recognize the statement made by the defunct Chinese government on October 26, 1946 in accordance with paragraph 2 of Article 36 of the Statute of the International Court of Justice concerning the acceptance of the compulsory jurisdiction of the Court.” *Id.* For the text of the Republic of China's declaration, see *Declaration of China Recognizing as Compulsory the Jurisdiction of the Court in Conformity with Article 36, Paragraphs 2 and 3, of the Statute of the International Court of Justice*, Oct. 26, 1946, 1 U.N.T.S. 35, 36.

28. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, available at [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf) [hereinafter GATT]. The history of withdrawal is summarized in HAROLD K. JACOBSON & MICHEL OKSENBERG, *CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER* 59–63 (1990); Robert E. Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 LAW & POL'Y INT'L BUS. 371, 402–04 (1986); and Lori Fisler Damrosch, *GATT Membership in A Changing World Order: Taiwan, China, and the Former Soviet Republics*, 1992 Colum. Bus. L. Rev. 19, 21–24 (1992).

a policy of non-participation in most international organizations.<sup>29</sup> The PRC effectively denounced the ROC's acceptance of compulsory jurisdiction under the ICJ and did not nominate its own member for that court until 1985.<sup>30</sup> This left the ICJ without a Chinese member for almost 20 years, the only time that a permanent member of the Security Council has failed to have been represented on the ICJ.<sup>31</sup> The PRC did not join GATT or any of the other major regimes involving international adjudication for most of its turbulent early history. This stemmed initially from the PRC's alignment with the Soviet Union, but also from its self-imposed isolation from the international community while it underwent the Cultural Revolution in the 1960s and 1970s.<sup>32</sup> Cohen and Chiu offer this colorful example of the PRC's then-attitude toward the ICJ and compulsory jurisdiction:

Imperialism has always considered the general acceptance of the compulsory jurisdiction of the International Court of Justice to be an important signpost on the road to universalism . . . . In recent years, American imperialism has obviously begun to believe that control of the various countries through the [ICJ] would be to its advantage . . . .<sup>33</sup>

## II. CONTEMPORARY CHINA AND INTERNATIONAL TRIBUNALS

### A. *General Trends*

Since 1978, the PRC has pursued the “reform and opening” policy in pursuit of greater and faster economic development.<sup>34</sup> One

---

29. Cf. COHEN & CHIU, *supra* note 6, at 1289 (“[A]t the height of China’s disillusionment over the failure of the League of Nations to act against Japanese aggression, the Communist regime [in China] announced its hostility to the League [of Nations].”).

30. Ling Yan, *In Memoriam: Ni Zhengyu*, 3 CHINESE J. INT’L L. 693, 695 (2004); 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 27 at 18 n.1.

31. Cogan, *supra* note 26, at 250.

32. For a useful overview of China’s relationship with international tribunals, see Zhao Haifeng (赵海峰), *Zhongguo yu Guoji Sifa Jigou Guanxi de Jiangzuo* (中国与国际司法机构关系的演进) [Evolution of the Relationship Between China and International Judicial Organizations], 26 FAXUE PINGLUN (法学评论) [WUHAN UNIVERSITY LAW REVIEW] 3 (2008)

33. COHEN & CHIU, *supra* note 6, at 1444 (quoting *International Court of Justice—A Shelter for Gangsters*, JEN-MIN JIH-PAO (RENMIN RIBAO) (人民日报) [PEOPLE’S DAILY], July 26, 1966, at 6).

34. Chen Su, *The Establishment and Development of the Chinese Economic Legal System in the Past Sixty Years* (Xie Zengyi trans.), 23 COLUM. J. ASIAN L. 109, 116 (2009).



key aspect of the “opening” policy involved opening its domestic markets to foreign trade and investment while at the same time exporting products to global markets.<sup>35</sup> The PRC’s gradual “opening” and re-integration into the world economy is accompanied by a need to pursue a more active role in the international community. As China re-entered the world economic community, it slowly began to reconsider its complete separation from systems of international adjudication. The 1985 nomination of Ni Zhengyu (倪征奥) to become the PRC’s first member of the ICJ<sup>36</sup> symbolizes this reconsideration. The PRC also participated in the ICJ’s advisory jurisdiction proceeding on the status of Kosovo.<sup>37</sup>

The PRC is now party to 571 conventions, 203 treaties, and 2,616 agreements.<sup>38</sup> This represents a substantial change from the pre-1971 period. Overall, the PRC is currently party to 6,720 different types of international agreements, compared to approximately 1660 in 1972.<sup>39</sup> China’s ascension to multilateral conventions is particularly striking. Since 1971, the PRC has joined 23 U.N. sponsored multilateral conventions.<sup>40</sup> While the PRC’s participation in international treaty-making is still less than other comparable countries (the United States is currently party to 912 conventions),<sup>41</sup> there is little doubt that the PRC is now a full-fledged and active participant in the world of international treaties and conventions.

Although the PRC now joins treaties with more frequency, it exercises much more caution when participating in international dispute resolution. The PRC is party to at least 53 multilateral conventions that include dispute resolution clauses.<sup>42</sup> But, with a few

---

35. *Id.*

36. Ling Yan, *supra* note 30, at 695.

37. See *Written Statement of the People’s Republic of China to the International Court of Justice on the Issue of Kosovo* (Apr. 16 2009), <http://www.icj-cij.org/docket/files/141/15611.pdf>.

38. These counts are a result of a key word search for “公约” [conventions], “条约” [treaties], and “协定” [agreements] in the Chinalawinfo database’s “中外条约” [Sino-foreign agreements] database .

39. These counts reflect all agreements listed in the “中外条约” database. Compare SCOTT, *supra* note 3, at 140.

40. These counts generated by a search for “联合国” [United Nations] and “公约” [conventions] in Chinalawinfo database’s “中外条约” database

41. This list reflects a word search for the term: “ti(convention!)” in the USTREATIES Database in Westlaw.

42. See Table I. This list of treaties was generated by the entering the following search terms, “联合国, 公约, 争端, 解决” in Chinalawinfo’s “中外条约” database. From this list,

exceptions, none of these provisions require the PRC to accept the jurisdiction of an international tribunal.<sup>43</sup> Many of these treaties grant international tribunals compulsory jurisdiction, but make acceptance of such jurisdiction optional.<sup>44</sup> The PRC has generally done so in all such cases.<sup>45</sup> Finally, some treaties give a party the option to declare itself bound to compulsory dispute resolution, and in those cases, the PRC has uniformly refused to do so.<sup>46</sup> Based on this study, the PRC is party only to nine conventions or agreements (other than bilateral investment treaties) that require it submit to compulsory dispute settlement, where the PRC cannot block jurisdiction after a dispute arises.<sup>47</sup>

### B. *The PRC and Binding Dispute Resolution*

Therefore, unlike the ROC, the PRC has generally avoided any treaties that would obligate it to submit to compulsory dispute resolution. While this pattern is fairly consistent across treaty subject matter and time, there are exceptions to this approach. Fairly early in its history, the PRC entered into a few conventions subjecting it to binding arbitration.<sup>48</sup> In recent years, the most prominent exceptions to the PRC's otherwise cautious pattern are the Convention for the Settlement of Investment Disputes Between States and Nationals of

---

an individual review of the individual treaty provisions identified those with dispute resolution provisions.

43. See Table I (collecting treaties with compulsory dispute resolution obligations).

44. See, e.g., United Nations Convention Against Corruption art. 66(4), *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41, available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) ("Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.")

45. *Id.*

46. See, e.g., United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa art. 28, *opened for signature* Oct. 14, 1994, 1954 U.N.T.S. 3.

47. This study does not include bilateral investment treaties that grant jurisdiction to ICSID or other binding arbitration. See *infra* Part B.1 & note 56.

48. See, e.g., International Telecommunication Convention, *opened for signature* Nov. 6, 1982, 1533 U.N.T.S. 61 (PRC accession Aug. 19, 1985); 1972 Customs Convention on Containers, *opened for signature* Jan. 15, 1973, 988 U.N.T.S. 43 (PRC accession Jan. 22, 1986); International Convention for Safe Containers, *opened for signature* Dec. 2, 1972, 1064 U.N.T.S. 26 (PRC Accession Dec. 23, 1980); 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, *opened for signature* Nov. 29, 1969, 970 U.N.T.S. 212 (PRC accession Feb. 23, 1990); Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 15 U.N.T.S. 296 (ratified Apr. 4, 1947, recognized by PRC Feb. 15, 1974). Treaty information can be found at <http://treaties.un.org>, following the "Title Search" hyperlink and then searching by treaty title.

Other States, the UN Convention on the Law of the Sea, and the World Trade Organization Dispute Settlement Understanding.

### 1. ICSID Convention

The PRC joined the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) in 1990.<sup>49</sup> The ICSID Convention creates the International Center for the Settlement of Investment Disputes (ICSID) as a free-standing arbitration center for investor-state disputes.<sup>50</sup> Although parties must separately give consent to ICSID jurisdiction in a separate bilateral agreement or treaty, once invoked, the ICSID Convention binds members to ICSID arbitration procedures as well as obligations to comply and enforce ICSID awards.<sup>51</sup> Most importantly, the ICSID Convention rules permit a non-state party, usually a business corporation, to bring a claim against the host state directly without having to seek sponsorship from its home government.<sup>52</sup>

The most common way ICSID acquires jurisdiction over a state is in a “bilateral investment treaty” or BIT.<sup>53</sup> Such treaties usually provide for the protection of foreign investors against expropriation or other unfair treatment by the host state.<sup>54</sup> Most BITs typically

---

49. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *China became signatory* Feb. 9, 1990, 17 U.S.T. 1270, 575 U.N.T.S. 159, available at [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) [hereinafter ICSID Convention] (entered into force in China Feb. 6, 1993).

50. For general texts on the ICSID and its constitutive Convention, see JAN PAULSSON ET AL., *GUIDE TO ICSID ARBITRATION* (2d ed. 2001) and CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (2001).

51. ICSID Convention, *supra* note 49, art. 25(1) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”). *Id.* art. 26 (“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”).

52. See SCHREUER, *supra* note 50, at 159 (“The idea of granting direct access to an international forum to a non-State party was one of the Convention’s avowed purposes. . . . Some delegates had difficulties with this departure from accepted concepts and wanted to bring the investor’s home State into the picture. In response, Mr. Broches pointed to the advantages of direct dealings between States and investors for both sides.”) (internal citations omitted).

53. See *id.* at 210 (“The Report of the Executive Directors to the Convention . . . refer[s] to the possibility of a unilateral offer of consent by the host State through its legislation and the acceptance of that offer by the investor. . . . Consent through BITs has become accepted practice.”).

54. See, e.g., *infra* notes 56–57 and accompanying text.

provide for compulsory jurisdiction to ICSID for disputes arising under the agreement.<sup>55</sup> The PRC added a reservation limiting its consent to ICSID jurisdiction to disputes over compensation for expropriation.<sup>56</sup>

The PRC has been an active and enthusiastic creator of BITs. As of June 1 2011, the PRC is party to 88 bilateral investment treaties, most of which provide for investor state arbitration under ICSID.<sup>57</sup> Many early PRC BITs do not permit any investor state arbitration at all.<sup>58</sup> Later PRC BITs permit investor-state dispute under ICSID, but only for questions of compensation for expropriation.<sup>59</sup> These early PRC BITs excluded protection for “indirect” investments.<sup>60</sup> But beginning in 2001, the PRC has agreed to more expansive investor-state arbitrations covering more than just expropriation and including other kinds of mistreatment.<sup>61</sup> In a proceeding initiated by a Chinese national against Peru, an ICSID panel held that the most-favored nation clause of the China-Peru BIT incorporated provisions from other more recent BITs.<sup>62</sup> These provisions allow investors to seek

---

55. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004 Model BIT), art. 25, 2004, *available at* <http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> [hereinafter U.S. Model BIT].

56. *See* SCHREUER, *supra* note 50, at 113 (“China has announced that it ‘would only consider submitting . . . disputes over compensation resulting from expropriation and nationalisation.’”) (quoting Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable For Submission to the Centre, ICSID/8-D 1).

57. U.N. Conference on Trade & Dev., Total Number of Bilateral investment Treaties Concluded, 1 June 2011, [http://archive.unctad.org/sections/dite\\_pccb/docs/bits\\_china.pdf](http://archive.unctad.org/sections/dite_pccb/docs/bits_china.pdf) (last visited Apr. 16, 2012).

58. *See, e.g.*, Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Egypt, art. 9, Apr. 21, 1994, 1998 U.N.T.S. 125 (requiring resolution of investor-state disputes in the competent court of the Contracting Party accepting the investment).

59. *See, e.g.*, Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Peru, art. 8(3), June 9, 1994, 1901 U.N.T.S. 257 (permitting submission of dispute to ICSID for disputes compensation for expropriation).

60. *See* Aaron M. Chandler, *BITs, MFN Treatment and the PRC: The Impact of China's Ever-Evolving Bilateral Investment Treaty Practice*, 43 INT'L LAW. 1301, 1310 (2009).

61. *See, e.g.*, Agreement Between the Federal Republic of Germany and the People's Republic of China on the Encouragement and Reciprocal Protection of Investments, Ger.-China, arts. 3–5, Dec. 1, 2003, 2362 U.N.T.S. 253, 272–73, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%202362/v2362.pdf>; Agreement on Encouragement and Reciprocal Protection of Investments Between the Government of the Kingdom of the Netherlands and the Government of the People's Republic of China, Neth.-China, art. 3, Nov. 26, 2001, 2369 U.N.T.S. 219, 244–45, *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%202369/v2369.pdf>.

62. *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence dated June 19, 2009, ¶ 190 (unofficial translation) (“Claimant

remedies for a broad set of state actions well beyond those permitted by the early PRC BITs.<sup>63</sup>

The PRC has yet to face a proceeding brought by an investor against it in ICSID under one of its BITs.<sup>64</sup> But the combination of the most favored nation clauses in their older BITs along with their more investor-friendly provisions in the newer BITs will likely expose the PRC to ICSID arbitration in the near future.<sup>65</sup> Moreover, ICSID requires states to adopt domestic enforcement measures through their domestic judiciary, increasing the pressure of the PRC to comply with an ICSID judgment.<sup>66</sup>

## 2. UNCLOS

China joined the UN Convention on the Law of the Sea (UNCLOS) in 1996.<sup>67</sup> UNCLOS is a comprehensive treaty regulating a wide range of issues including the designation of control over territorial seas, seabeds, and economic zones. UNCLOS creates a complex set of options for dispute resolution.

Part XV of UNCLOS offers four options for dispute resolution:

- (a) the International Tribunal for the Law of the Sea (ITLOS);
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII; and

---

ultimately alleges . . . that Peru has signed other BITs which allows the submission of any disputes between the investor and the host State to ICSID arbitration. Claimant believes that the same treatment must also be extended to disputes related to violations to fair and equitable treatment, as well as to protection in the territory in favour of a Chinese investor, as required by the MFN clause in the Peru-China BIT.”)

63. Chandler, *supra* note 60, at 1310.

64. See INT’L CENTRE FOR SETTLEMENT OF INV. DISPUTES (ICSID), <http://icsid.worldbank.org/> (follow “Cases” hyperlink; then follow “List of Cases” hyperlink; then follow “Pending Cases” and “Concluded Cases” hyperlinks) (last visited Apr. 11, 2012) [hereinafter ICSID SEARCH].

65. *Cf.*, Ekran Berhad v. People’s Repub. China, ICSID Case No. ARB/11/15, Pending (July 22, 2011). The proceeding was suspended pursuant to the parties’ agreement. ICSID SEARCH, *supra* note 64.

66. ICSID Convention, *supra* note 49, art. 54.

67. U.N. DIV. FOR OCEAN AFF. & LAW OF THE SEA, THE LAW OF THE SEA: DECLARATIONS AND STATEMENTS WITH RESPECT TO THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND TO THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, at 12, U.N., Sales No. E.97.V.3 (2011) [hereinafter DECLARATIONS & STATEMENTS].

- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.<sup>68</sup>

Both parties must consent to the same procedure for settlement of disputes.<sup>69</sup> If there is no agreement on procedures, then the dispute must go to binding arbitration.<sup>70</sup> State parties may not, however, avoid the jurisdiction of the Seabed Disputes Chamber of the ITLOS, which is both compulsory and binding for matters related to the international seabed.<sup>71</sup>

State parties, however, may also limit the subject matter of this compulsory arbitration. Under Article 298, coastal states may exclude sea boundary delimitations, or those involving historic bays or titles, certain military or law enforcement activities, or actions pursuant to a Security Council function from any of the dispute resolution procedures.<sup>72</sup> The PRC exercised this right upon acceding to the UNCLOS.<sup>73</sup>

Thus, while China has a judge who sits on the ITLOS, the chance of China appearing before the tribunal is quite small since it would require China's consent after a dispute had arisen. Many of China's key disputes with its neighbors involve sea boundary delimitations or "historic bays and titles."<sup>74</sup> Such disputes, including those involving the South China Sea and the Diaoyu Islands, would probably be excluded from the jurisdiction of any UNCLOS dispute resolution method. Even if other non-excluded disputes reached dispute settlement, China could (and likely would) opt for arbitration instead of ITLOS, where it would be able to appoint at least one panel member. While China has appeared before the ITLOS to

---

68. U.N. Convention on the Law of the Sea, art. 287(4), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

69. *Id.*

70. *Id.* art. 287(5) ("If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree."). *See also id.*, Annex VII, art. 11 ("The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.").

71. *Id.* art. 287(2) ("A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5."). The jurisdiction of the Seabed Disputes Chamber is laid out in Art. 187 of UNCLOS.

72. *Id.*, art. 298.

73. DECLARATIONS & STATEMENTS, *supra* note 67.

74. *See* UNCLOS, *supra* note 68, art. 298(1)(a)(i).

support the jurisdiction of the Seabed Disputes Chamber, the entire proceeding was limited to the Chamber's advisory jurisdiction.<sup>75</sup>

Hence, it is not surprising that recent news reports suggest that the PRC does not support dispute resolution under ITLOS or UNCLOS. When the foreign minister of the Philippines suggested that the two countries settle disputes over the South China Sea at ITLOS, the PRC firmly refused his proposal.<sup>76</sup> China's pattern in the context of UNCLOS is thus consistent: limit binding dispute resolution as much as possible and opt for arbitration over standing tribunals.

### 3. WTO Dispute Settlement Understanding

In 2001, after a long process of application and negotiation, the PRC entered into the World Trade Organization.<sup>77</sup> In doing so, the PRC was obligated to accept the Dispute Settlement Understanding (DSU).<sup>78</sup> The DSU, which was first added to the international trading regime in 1994, requires all WTO members to accept dispute settlement before the Dispute Settlement Body of the WTO.<sup>79</sup>

Unlike most treaty regimes, the DSU is not optional for WTO members. The PRC's accession to the WTO required acceptance of compulsory jurisdiction and, unlike the ITLOS and ICSID system, the PRC was required to accept panel members whom it did not appoint and whom could not be PRC nationals.<sup>80</sup>

Thus, the WTO Dispute Settlement Board (DSB) represents the most intrusive form of international dispute settlement to which the PRC has ever agreed. For the first time since it withdrew from the ICJ's compulsory jurisdiction, the PRC's willingness to agree to

---

75. Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the International Seabed Area (China), Case No. 17, Written Statement of China, [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/Statement\\_China.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_China.pdf).

76. *Philippines Chides China for Rejecting Tribunal in Sea Dispute*, VOA NEWS, July 13, 2011, <http://www.voanews.com/english/news/asia/Philippines-Chides-China-for-Rejecting-Tribunal-in-Sea-Dispute-125478783.html>.

77. World Trade Organization, Protocol on the Accession of the People's Republic of China of 10 November 2001, WT/L/432, [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm).

78. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex II, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

79. *Id.* art.1(1).

80. *See id.* art. 8.

binding dispute resolution before an independent international tribunal is perhaps a sign of how important entering the WTO was for the PRC.

Given the PRC's share of world trade, it is not surprising that China has quickly become an active and frequent party to DSB proceedings. Since 2002, China has been the respondent in twenty one proceedings and it has initiated eight of its own proceedings.<sup>81</sup> While this level of activity is still far below that of its key trading partners,<sup>82</sup> these cases are the first international adjudications involving PRC since Belgium's 1927 proceeding in the PCIJ. Moreover, the PRC's 2002 complaint (along with eight co-complainants) against U.S. steel safeguard measures probably represented the first time in Chinese history that a Chinese government has initiated an international dispute resolution proceeding.<sup>83</sup> The PRC has also taken the initiative more often. Since 2008, it has initiated six complaints, most without co-complainants.<sup>84</sup>

The PRC's compliance with reports of the WTO DSB is equivalent to other leading members. While the PRC previously avoided panel reports by settling disputes in conciliation and mediation proceedings, it has taken a markedly more aggressive tone in the past five years. For example, in 2007, it contested a claim against its treatment of imported auto parts by the United States, European Union, and Canada.<sup>85</sup> When the panel report ruled against the PRC, it appealed and lost again.<sup>86</sup> It eventually agreed to comply with the panel report.<sup>87</sup> The episode reflects the first time China has lost a case in an international dispute proceeding, and it is probably

---

81. See Gao, *supra* note 5, at 168. Kristie Thomas, *China and the WTO Dispute Settlement System: From Passive Observer to Active Participant?* 6 (working paper), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1866259\\_code1011460.pdf?abstractid=1866259&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1866259_code1011460.pdf?abstractid=1866259&mirid=1).

82. The United States was involved in 28 proceedings as complainant and 57 as respondent and the European Union had similar number (27 and 37). Thomas, *supra* note 81, at 6.

83. Panel Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/R (July 11, 2003).

84. Thomas, *supra* note 81, at 11.

85. Panel Reports, *China—Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, Add.1, Add.2 (Jan. 12 2009), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds342\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds342_e.htm)

86. Appellate Body, *China—Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008).

87. Gao, *supra* note 5, at 170.



the first time it complied with a final judgment of an international tribunal.

Overall, the PRC's participation in the WTO DSB is by far China's most extensive experience with international dispute settlement. Whether as a "winner" or a "loser" of WTO disputes, China has remained an active participant.

### C. Views of PRC Scholars

Contemporary PRC publicists are generally more open to greater PRC participation in international adjudication than their predecessors. In a sweeping lecture on China's relationship with international judicial institutions, one scholar approvingly reviewed China's more open and positive attitude toward international judicial institutions, especially the WTO DSB.<sup>88</sup> Noting that China has essentially accepted compulsory jurisdiction in the WTO DSB and other institutions like ICSID, Dean Zhao Haifeng argued that the PRC "should open up its attitudes and completely reconsider and reassess its customarily negative views of international adjudication."<sup>89</sup> Indeed, Dean Zhao went so far as to link the PRC's "continuous development of domestic rule of law" with the likelihood that the PRC will eventually change its approach to international adjudication.<sup>90</sup>

Other scholars have called upon the PRC government to engage the ICJ more energetically.<sup>91</sup> Professor Guan Jianjun has recommended that the PRC accept the ICJ's compulsory jurisdiction in the context of particular multilateral treaties and consider utilizing the ICJ's special chamber procedures.<sup>92</sup> But this positive attitude is tempered by a healthy dose of realism. Another scholar, noting that other great powers prefer to avoid international adjudication, has suggested the PRC carefully study the motivations and actions of

---

88. See Zhao Haifeng, *supra* note 32, at 12.

89. *Id.*

90. *Id.*

91. See, e.g., Wang Yong (王勇) & Guan Zhengfeng (管征峰), *Wushiwu nian lai Zhongguo dui Guoji Fayuan Susong Guanxiaquan de Taidu zhi Shuping* (五十五年来中国对国际法院诉讼管辖权的态度之述评) [Review of China's Attitude toward the Compulsory Jurisdiction of the International Court of Justice in the past 55 Years], *HUADONG ZHENGFA DAXUE XUEBAO* (华东政法大学学报) 22 [J.E. CHINA UNIV. POL. SCI. & L.] 72, 74-75 (2002) (arguing for a limited acceptance of the ICJ's compulsory jurisdiction).

92. See Guan Jianjun (管建军), *Guoji Fayuan de "Fuxing" yu Woguo zhi Yingdui*, (国际法院的“复兴”与我国之应对) ["Renaissance" of the International Court of Justice and the Response of Our Country], *FAXUE* (法学) [LEGAL SCI. MONTHLY], Apr. 1996, at 11.

such powers before committing itself to international adjudication.<sup>93</sup> Similarly, Professor Guan recommends against the PRC's acceptance of the ICJ's compulsory jurisdiction until all five permanent members of the Security Council also accept to do the same.<sup>94</sup>

### III. SUMMARY AND CONCLUSIONS

The PRC's pattern of participation in international dispute settlement represents a shift from the PRC's early years.<sup>95</sup> But it remains a far cry from the more aggressively internationalist approach adopted during the ROC period.<sup>96</sup> This concluding section speculates briefly about China's future policy and impact on international adjudication.

#### A. *China's Future Policy Toward International Adjudication*

As this brief study has suggested, the PRC's post-reform engagement with international adjudication is significant. Since 1978, China has entered into numerous treaties that would allow the PRC to submit disputes to arbitration. Most importantly, it has subjected itself to three international treaty regimes—ICSID, UNCLOS, and the WTO DSB—that could require the PRC to submit to involuntary international adjudication.<sup>97</sup> This trend is also reflected in the generally positive view of international dispute resolution among PRC scholars and publicists.

Yet it would be too hasty to declare that the PRC is ready to become a regular supporter of international adjudication. The PRC continues to avoid (when possible) most compulsory dispute resolution provisions. It has maintained its avoidance of compulsory jurisdiction in the International Court of Justice. It has been a critic of the International Criminal Court's attempt to define the crime of "aggression" at its recent conference in Kampala, Uganda.<sup>98</sup>

---

93. See Su Xiaohong (苏晓宏), *Daguo Weishenme Buxihuan Guoji Sifa* (大国为什么不喜欢国际司法) [*Why Great Powers Dislike International Adjudication*], LEGAL SCI. MONTHLY, Nov. 2003, at 8.

94. See Wang Yong & Guan Zhengfeng, *supra* note 91, at 11.

95. See *supra* Part I.

96. See *supra* Part I.

97. See *supra* Part II.

98. Int'l Crim. Ct. [ICC], *Review Conference of the Rome Statute of the International Criminal Court*, at 125, ICC Doc. RC/11 (May 31-June 11, 2010), [http://www.icc-cpi.int/icedocs/asp\\_docs/ASP9/OR/RC-11-ENG.pdf](http://www.icc-cpi.int/icedocs/asp_docs/ASP9/OR/RC-11-ENG.pdf).

What then should we make of the PRC's willingness to join the ICSID, UNCLOS, and WTO DSB systems? In my view, the PRC's willingness to subject itself to the WTO DSB is simply a price of admission to the WTO. It is worth noting that when given an opportunity, the PRC will always choose the most limited compulsory jurisdiction possible, as it did in the UNCLOS system. There is little evidence in the PRC's pattern of participation in international adjudication will shift so that it will willingly subject itself to compulsory jurisdiction if there is any way for it to avoid doing so.

### *B. Implications for International Adjudication*

The PRC's approach has important consequences for the continued development of international courts and tribunals. As a leading political and legal power, the PRC's limited and cautious approach to international adjudication will likely have spillover effects on other countries. A few possibilities follow.

First, the United States has a very similar approach to international adjudication as China. The United States has, like the PRC, withdrawn from the ICJ's compulsory jurisdiction.<sup>99</sup> Unlike China, the United States has not acceded to UNCLOS, but if it did, it would most likely exclude sea boundaries and military activities from any UNCLOS forum's jurisdiction.<sup>100</sup> The United States has made clear that it will not agree to any cases heard in the ITLOS and instead will opt for arbitration.<sup>101</sup>

On the other hand, like the PRC, the United States is an active participant of the WTO DSB system. The United States is one of the most active members of the WTO DSB system, as well as one of the most the most frequently targeted.<sup>102</sup> Similarly, the United States is an active supporter of the ICSID Convention system by making submission to ICSID arbitrations standard features of its BITs<sup>103</sup> and

---

99. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 80 AM. J. INT'L L. 151, 163–65 (1986) (describing the U.S. withdrawal from jurisdiction of the ICJ during the course of proceedings brought by Nicaragua against the United States).

100. *But see* S. REP. NO. 110-9, at 9 (2007) (recommending U.S. accession to UNCLOS).

101. *Id.* at 19.

102. JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RS 20088, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION (WTO): AN OVERVIEW 2 (2010) (“Approximately one-half of the 405 WTO complaints involve the United States as complaining party or defendant.”).

103. *See* U.S. Model BIT, *supra* note 55.

acceding to ICSID in many of its free trade agreements.<sup>104</sup> Hence, like the PRC, the United States has shown a striking preference for international adjudication for economic issues while avoiding and sometimes decrying international adjudication in other contexts. Moreover, like the PRC, the United States has preferred arbitration systems, where it has the power to appoint at least one arbitrator, over stand-alone international courts.<sup>105</sup>

The similarity between the American and Chinese approaches to international adjudication matters because both countries exercise outsized influence on global affairs. The unwillingness of two of the world's largest economic and military powers to submit non-economic matters to international adjudication will limit the effectiveness of international courts like the ICC and the ICJ. Instead, it is possible that countries, following the PRC and U.S. examples, will increasingly resort to arbitral mechanisms over judicial ones. It is also possible that other countries will eschew international adjudication altogether for most non-economic disputes. In any event, if the PRC's approach remains the same as it is today, it is unlikely that the United States will alter its policies to become friendlier toward international adjudication. Indeed, China's participation in the UNCLOS, and its possible manipulation of international adjudication, is already being used as an argument against U.S. ratification of the treaty.<sup>106</sup>

To be sure, how international adjudication will develop in the future is hard to predict. This study suggests a number of areas of important research to further analyze this question. For instance, the PRC's domestic enforcement of international tribunal judgments will reveal more evidence of its seriousness toward international adjudication. Similarly, the PRC's aggressive promotion of its judges to international tribunals, including ones to which it does not grant

---

104. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1135, 32 I.L.M. 289, 646 (1993).

105. This strategy of preferring arbitration over independent courts has been theorized by some scholars to actually enhance the prospects for resolving international disputes. See generally Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005). This view has been criticized. See generally Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005). It is striking, however, that both China and the United States seem to prefer these kinds of less independent tribunals.

106. See John Bolton & Dan Blumenthal, *Time to Kill the Law of the Sea Treaty—Again*, WALL ST. J., Sept. 29, 2011, at A15 (“If the Senate ratifies the treaty, we would become subject to its dispute-resolution mechanisms and ambiguities.”).

2012] CHINA AND THE FUTURE OF INTERNATIONAL ADJUDICATION 173

jurisdiction, may reveal its attitude about the significance of those tribunals as players in world politics. The U.S. reaction to the PRC's approach also bears further consideration.

In any event, the one safe prediction is that, for better or for worse, the PRC will play a key role in shaping the future of international adjudication.