

MEASURING CHINA'S SOCIAL INSURANCE LAW UNDER INTERNATIONAL STANDARDS OF INTERNATIONAL LABOUR ORGANIZATION AND INFLUENCES OF SOCIAL DIMENSION PROVISIONS OF FREE TRADE AGREEMENTS AND BILATERAL INVESTMENT TREATIES



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This article analyses China's new Social Insurance Law and its treatment of foreigners in an international context. First discussed is the International Labour Organization (ILO) Convention 102 establishing standards and requirements for social security regimes. Second, other international obligations that may implicate additional social security obligations are dealt with, looking at free trade agreements and bilateral investment treaties. This is followed by an outline of the highlights of China's new Social Security Law and its obligations placed on foreign nationals. Also, some of the domestic issues of implementation are also identified. The fourth section compares China's new social security provisions with those of other developed countries, including Germany, South Korea, US, and Japan. Finally, based on the above, analysis of the compatibility of China's new law is made under ILO Convention 102.

I. International Standards: ILO Social Security Convention 102

A. Background

Adopted by the International Labour Conference of the International Labour Organization (ILO) on 28 June 1952, the ILO Social Security (Minimum Standards) Convention, Number 102, is the flagship of all ILO Social Security Conventions, as it is the only international instrument, based on general social security principles, that establishes

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worldwide-agreed minimum standards for all nine branches of social security: (1) medical care, (2) sickness benefit, (3) unemployment benefit, (4) old-age benefit, (5) employment injury benefit, (6) family benefit, (7) maternity benefit, (8) invalidity benefit and (9) survivors' benefit.¹ As of November 2015, 51 countries have ratified the Convention.² The US has not ratified the Convention nor have the majority of Eastern Asian countries, including China, with the notable exception of Japan.³

B. Ratifying the Convention: Flexibility in Social Security Regimes

Although the Convention aims to have ratifying countries aspire to provide universal social security to all citizens across these nine branches, it is built upon the basis that there is no right model for every country with respect to social security, given countries' disparate social and cultural values, their unique histories, their institutions and their differing levels of economic development. To this end, the Convention affords ratifying member countries some flexibility in striving towards universal social security for all citizens across the nine branches, in three important respects.

First, the Convention may be ratified by a country, without agreement to abide by it in its entirety. The Convention is composed of two parts: the general social security principles, and agreed upon minimum standards across the nine branches. To ratify the Convention, a country has to accept the general social security principles but only the minimum standards for at least three of the social security branches, including at least one of the following: (1) unemployment, (2) old age, (3) employment injury, (4) invalidity or (5) survivors.

Second, under the Convention, Art 9 expressly provides for three alternatives for countries to provide universal social security under the branches it agrees to. The country can choose to protect (1) 50 per cent of all citizens, (2) 20 per cent of all citizens of the economically active population or (3) 50 per cent of all employees.⁴

¹ International Labour Organizations Social Security (Minimum Standards) Convention (ILO No. 102), 28 June 1952, 210 UNTS 131, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C102 (last visited June 2, 2015).

² http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312247 (last visited July 5, 2015).

³ *Ibid.*

⁴ International Labour Organization No. 102 (n 1 above), Art 9.

Third, countries, in committing to provide social security across chosen branches, can opt to administer through public or private means.

C. Social Security Regimes: General Provisions and Minimum Standards

The Convention, with respect to the countries who have ratified it, sets minimum social security standards across the branches agreed to with regard to: (1) the percentage of the country's population to be at least protected in case of occurrence of one of the specified contingencies, (2) a minimum level of benefits to be paid to citizens in case of occurrence of one of the contingencies and (3) the conditions for and periods of entitlement to the prescribed benefits.

For each of the Convention's social security branches, Table I below identifies prescribed minimum standards for coverage, levels of benefits and other conditions.

Table I: ILO Social Security Convention (Minimum Standards), 1952 (No. 102)⁵

ILO Social Security Convention (Minimum Standards)			
Branch	Coverage	Benefit	Conditions/ Duration
Sickness	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	45%	To preclude abuse 26 weeks
Unemployment	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	45%	To preclude abuse 13 weeks in 12 month period
Old-Age	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	40%	30 years Throughout contingency

⁵ Valerie Schmitt, "International Labour Organization Convention 102 on Social Security, International Labour Organization DWT Bangkok Experts Meeting in Jakarta" (12–15 Dec 2011), available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/presentation/wcms_170572.pdf (last visited June 2, 2015).

Table I (Continued)

Branch	Coverage	Benefit	Conditions/ Duration
Employment Injury <ul style="list-style-type: none"> • Short-Term Disability • Permanent Disability • Death 	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	50% 50% 40%	No qualifying period allowed Throughout contingency
Family	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	3%	To preclude abuse Throughout contingency
Maternity	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	45%	To preclude abuse Minimum 12 weeks
Invalidity	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	40%	15 years Throughout contingency <i>or</i> until old-age benefit is paid
Survivor's Benefit	50% of all residents <i>or</i> 20% of residents within economically active population <i>or</i> 50% of employees	40%	15 years Throughout contingency

II. Other International Standards and Influences: Bilateral Treaties, Free Trade Agreements and Bilateral Investment Treaties

A. China–Association of Southeast Asian Nations (Singapore) Social Security Regimes

China and Association of Southeast Asian Nations (ASEAN) have a bilateral free trade and investment agreement.⁶ The Framework

⁶ China Ministry of Commerce, “China Free Trade Agreement Network”, available at http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (last visited 9 Feb 2015).

Agreement on Comprehensive Economic Cooperation between China and ASEAN was signed on 5 November 2002. The framework comprises three agreements to date: Trade in Goods, Trade in Services and Investment, which were concluded in November 2004, January 2007 and August 2009 respectively. The Working Group on Economic Cooperation under the framework agreement held their first meeting in 2009, which focused on various areas of implementation in relation to the free trade agreement (FTA). In spite of lengthy negotiations conducted on a sequential basis, trade between China and ASEAN grew at an exponential rate between 2004 and 2008; almost surpassing the US\$200 billion target two years ahead of schedule. Part of this success was contributed by the implementation of the Early Harvest Programme for goods in January 2004. It should be noted that the China–ASEAN FTA deals primarily with trade and tariffs and does not touch upon social dimensions of trade, to include employment and labour provisions, and so does not implicate social security regimes.⁷

As it is impractical to focus on all ASEAN countries, focus is on Singapore with whom China also has an FTA. The China–Singapore Free Trade Agreement (CSFTA) was signed after eight rounds of negotiations held over two years in both Singapore and Beijing. The CSFTA negotiations were concluded on 3 September 2008 in Beijing. This is the first comprehensive bilateral FTA that China had signed with another Asian country, covering customs procedures, economic cooperation, dispute settlement, rules of origin, sanitary measures, technical barriers to trade, trade in goods and services and trade remedies, among others. The CSFTA entered into force on 1 January 2009. However, it should also be noted, like the China–ASEAN FTA, that the China–Singapore FTA deals mostly with trade and tariffs and does not envelop social dimensions such as employment and labour provisions and so does not touch social security regimes.⁸

Social security regimes of China and Singapore are provided in Table II, showing China's comparison with even its developed country partners.

⁷ China Ministry of Commerce, "Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and the Association of Southeast Asian Nations, China-ASEAN, January 2007" (2013), available at <http://fta.mofcom.gov.cn/dongmeng/annex/xieyi2004en.pdf> (last visited June 2, 2015).

⁸ China Ministry of Commerce, "China-Singapore Free Trade Agreement", available at <http://fta.mofcom.gov.cn/topic/ensingapore.shtml> (last visited 9 Feb 2015).

Table II: Comparison: China–Singapore Social Insurance Regimes

Comparison: China-Singapore Social Insurance Regimes		
Social Security Branch	China	Singapore ^a
Medical Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> 55% <i>Conditions/Duration:</i> No qualifying period No duration	<i>Coverage:</i> 100% <i>Benefit:</i> 80% <i>Conditions/Duration:</i> No qualifying period No duration
Unemployment Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> Amount not related to salary; fixed amount set by province <i>Conditions/Duration:</i> Eligible after 1 year Up to 2 years duration	<i>Coverage:</i> No system in place <i>Benefit:</i> N/A <i>Conditions/Duration:</i> N/A
Employment Injury Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> Salary + medical costs For duration of contingency	<i>Coverage:</i> 100% <i>Benefit:</i> 66.7–100% <i>Conditions/Duration:</i> No qualifying period. 100% of up to 14 days 66.7% thereafter up to 1 year
Maternity Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> No conditions Up to 5 months	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> No conditions Up to 16 weeks

Note: ^a United States Social Security Administration, “Singapore, Social Security Systems throughout the World (2010)”, available at <http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/asia/singapore.html> (last visited 9 Feb 2015).

B. China–US Bilateral Investment Treaty (Trading and Social Security)

As part of the US–China Strategic Economic Dialogue, the US and China agreed in 2008 to negotiate a bilateral investment treaty (BIT).⁹ They are

⁹ The first Strategic Economic Dialogue between the United States and China was launched in September 2006. The second to the sixth Strategic Economic Dialogues were held in December

currently negotiating a BIT, as outlined below.¹⁰ If forged, this agreement also would likely not impact either party's social security regimes. China and the US do not have a totalisation agreement on social security.

1. *China–US model BIT*

In February 2009, the Obama administration initiated a review of the US's model BIT to ensure that it was consistent with the public interest and the administration's overall economic agenda.¹¹ It was an administration priority to enhance labour and environmental standards in the model BIT. As a result, the 2012 model BIT expands obligations in the areas of labour and environment in four important ways.

1. New obligation not to “waive or derogate” from domestic laws. The 2012 model BIT includes an obligation on parties to not waive or derogate from their domestic labour and environmental laws as an encouragement for investment.¹²
2. New obligation to “effectively enforce” domestic laws. The 2012 model BIT also contains an obligation on parties not to fail to effectively enforce their domestic labour and environmental laws as an encouragement for investment.
3. New provision whereby parties reaffirm and recognise international commitments. Under the 2012 model BIT, parties reaffirm their commitments under the ILO Declaration and recognise the importance of multilateral environmental agreements.¹³
4. Strengthened consultations procedure. Finally, the 2012 model BIT subjects the articles on labour and environment to more detailed and extensive consultation procedures than those applicable under the 2004 model BIT.¹⁴

With regard to the US–China BIT, the 2012 model BIT is serving as the framework for negotiations and the US aims to bind other countries, from preventing businesses from compromising worker protections, under the banner of investment.

To this end, under the 2012 model BIT, the US and its BIT partner commit to their respective obligations as ILO members and to their

2006, May 2007, December 2007, June 2008 and December 2008, respectively. When President Barack Obama and President Hu Jintao first met in April 2009, the Strategic Economic Dialogue was renamed as the Strategic and Economic Dialogue to encompass strategic issues. The first Strategic and Economic Dialogue was held from 28 to 29 July 2009, in Washington, D.C.

¹⁰ China Ministry of Commerce (n 6 above).

¹¹ US Department of State, “Model Bilateral Investment Treaty” (20 Apr 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm> (last visited June 2, 2015).

¹² *Ibid.*

¹³ US Department of State (n 12 above).

¹⁴ *Ibid.*; see also “International Labour Organization Declaration on Fundamental Principles and Rights at Work and Its Follow Up”, 18 June 1998, 37 ILM 1233, available at <http://ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> (last visited June 2, 2015).

commitment to the *ILO Declaration on Fundamental Principles and Rights of Work and Its Follow-Up*.¹⁵ Moreover, the US and its BIT partner agree to affirm domestic laws and not to waive from them with respect to worker protections via sustained or reoccurring action or inaction.¹⁶ To clarify, the model BIT specifies which domestic US and partner laws would pertain to worker rights, reflecting the ILO Core Labour Standards, as those related to (1) freedom of association, (2) the effective recognition of the right to collective bargain, (3) the elimination of all forms of compulsory labour, (3) the effective abolition of all forms of child labour and the worst forms of child labour, (4) the elimination of discrimination with respect to employment and occupation and (5) acceptable conditions of work with respect to minimum wages, hours of work and occupational safety and health.¹⁷ Under the model BIT, however, the US has restricted its commitment, via an exculpatory footnote, to conforming only US Congressional acts and regulations pursuant to such an act.¹⁸

Although the 2012 model BIT dictates how the US and its partner will enforce the agreement to deal with investment disputes as outlined in the next section, it is less clear how the US and its partner would enforce its employment/labour provisions. The article pertaining to these provisions, simply states that the US and its partners, when they have a dispute that falls under it, should notify the other by writing for a request for consultations, with the other responding within 30 days, and with both agreeing to work towards a mutually satisfying resolution.¹⁹ Unlike model FTA language, the US BIT does not wed investment sanctions with its employment/labour provisions nor does it seem to have any meaningful enforcement mechanism for them.

The US clearly is not confident that the BIT can be effectively enforced, and to this end, has expressed interest in having a set of enforcement procedures to effectively monitor compliance with the national treatment obligations. For example, in tangent to the 2012 model BIT dispute provisions, the US has suggested that “it is necessary to draft the BIT with specific presumptions, evidentiary burdens, or standards to allow inferences of discrimination when the Chinese public record is murky”.²⁰

Under the China–US BIT, there are no agreed upon substantive ILO rights that implicate social security, let alone mandate social security for

¹⁵ US Department of State, “2012 U.S. Model Bilateral Investment Treaty”, Art 13.1, available at <http://www.state.gov/documents/organization/188371.pdf> (US Model BIT) (last visited June 2, 2015).

¹⁶ *Ibid.*, Art 13.2.

¹⁷ *Ibid.*, Art 13.3 (a)–(f).

¹⁸ *Ibid.*, n. 17.

¹⁹ *Ibid.*, Art 13.4.

²⁰ Kong Qingjiang, “US-China Bilateral Investment Treaty Negotiations” (EAI Background Brief No. 507, 25 Feb 2010) p 7, available at <http://www.eai.nus.edu.sg/BB507.pdf> (last visited June 2, 2015).

foreigners. The most controlling aspect of the China–US BIT as it pertains to social security is that both parties agree to abide by domestic laws with respect to workers, which would, under the Chinese Social Insurance Law, extend social security insurances to foreigners. And observe that US agreement to ILO core labour standards, with the traditional US footnote caveat means only the ILO Declaration.

III. China's New Social Insurance Law²¹

A. Introduction

Under the law, major general provisions across the chapters include, but are not limited to, (1) the establishment of a nationwide unified personal social security ID system based on the same identity number for each citizen, (2) the portability of social security insurances, including basic pension and healthcare benefits across different regions in the country, (3) the gradual realisation of a national pooling fund for the basic pension scheme and a provincial pooling fund for the other social insurance schemes, (4) the coverage of foreigners working in China and (5) enhanced compliance and enforcement measures with regard to a unified collection of social insurance contributions, privacy protection as regards social security information, prevention of the misappropriation of social insurance funds, investment and management of the non-contributory national social security fund (as a strategic reserve for the social insurance schemes).²²

The law does not specify national contribution rates by employers and employees and the basis of calculation for each kind of social security leaves room for local governments to formulate their own policies in line with their local economic realities.

The law, however, expressly specifies that both the employer and employee will make contributions to the pension, basic medical insurance and unemployment insurance while only the former will make contributions to the work-related injury insurance and the maternity insurance.²³

In the past, under People's Republic of China (PRC) social security regulations and rules, there was not a real national scheme. State-owned enterprises were not covered while private ones were; likewise, urban and rural citizens were treated differently in terms of coverage. Under the new law, in the PRC, in the national scheme all companies,

²¹ Also referred to as Social Security Law.

²² US Model BIT (n 16 above), Art 13.4.

²³ *Ibid.*, Ch 2, Art 12.

state-owned and private, are covered, as are all citizens, both urban and rural. Perhaps, more importantly, is the national portability of the social security scheme. Previously, if a company or citizen moved from one area of the country to another, the social security relationship could not be transferred. The new law lifts this restriction. Under the PRC employment law, the employer is obliged to help the employee to transfer his social security relationship, and an individual will be allowed to transfer his pension, basic medical and unemployment insurance relationships with him when the individual decides to move to another city to take up new employment. The social security contribution years will be calculated cumulatively regardless of the change in the work location of the individual concerned.

Likewise, in the past, it was not entirely clear whether expatriate employees needed to participate in the Chinese social insurance scheme. In practice, foreigners if they preferred could have participated in the pension, basic medical insurance and work-related injury insurances based on a contractual agreement with the employer in some cities such as Shanghai, Suzhou and Tianjin. The law changes this dynamic, as Chinese companies employing foreigners must include them in the social security scheme.²⁴

B. New Law

The Social Insurance Law of the PRC was passed during the 11th session of the Standing Committee of the National People's Congress of China on 28 October 2010.²⁵ The law took effect on 1 July, 2011. Before its promulgation, PRC social security policies and related administrative issues were scattered throughout a range of national and local regulations and rules. The law, with respect to the PRC, is a comprehensive piece of legislation in that it consolidates these social security regulations and rules, while introducing new ones, in an attempt to apply to all companies, both state-owned and private, and to cover all citizens, both urban and rural, as well as foreigners.²⁶

²⁴ *Ibid.*, Ch 12, Art 97.

²⁵ Laney Zhang, "China: Law on Social Insurance Passed" Library of Congress (4 Nov 2010), available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205402348_text (last visited June 2, 2015).

²⁶ "New Social Insurance Law Aims to Improve Social Welfare System in China" *China Briefing* (8 Mar 2011), available at <http://www.china-briefing.com/news/2011/03/08/new-social-insurance-law-aims-for-an-all-round-social-welfare-system-in-china.html> (last visited June 2, 2015). See summary in, Manuela Reintgen, "The Social Security System in China" *Ecovis* (27 June 2014), available at <http://www.ecovis.com/focus-china/chinas-social-security-system/> (last visited June 2, 2015).

In total, the law encompasses twelve chapters, and contains one chapter on general social security provisions, one chapter each on five social insurance programmes and their minimum standards, with the remaining six chapters covering social security administrative concerns, including outlining social insurance agencies, social insurance supervision as well as legal responsibilities and supplementary provision, social insurance funds and social insurance contributions.²⁷

Table III summarises the minimum standards of China's new law.

Table III: China Social Insurance Law (Minimum Standards)

China Social Insurance Law (Minimum Standards)			
Branch	Coverage	Benefit	Conditions/Duration
Pension	100% Includes foreigners, unless otherwise exempt	40–60%	15 years ²⁸ Once the employee has reached statutory retirement age and/or has paid in for at least 15 years, may draw benefit until pool is exhausted, after which may draw from public pool. ²⁹
Medical Insurance	100% Includes foreigners, unless otherwise exempt	55% ³⁰	No qualifying period ³¹ Urban Medical Insurance programme for urban residents/Rural Medical Cooperative for rural residents ³² Urban residents pay percentage of income, up to 2%; rural residents pay flat rate ³³

²⁷ 中华人民共和国社会保险法 [Social Insurance Law of the People's Republic of China] (promulgated by Standing Comm. National. People's Congress, 28 Oct 2010, effective from 1 July 2010) (Lawinfochina) (China), available at [\(http://www.lawinfochina.com/display.aspx?id=8328&lib=law&SearchKeyword=Social%20Insurance%20Law%20of%20the%20People's%20Republic%20of%20China&SearchCKeyword=\(New%20Social%20Insurance%20Law\)\)](http://www.lawinfochina.com/display.aspx?id=8328&lib=law&SearchKeyword=Social%20Insurance%20Law%20of%20the%20People's%20Republic%20of%20China&SearchCKeyword=(New%20Social%20Insurance%20Law)) (last visited June 2, 2015); see also Kaizen Corporate Services Limited, "Social Insurance Law of the People's Republic of China" (English Translation), available at, <http://www.by-cpa.com/html/news/20116/1585.html> (last visited 9 Feb 2015).

²⁸ "Mandatory Social Benefits for Chinese Employees", *China Briefing* (21 Feb 2012), available at <http://www.china-briefing.com/news/2012/02/21/mandatory-social-welfare-benefits-for-chinese-employees.html> (last visited June 2, 2015).

²⁹ *Ibid.*

³⁰ Shan Juan, "Health Insurance to Cover 95% of Residents" *China Daily* (8 Jan 2013), available at http://www.chinadaily.com.cn/china/2013-01/08/content_16093578.htm (last visited June 2, 2015).

³¹ *China Briefing* (n 29 above).

³² *Ibid.*

³³ *Ibid.*

Table III (Continued)

Branch	Coverage	Benefit	Conditions/Duration
Unemployment Insurance	100% Includes foreigners, unless otherwise exempt	Fixed amount/set by local provinces, unrelated to salary or amount paid-in	1 year of covered employment Must actively be seeking employment ³⁴ Depends on years of coverage: Less than 5 years =up to 1 year Less than 10 years=up to 1.5 years Less than 20 years=up to 2 years ³⁵
Employment Injury	100% Includes foreigners, unless otherwise exempt	100%, based on average monthly salary over the past 12 months	No qualifying period allowed ³⁶ Insurance pays salary and costs of medical treatment. ³⁷ No duration
Maternity Insurance	100% Includes foreigners, unless otherwise exempt	Average salary within the company where currently employed	No qualifying period Up to 5 months; 3 months is most provinces ³⁸

C. Domestic Implementation: Work in Progress

New implementation provisions were promulgated in 2013 to require stricter and wider enforcement of social insurance contributions.³⁹ Coverage of the new law includes pension premiums, medical insurance premiums, work injury insurance premiums, unemployment insurance premiums and maternity insurance premiums.⁴⁰ Local regulations in

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ (社会保险费申报缴纳管理规定) [Provisions on the Administration of Declaration and Payment of Social Insurance Premiums] (promulgated by Ministry Human Resources & Social Security, 26 Sep 2013, effective from 1 Nov 2013) (LawinfoChina) (China), available at <http://www.lawinfochina.com/display.aspx?id=15166&lib=law&SearchKeyword=social%20insurance&SearchCKeyword> (last visited June 2, 2015).

⁴⁰ *Ibid.*, Art 2. Earlier interim measures previously listed only pensions, medical insurance and work injury insurance premiums, but as of 1 November 2013 all five types of insurance are included. For discussion of earlier measures, see Wan Li, "China Employment Law Alert;

Suzhou also addressed some of the implementation issues of social security, including housing fund and minimum wages.⁴¹ Notwithstanding compliance with international standards, domestic implementation of the Social Insurance Law continues to be a work in progress and criticisms of perceived deficiencies of the law and between the law and the practices also continue.

Commentators on the Social Insurance Law observe that “although the Social Insurance Law establishes penalties and fines for employers that do not comply with the law, the statistics indicate that one of the largest obstacles to China’s social insurance reforms lie in implementation and compliance. For China to accomplish its goal of providing a stronger safety net, it must solve large structural issues such as ensuring that benefits can actually be transferred between regions, and compelling greater compliance by employers”.⁴²

The primary difficulty in China’s social insurance system is the regional diversity in rules and regulations, making it very difficult to have a uniform

Administrative Provisions on Declaration and Payment of Social Security Contributions” Seyfarth Shaw (6 Nov 2013), available at <http://www.seyfarth.com/uploads/siteFiles/publications/SocialSecurityContributions.pdf> (last visited June 2, 2015).

⁴¹ “Decision on Comprehensively Deepening Reform” *TenCentNews* (15 Nov 2013), available at http://news.qq.com/a/20131115/015402_2.htm (last visited June 2, 2015) (no translation available). The Suzhou regulation states that both employers and employees must make mandatory contributions to the five social insurances (pension, medical, unemployment, work injury and maternity) if the employee’s monthly wage is over RMB2,170. Dezan Shira and Associates, “Social Insurance, Housing Fund, and Minimum Wage Adjusted in Suzhou” (8 July 2013), available at <http://www.dezshira.com/updates/2013/07/social-insurance-housing-fund-and-minimum-wage-adjusted-in-suzhou.html/> (last visited June 2, 2015).

⁴² “China’s Social Security System” *China Labour Bulletin*, available at <http://www.clb.org.hk/en/view-resource-centre-content/110107> (last visited 9 Feb 2015). According to a Report in the *Labour Bulletin*, “although both the *Labour Contract Law* and *Social Insurance Law* state that social insurance benefits and entitlements are transferrable from location to location and employer to employer, the laws only broadly state the principle without establishing a system for exactly how such transfers are to take place. However, in late 2009, the State Council enacted two provisional measures instructing local authorities on how to handle the transfer of pension and medical insurances and several regions have implemented their own policies for the transfer of other social insurances, such as unemployment insurance. When workers move to a new city or town, they should be able to transfer the entirety of their individual pension account over to the social insurance agency in the new work location. An additional amount equal to 12 percent of the worker’s former wages is transferred over to the new social insurance agency’s pooled funds, to cover the employer-funded pooled funds. Workers may also temporarily stop contributing into the system (if they return to their villages, for instance) and resume contributing later on, even in another city or town. The provisional measures maintain that the individual account will always be preserved for the worker, even if the worker does not return to the urban workforce, and states that the worker will still be able to enjoy urban retirement benefits if the worker had contributed for the required number of years. The worker also has the option to transfer their urban retirement account into the rural retirement system. The transference of medical insurance operates in a similar manner, allowing for the transfer of a worker’s individual account between different urban areas as well transfers into the rural medical scheme.” *Ibid.*

and efficient national insurance programme.⁴³ While portability has been addressed by the law, without a universal national system local variations will likely continue the lack of coherency in implementation. Critics have argued that the social security system retains gaps in benefits, eligibility requirements and disparities between public and private sectors⁴⁴ and can still produce obstacles to labour mobility.⁴⁵

According to Professor Wenjiong He, there are benefit gaps between labourers in the public and enterprise industries, where public employees still fall under the regulations from 1950 wherein the government funded social insurance. Public employees generally not been required to contribute to the system but will still receive pensions nearly double that of a private employee under the current scheme.⁴⁶ Medical insurance also shows a benefit gap between farmers, urban residents, enterprise workers and civil servants with an accumulated fund per group at a ratio of 1:3:10:20.⁴⁷ This results in the younger generation searching for jobs in the public sector while older labourers remain in the lesser desirable rural and enterprise positions.

Professor He continues that another labour mobility problem is that social insurance works at a regional level, while employment within a region works from the same pool of funds; if that labourer decides to enter a different region he may face problems transferring his earned benefits. He proposes the solution would be to pool social insurance funds at a national level as opposed to regional so that labour mobility would

⁴³ Wenjiong He, "Free Movement of Workers and Unification of the Social Insurance System" in Alan C Neal (ed), *Cross-Currents in Modern Chinese Labour Law* (2014) 163. One assessment of the new law provides that improved portability of social insurance benefits is intended by the law. "Implementation of SIL encourages workforce mobility through the transferability of social insurance accounts across different locations, which means workers are allowed to transfer pension, medical and unemployment insurance from one city or province to another when they change their place of work. It also makes clear that the premium contribution years in different locations will be calculated cumulatively. This enables the portability of individual social insurance accounts and gives the employees more flexibility to better enjoy the pension benefits". Blank Rome, "China Social Insurance Law Update" (August 2011, No. 2), available at <http://www.blankrome.com/index.cfm?contentID=37&itemID=2555> (last visited June 2, 2015). See generally, Nurulsyahirah Tahaand, Mahmood Messkoub and Karin Astrid Siegmann, *How Portable is Social Security for Migrant Workers? A Review of the Literature* (International Institute of Social Studies, 2013), available at http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Research_and_projects/IDRC-MGSJ/Taha-et-al-portability_of_rights-2013_LitRev_bibly_220913.pdf (last viewed June 2, 2015).

⁴⁴ There are different *pension* schemes for civil servants, enterprise workers, urban household businessmen and rural workers that result in difficulty when "transferring their social insurance accounts" from one job to another. He (n 44 above), p 163.

⁴⁵ *Ibid.*, p 159.

⁴⁶ *Ibid.*, p 162.

⁴⁷ *Ibid.*

increase among the regions in China. There are also different pension schemes (as an example) that further obstruct labour mobility from one career to another.⁴⁸

Finally, it is argued that local policy is another barrier towards a more cohesive social insurance system. Local rules and customs will sometimes require migrant employees to work for a certain amount of time in their region before they recognise the labourer's right to benefits, or in other cases they will only allow for the transfer of funds within a worker's personal account and not their regional social pool funds from a different region effectively disenfranchising that labourer from hard-earned benefits.⁴⁹

IV. Comparing Social Security Regimes and Bilateral Treaties

A. Accommodating Foreigners with Dual Social Security Systems

1. China–European Union (Germany)

Currently, China and the European Union (EU) have neither a bilateral free trade nor investment agreement that would implicate respective social security regimes.⁵⁰ However, China has entered into an agreement with one EU country, Germany, on totalising social security issues, related to overlapping systems, dealing specifically with pensions, and is in negotiations with several others, including France, Sweden, Belgium, Finland, Denmark and Spain.⁵¹ The agreement between China and Germany effects approximately 4,500 Chinese-based German workers and exempts them from paying into the Chinese *pension insurance or unemployment insurance*, if they have paid into Germany's, for a period of up to four years.⁵² The reciprocal would hold for German-based Chinese workers, estimated to be around 10,700 people. However, Chinese-based German workers would still have to pay into other Chinese social insurances, under its new law.⁵³

Table IV provides a China–Germany comparative chart on their respective social security schemes.

⁴⁸ There are different pension schemes for civil servants, enterprise workers, urban household businessmen, and rural workers that result in difficulty when “transferring their social insurance accounts” from one job to another. *Ibid.*, p 163.

⁴⁹ *Ibid.*, p 165.

⁵⁰ China Ministry of Commerce (n 6 above).

⁵¹ “Insurance for Foreigners to Be Simplified” (5 June 2013), available at http://www.china.org.cn/china/2012-06/05/content_25565469.htm (last viewed June 2, 2015).

⁵² *Ibid.*

⁵³ *Ibid.*

Table IV: Comparison: China–Germany Social Insurance Regimes

Comparison: China–Germany Social Insurance Regimes		
Social Security Branch	China	Germany ⁵⁴
Medical Insurance	Coverage: 100% Benefit: 55% Conditions/Duration: No qualifying period No duration	Coverage: All employees earning up to €49,950/annum Benefit: 80% Conditions/Duration: No qualifying period No duration
Unemployment Insurance	Coverage: 100% Benefit: Amount not related to salary; fixed amount set by province Conditions/Duration: Eligible after 1 year Up to 2 years duration	Coverage: 100% Benefit: 67% Conditions/Duration: No qualifying period From 6 to 24 months, depending on time worked
Employment Injury Insurance	Coverage: 100% Benefit: 100% Conditions/Duration: Salary + medical costs For duration of contingency	Coverage: 100% Benefit: 80% Conditions/Duration: Salary + medical costs Up to 78 weeks
Maternity Insurance	Coverage: 100% Benefit: 100% Conditions/Duration: No conditions Up to 5 months	Coverage: 100% Benefit: 100% Conditions/Duration: No qualifying period Up to 14 weeks

2. China–South Korea

Currently, China and South Korea have neither a bilateral free trade nor investment agreement that would implicate respective social security

⁵⁴ United States Social Security Administration, “Germany, Social Security System throughout the World Europe, 2010”, available at <http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/europe/germany.html> (last visited 9 Feb 2015).

regimes.⁵⁵ Currently, China is working with both South Korea and Japan on a joint study concerning the feasibility of such an agreement. However, China has entered into an agreement with South Korea, on social security issues, related to overlapping systems, dealing specifically with *pensions*. The agreement between China and South Korea effects approximately 2,000 Chinese-based Korean workers and exempts them from paying into the Chinese pension insurance or unemployment insurance, if they have paid into South Korea's, for a period of up to five years.⁵⁶ The reciprocal would hold for South Korean-based Chinese workers, estimated to be about 11,000 people. However, Chinese-based South Korean workers would still have to pay into other Chinese social insurances, under its new law.⁵⁷

**Table V: Comparison: China–South Korea
Social insurance Regimes**

Comparison: China–South Korea Social Insurance Regimes		
Social Security Branch	China	South Korea⁵⁸
Medical Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> 55% <i>Conditions/Duration:</i> No qualifying period No duration	<i>Coverage:</i> 100% <i>Benefit:</i> 10% <i>Conditions/Duration:</i> No qualifying period No duration
Unemployment Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> Amount not related to salary; fixed amount set by province <i>Conditions/Duration:</i> Eligible after 1 year Up to 2 years duration	<i>Coverage:</i> 100% <i>Benefit:</i> 90% <i>Conditions/Duration:</i> 6 months employment during 18 month period From 90 days up to 240 days, depending on time worked

⁵⁵ China Ministry of Commerce (n 6 above).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ United States Social Security Administration, "South Korea, Social Securities Programs throughout The World: Asia and the Pacific, 2010", available at <http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/asia/southkorea.html> (last visited 9 Feb 2015).

Table V (Continued)

Social Security Branch	China	South Korea
Employment Injury Insurance	Coverage: 100% Benefit: 100% Conditions/Duration: Salary + medical costs For duration of contingency	Coverage: 100% Benefit: 70% Conditions/Duration: Salary +_ medical costs For duration of contingency
Maternity Insurance	Coverage: 100% Benefit: 100% Conditions/Duration: No conditions Up to 5 months	Coverage: 100% Benefit: 100% Conditions/Duration: N/A Up to 60 days with full pays; up to 90 with no additional pay.

B. Comparisons of Social Insurance Regimes: China

1. United States

A comparison of China–US Social Insurance Regimes is provided in Table VI.

Table VI: Comparison: China–US Social Insurance Regimes

Comparison: China–US Social Insurance Regimes		
Social Security Branch	China	United States
Medical Insurance	Coverage: 100% Benefit: 55% Conditions/Duration: • No qualifying period • No duration	Coverage: N/A Benefit: Conditions/Duration: • Government does not provide as a social insurance, but requires employers with 50+ employees to provide medical insurance for workers who work 30+ hours a week

Table VI (Continued)

Social Security Branch	China	United States
Unemployment Insurance	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> Amount not related to salary; fixed amount set by province</p> <p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • Eligible after 1 year • Up to 2 years duration 	<p><i>Coverage:</i></p> <ul style="list-style-type: none"> • Varies by state, but the average is 50% of wages during base period • States determine a maximum payable wage <p><i>Benefit:</i> States not the federal government determine eligibility, benefit amount or duration of benefit;</p> <p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • Varies by state, how long employee must have worked to receive benefit • All states require recipients to be able and available to work • Depends on state, but benefits can be paid anywhere from 1 to 26 weeks
Employment Injury Insurance	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 100%</p> <p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • Salary + medical costs • For duration of contingency 	<p><i>Coverage:</i></p> <ul style="list-style-type: none"> • Federal government has its own programme for federal employees • No federal employment injury programme • Each state has its own programme, so coverage varies by state <p><i>Benefit:</i></p> <ul style="list-style-type: none"> • Varies by state <p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • Varies by state
Maternity Insurance	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 100%</p> <p><i>Conditions/Duration:</i> No conditions Up to 5 months</p>	<p><i>Coverage:</i> N/A</p> <p><i>Benefit:</i> Government does not provide as a social insurance, but requires employers to provide unpaid leave up to 12 weeks</p> <p><i>Conditions/Duration:</i> Must have worked at least 12 months</p>

2. Japan

Currently, China and Japan have neither a bilateral free trade nor investment agreement that would implicate respective social security regimes.⁵⁹ However, China is currently working with both Japan and South Korea on a joint study concerning the feasibility of such an agreement. China and Japan do not have a totalisation agreement on social security.

Table VII summarises the comparative benefits of Japan's social insurance laws.

Table VII: Comparison: China–Japan Social Insurance Regimes

Comparison: China–Japan Social Insurance Regimes		
Social Security Branch	China	Japan⁶⁰
Medical Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> 55% <i>Conditions/Duration:</i> No qualifying period No duration	<i>Coverage:</i> 100% <i>Benefit:</i> 50% <i>Conditions/Duration:</i> No qualifying period No duration
Unemployment Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> Amount not related to salary; fixed amount set by province <i>Conditions/Duration:</i> Eligible after 1 year Up to 2 years duration	<i>Coverage:</i> <i>Benefit:</i> 50–80% <i>Conditions/Duration:</i> 6 months Between 90 days and 330 days, depending on time worked
Employment Injury Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> Salary + medical costs For duration of contingency	<i>Coverage:</i> 100% <i>Benefit:</i> 60% <i>Conditions/Duration:</i> No qualifying period Salary + medical costs Up to 18 months

⁵⁹ China Ministry of Commerce (n 6 above).

⁶⁰ United States Social Security Administration, "Japan, Social Security Program Throughout The World: Asia and the Pacific", available at <http://www.ssa.gov/policy/docs/progdesc/sptw/2006-2007/asia/japan.html> (last visited 9 Feb 2015).

Table VII (Continued)

Social Security Branch	China	Japan
Maternity Insurance	Coverage: 100% Benefit: 100% Conditions/Duration: No conditions Up to 5 months	Coverage: 100% Benefit: 66% Conditions/Duration: No conditions Up to 14 weeks.

Comparative social security programmes, discussed above, are summarised in Table VIII below.

V. Compatibility with ILO Convention 102

A. General Provisions and Minimum Standards

Although ILO Convention 102 has not been ratified by China, it would appear, *vis-à-vis* its new Social Insurance Law, that it has done so, *per se*. As noted earlier, to ratify 102, all a country needs to do is to agree to its general social security principles as well as adopt the general provisions and minimum standards for three social security branches to include one of the specified ones identified earlier.

The general social security principles of ILO Convention 102 certainly mesh with China's Social Insurance Law, in that, like the law itself, they simply commit the country to establishing protocols for a social security regime, per its national laws. Additionally, as per ILO Convention 102, China, as part of this social security regime, has adopted at least three of the social security branches (ie, medical insurance, unemployment insurance, employment injury insurance and maternity insurance), including at least one of the specified ones, (ie, unemployment insurance and employment injury insurance).

In implementing its social security regime, under Chinese Law, the country also appears to be meeting the minimum standards prescribed under ILO Convention 102 for these social insurances with respect to (1) coverage and (2) conditions and duration of benefit. Of course, while ILO Convention 102 provides flexibility in what a country needs to provide in terms of social security coverage, up to 50 per cent of citizens or employees, China, under its law, already exceeds this threshold, by providing social security coverage to all citizens, even extending it to foreigners. Table IX compares minimum standards of ILO Convention 102 and Chinese minimum standards for social insurances provided under its new law.

Table VIII: Summary of Selected Social Insurance Programmes

Comparison: China–Trading Partner Social Insurance Regimes						
Social Security Branch	China	United States	Germany	Singapore	Japan	South Korea
Medical Insurance	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 55%</p> <p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • No qualifying period • No duration 	<p><i>Coverage:</i> N/A</p> <p><i>Benefit:</i></p> <ul style="list-style-type: none"> • Government does not provide as a social insurance, but requires employers with 50+ employees to provide medical insurance for workers who work 30+ hours a week <p><i>Conditions/Duration:</i></p>	<p><i>Coverage:</i> All employees earning up to €49,950/annum</p> <p><i>Benefit:</i> 80%</p> <p><i>Conditions/Duration:</i> No qualifying period No duration</p>	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 80%</p> <p><i>Conditions/Duration:</i> No qualifying period No duration</p>	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 50%</p> <p><i>Conditions/Duration:</i> No qualifying period No duration</p>	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 10%</p> <p><i>Conditions/Duration:</i> No qualifying period No duration</p>
Unemployment Insurance	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> Amount not related to salary; fixed amount set by province</p>	<p><i>Coverage:</i></p> <ul style="list-style-type: none"> • Varies by state, but the average is 50% of wages during base period • States determine a maximum payable wage 	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 67%</p>	<p><i>Coverage:</i> No system in place</p> <p><i>Benefit:</i> N/A</p> <p><i>Conditions/Duration:</i> N/A</p>	<p><i>Coverage:</i></p> <p><i>Benefit:</i> 50–80%</p> <p><i>Conditions/Duration:</i> 6 months</p>	<p><i>Coverage:</i> 100%</p> <p><i>Benefit:</i> 90%</p> <p><i>Conditions/Duration:</i></p>

	<p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • Eligible after 1 year • Up to 2 years duration 	<p><i>Benefit:</i></p> <p>States not the federal government determine eligibility, benefit amount, or duration of benefit;</p> <p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • Varies by state, how long employee must have worked to receive benefit • All states require recipients to be able and available to work • Depends on state, but benefits can be paid anywhere from 1 to 26 weeks 	<p><i>Conditions/Duration:</i></p> <p>No qualifying period</p> <p>From 6 to 24 months, depending on time worked</p>		<p>Between 90 days and 330 days, depending on time worked</p>	<p>6 months employment during 18-month period</p> <p>From 90 days up to 240 days, depending on time worked</p>
Employment Injury Insurance	<p><i>Coverage:</i></p> <p>100%</p> <p><i>Benefit:</i></p> <p>100%</p> <p><i>Conditions/Duration:</i></p> <ul style="list-style-type: none"> • Salary + medical costs • For duration of contingency 	<p><i>Coverage:</i></p> <ul style="list-style-type: none"> • Federal government has its own programme for federal employees • No federal employment injury programme • Each state has its own programme, so coverage varies by state 	<p><i>Coverage:</i></p> <p>100%</p> <p><i>Benefit:</i></p> <p>80%</p> <p><i>Conditions/Duration:</i></p> <p>Salary + medical costs</p> <p>Up to 78 weeks</p>	<p><i>Coverage:</i></p> <p>100%</p> <p><i>Benefit:</i></p> <p>66.7–100%</p> <p><i>Conditions/Duration:</i></p> <p>No qualifying period.</p> <p>100% of up to 14 days</p>	<p><i>Coverage:</i></p> <p>100%</p> <p><i>Benefit:</i></p> <p>60%</p> <p><i>Conditions/Duration:</i></p> <p>No qualifying period</p> <p>Salary + medical costs</p>	<p><i>Coverage:</i></p> <p>100%</p> <p><i>Benefit:</i></p> <p>70%</p> <p><i>Conditions/Duration:</i></p> <p>Salary +_ medical costs</p> <p>For duration of contingency</p>

Table VIII (Continued)

Social Security Branch	China	United States	Germany	Singapore	Japan	South Korea
		<i>Benefit:</i> <ul style="list-style-type: none"> • Varies by state <i>Conditions/Duration:</i> <ul style="list-style-type: none"> • Varies by state 		66.7% thereafter up to 1 year	Up to 18 months	
Maternity Insurance	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> No conditions Up to 5 months	<i>Coverage:</i> N/A <i>Benefit:</i> Government does not provide as a social insurance, but requires employers to provide unpaid leave up to 12 weeks <i>Conditions/Duration:</i> Must have worked at least 12 months	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> No qualifying period Up to 14 weeks	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> No conditions Up to 16 weeks	<i>Coverage:</i> 100% <i>Benefit:</i> 66% <i>Conditions/Duration:</i> No conditions Up to 14 weeks.	<i>Coverage:</i> 100% <i>Benefit:</i> 100% <i>Conditions/Duration:</i> N/A Up to 60 days with full pays; up to 90 with no additional pay.

Table IX: Comparative Minimum Standards of ILO Convention 102 and China's Social Insurance Law

Comparative Minimum Standards: ILO Convention 102 and China's Social Insurance Law												
Minimum Standards	Medical Insurance			Unemployment Insurance			Employment Injury Insurance			Maternity Insurance		
	Benefit	Condition	Duration	Benefit	Conditions	Duration	Benefit	Conditions	Duration	Benefit	Conditions	Duration
ILO 102	45%	N/A	26 week	45%	N/A	13 weeks/12-month period	50%	N/A	Through contingency	45%	N/A	Minimum 12 weeks
China Social Security Law	55%	N/A	None	Fixed amount, unrelated to salary	N/A	From 1 to 2 years	100%	N/A	N/A	100%	N/A	Up to 5 months

From Table IX, above, comparing ILO Convention 102 with China's Social Security Law in terms of minimum standards for the social insurances yields a few important observations. First, ILO and Chinese minimum standards mesh for each of the social insurances in terms of benefit provided, with China exceeding all, with the exception of unemployment insurance. ILO mandates that a country provide 45 per cent benefit for unemployment insurance, but China only provides an amount that is not fixed to salary but is fixed by local provinces. Second, the ILO requires countries not to put conditions on these social insurances, which China does not with the exception of employment insurance. The ILO requires no qualifying period of a citizen to take advantage of employment insurance, but China requires the citizen to have been working at least a year before doing so. Third, the ILO duration that a country should provide the benefit of these social insurances is exceeded under Chinese law for each one. And, notably, the ILO minimum standards are far less than China's for each. For medical insurance, the ILO duration is 26 weeks, and China has no limit. For unemployment insurance, the ILO duration is 13 weeks, and China's is from 1 year up to 2 years. For employment injury insurance, the ILO duration is through contingency as is China's. And, for maternity insurance, the ILO duration is a minimum of 12 weeks, and China's is up to 5 months.

B. Foreigners

In September 2011, the PRC Ministry of Human Resources and Social Security further promulgated the *Interim Measures for Participation in the Social Insurance System by Foreigners Working within the Territory of China (Interim Measures)*, which became effective on 15 October 2011, and laid out the specifics of the requirement.⁶¹ According to the *interim measures*, foreigners working in China should participate in the five social insurances, that is, pension, medical, work-related injury, unemployment and maternity insurance programmes in accordance with the law, with the social insurance premiums contributed by both employers and themselves.

The *interim measures* also specified that "Foreigners working in China" refer to individuals who:⁶²

- do not have Chinese nationality;
- have obtained the Employment Permit for Foreigners, the Certificate of Foreign Experts, the Press Card for Foreign Resident

⁶¹ "Foreigner Participation in China's Social Insurance System" *China Briefing* (12 Nov 2013), available at <http://www.china-briefing.com/news/2013/11/12/foreigner-participation-in-chinas-social-insurance-system.html> (last visited June 2, 2015).

⁶² *Ibid.*

Correspondents and other employment permits and residence permits for foreigners pursuant to the law;

- hold a Permanent Residence Permit for Foreigners; and
- are lawfully working within the territory of the.

Further, the *interim measures* provided that if the foreigner leaves China prior to reaching the prescribed statutory age for pension withdrawal, his social insurance personal account will be retained, and the contribution years will be calculated on a cumulative basis if he comes back to China to work again in the future. Alternatively, upon submitting a written application for terminating the social insurance relationship, the in-charge social insurance agency can make a lump-sum payment of the money deposited in the social insurance personal account to him.⁶³ Foreigners who reside outside China and receive monthly social insurance benefits should, on a yearly basis, submit to the in-charge social insurance agency a certification of existence issued by a Chinese embassy or consulate, or one that is notarised or certified by the relevant authority of his resident country and then certified by the relevant Chinese embassy or consulate. The balance remaining in the personal social insurance account of a deceased foreigner can be inherited pursuant to the law.

Foreigners on valid working visas are also covered by national social security laws and are obligated to pay into programmes as is common in countries like the US, Japan and South Korea.⁶⁴ It should be re-emphasised that workers from Germany are exempt from pension insurance and unemployment insurance in China for the first 48 calendar months, while those from South Korea are exempt from pension insurance for a period of 5 years.⁶⁵ In addition, the PRC is currently under negotiations with Japan, the US, Singapore and several EU countries including France, Sweden, Belgium, Finland and Spain to enter into bilateral social insurance treaties.⁶⁶ The benefits to China

⁶³ *Ibid.*

⁶⁴ Dawn Nuschler and Alison Siskin, "Social Security Benefits for Noncitizens: Current Policy and Legislation", The Library of Congress Congressional Research Service (updated 11 May 2005), available at <http://fpc.state.gov/documents/organization/46681.pdf> (last visited June 2, 2015). See also James P Klein, "Social Security in an International Context" Pillsbury Law (Fall 2011), available at <http://www.pillsburylaw.com/publications/social-security-in-an-international-context>. For Japan, see Masahiko Yamada, "The Current Issues on Foreign Workers in Japan", (2010) 7 Japan Labor Review 5, available at http://www.jil.go.jp/english/JLR/documents/2010/JLR27_yamada.pdf (last visited June 2, 2015). Also, see United States Social Security Administration, "South Korea", available at <http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/asia/southkorea.html> (last visited 17 Feb 2015).

⁶⁵ New Social Insurance Law (n 28).

⁶⁶ "Insurance for Foreigners to Be Simplified" *China Daily* (5 June 2012), available at http://www.china.org.cn/china/2012-06/05/content_25565469.htm (last visited June 2, 2015). Denmark and China

of these bilateral exemption treaties can be seen in the slow enrolment and payment by foreigners.⁶⁷

VI. Conclusion

The wording of China's new Social Security Law meets and exceeds ILO Standards of Convention 102 and the law compares favourably with other developed nations. Its coverage of foreigners is consistent with most other nations and China is working on treaty exceptions to meet needs of overlapping national coverage of social security provisions, particularly pensions.

Of course a law's compliance with ILO Convention standards as a law is written does not mean the law in practice is in compliance with those standards and it must be additionally measured in terms of the law's coverage, consistent application and enforcement. As discussed earlier, China's Social Insurance Law in practice is still a work in progress with many infrastructural and implementation issues yet to resolve.

Chinese experts and drafters of the law point out that to be fully implemented at the local levels it must overcome the cultural logic and Chinese characteristics of law and law enforcement in China. Government laws and regulations are decentralised in that national legislation generally sets forth broad standards, but leave the local detailed implementing regulations to the provincial and local authorities.⁶⁸ Thus, in implementing the new Social Insurance Law, wide variances can be found in obligations regarding coverage, funding and enforcement at the local levels. Thus, truly implementing an ILO obligation is complex and always has layers, and dimensions within layers, even though it meets the international standards.

also now have a treaty. Permanent State Secretary of the Danish Ministry of Social Affairs, Children and Integration, Mr Jesper Zwisler signed a bilateral social security agreement on 9 December 2013 with Mr Wang Xiaochu, Vice Minister, Ministry of Human Resources and Social Security, between China and Denmark. See, "Ministry of Social Affairs, Children and Integration Signs Bilateral Social Security Agreement" Denmark in China, Ministry of Foreign Affairs of Denmark (12 October 2013), available at <http://kina.um.dk/en/about-us/news/newsdisplaypage/?newsid=bd54595b-044f-4b0a-a0b0-96df5741df6a> (last visited June 2, 2015). See discussion of China signing *bilateral social security agreement* on mutual exemption in Wang Yanzhong and Wei Anan, "Issues of China's Social Security Internationalization Development" (Konrad Adenauer Stiftung, 11 Nov 2009), available at http://www.kas.de/wf/doc/kas_18073-1522-2-30.pdf?091111050359 (last visited June 2, 2015).

⁶⁷ "Two and half years after the enactment of China's Social Insurance Law, which extends the country's social security program to foreign workers, more than 200,000 expats have participated in various social insurance programs, said Hu Xiaoyi, vice-minister of human resources and social security. The official said about 20 percent of expats working in China had joined the country's social security programs covering basic pension, medical, unemployment, working injury and maternity benefits". Zhao Huanxin and He Dan, "Foreigners Stay Cool to insurance" *China Daily* (12 Dec 2013), available at http://www.chinadaily.com.cn/cndy/2013-12/13/content_17171430.htm (last visited June 2, 2015). Recent discussions suggest there may soon be ever further simplification. Chen Xin, Insurance for Foreigners to be Simplified, at, http://usa.chinadaily.com.cn/china/2012-06/05/content_15473268.htm (last checked June 1, 2015).

⁶⁸ See Ronald C Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics*, Kluwer Law International (1997).