Recognition and Enforcement of ASEAN Member States' Judgments in China and the Principle of Reciprocity

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บทคัดย่อ

ในปี 2010 จีนและประเทศสมาชิกอาเซียนได้ทำความตกลงเขตการค้าเสรีระหว่างจีน-อาเซียนอย่างเป็นทางการ ด้วยวัตถุประสงค์ที่จะสร้างเสริมความร่วมมือระหว่างประเทศด้านกระบวนการยุติธรรมเกี่ยวกับการรับรองและบังคับใช้คำพิพากษาของต่างประเทศกับอาเซียนและเพื่อจะรักษาสิทธิและผลประโยชน์ตามกฎหมายของเจ้าหนี้ตามคำพิพากษาของศาลประเทศอาเซียน มีความจำเป็นต้องศึกษาทางปฏิบัติในปัจจุบันเกี่ยวกับการรับรองและการบังคับใช้คำพิพากษาต่างประเทศในจีน ประเทศจีนได้ตกลงในสนธิสัญญาเกี่ยวกับการร่วมกันยอมรับและการบังคับใช้คำพิพากษาต่างประเทศกับประเทศลาวและเวียดนามตามลำดับ ส่วนการพิจารณาเกี่ยวกับการรับรองและการบังคับใช้คำพิพากษาของศาลจากประเทศอื่นในอาเซียนนั้นจะเป็นไปตามหลักต่างตอบแทน เนื่องจากศาลฎีกาจีนเคยใช้เกณฑ์การพิจารณาที่เข้มงวดโดยต้องดูจากลักษณะต่างตอบแทนตามจริง (factual reciprocity) หากไม่มีสนธิสัญญาเกี่ยวกับการรับรองคำพิพากษาของศาลต่างประเทศ ศาลจีนจะสามารถรับรองคำพิพากษาของศาลต่างประเทศได้เฉพาะในกรณีที่ประเทศนั้นๆ เคยรับรองและบังคับใช้คำพิพากษาของจีนมาก่อนเท่านั้น จากเกณฑ์นี้ นักวิชาการหลายคนจึงเสนอว่าการพิจารณา

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ลักษณะต่างตอบแทนตามจริง (factual reciprocity) อาจจะนำมาซึ่งการปฏิบัติต่อกันเพื่อตอบโต้อย่างไม่เป็นมิตรและสร้างความเสียหายต่อผลประโยชน์ทางกฎหมายของเจ้าหนี้ตามคำพิพากษา บทความนี้เสนอว่าศาลจีนควรดำเนินแนวทางใหม่โดยเร็วคือสันนิษฐานไว้ก่อนว่ามีลักษณะต่างตอบแทน เพื่อจะปรับปรุงให้เกิดความยุติธรรมทางธุรกรรม (transactional justice)

คำสำคัญ : การรับรองและการบังคับใช้คำพิพากษาต่างประเทศ หลักต่างตอบแทน ลักษณะต่างตอบแทนตามจริงและโดยสันนิษฐาน เขตการค้าเสรีจีน-อาเซียน

Abstract

In 2010, China and the 10 ASEAN member states have officially established the China-ASEAN Free Trade Area. In order to strengthen international judicial assistance concerning the recognition and enforcement of foreign judgments with ASEAN and effectively preserve the lawful rights and interests of judgment holders from ASEAN, there is a need to review the current practice concerning foreign judgment recognition and enforcement adopted by China. China has already concluded the treaty on mutual recognition and enforcement of foreign judgments with Laos and Vietnam respectively, so in terms of the determination on recognition of judgments rendered by courts from other ASEAN countries, the principle of reciprocity will be applied. Due to the adoption of the strict requirement of factual reciprocity by the Chinese Supreme Court, a competent Chinese court, in the absence of a treaty on foreign judgment recognition, may recognize a foreign judgment only on the basis that the foreign country has previously recognized and enforced a Chinese court judgment. Based on the requirement, many scholars argued that the factual reciprocity could bring retaliatory treatment and damage the legal interests of judgment holders. In order to improve transactional justice in the CAFTA, the Article proposes the Chinese courts to adopt a new approach, namely the presumed reciprocity, right away.

Key Words : Recognition and Enforcement of Foreign Judgments; Principle of Reciprocity; Factual and Presumed Reciprocity; China-ASEAN Free Trade Area.

I : Introduction

The creation of the China[1] - ASEAN[2] Free Trade Area ("CAFTA") was firstly proposed by the former Chinese Prime Minister Zhu Rongji in November 2000,[3] which aims to strength and enhance economic, trade and investment cooperation between China and ASEAN. Even though facing competing interests and major differences in levels of development, after putting numerous efforts by both sides, the Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China[4] ("the Framework Agreement") was concluded in Cambodia in 2002, which provided the legal basis to the creation of the CAFTA by 2010.[5] In 2010, the CAFTA was officially established after the conclusion of the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China[6] ("the

[1]*For the purpose of this thesis, China refers to the People's Republic of China or PRC, excluding the Hong Kong Special Administrative Region, Macau Special Administrative Region, and the territory of Taiwan.*

[2]ASEAN was founded in 1967 by five states in South East Asia, that is, Indonesia, Malaysia, Singapore, Thailand, and the Philippines. Five other states in the same region, namely, Brunei Darussalam (1984), Vietnam (1992), Myanmar (1997), Laos (1997), and Cambodia (1999), became members thereafter.

[3]Michael Richardson, 'Asian Leaders Cautious on Forging New Regional Partnerships' (The New York Times, 27 November 2000) <http://www.nytimes.com/2000/11/27/business/worldbusiness/27iht-ASEAN.2.T.html> accessed 9 July 2017.

[4]The Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China ("the Framework Agreement") (ASEAN-China)(adopted 4 November 2002, entered into force 1 July 2003) <http://asean.org/?static_post=framework-agreement-on-comprehensive-economic-co-operation-between-asean-and-the-people-s-republic-of-china-phnom-penh-4-november-2002-4> accessed 9 July 2017.

[5]Even though ASEAN-China cooperation was formalized in 1996, substantive cooperation only picked up pace in 2001 when the Leaders of ASEAN and China endorsed a proposal for a framework on economic cooperation and to establish a free trade area in 10 years.

[6]Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and China ("Agreement on Investment") (ASEAN-China) (adopted 15 August 2009, entered into force 1 August 2010) <https://cil.nus.edu.sg/rp/pdf/2009%20Agreement%20on%20Investment%20of%20the%20Framework%20Agmt%20on%20Comprehensive%20Ec%20Coop%20ASEAN%20and%20China-pdf.pdf> accessed 9 July 2017.

Agreement on Investment").[7] Since then, then CAFTA has become not only the biggest free trade area among developing countries but also a model for the south-south cooperation. With the rapid economic growth in the CAFTA, China and ASEAN launched negotiations on an upgrading of the CAFTA in 2014, focusing on key area of trade in goods and services.[8]

Bearing in mind the rapid economic growth in the CAFTA, judgment holders from ASEAN States have raised the following concern: whether they are justified to enforce their legally effective judgments in a competent Chinese court? It is true that nothing is more frustrating for the judgment holders than finding out that their judgments cannot be recognized and enforced after a long hard fought battle in the court of their home countries.[9] So far, China has not enacted a specific law governing the recognition and enforcement of foreign judgments, the only rules applicable to the enforcement of foreign judgments can be found under the Civil Procedure Law of People's Republic of China[10] ("CPL") and the Interpretations of the Supreme People's Court on Applicability of the CPL[11] ("CPL Interpretations"). Pursuant to Article 281 of the CPL, there are two grounds justifying the recognition and enforcement of foreign judgments, namely based on bilateral or multilateral treaties for mutual recognition and enforcement of judgments and the principle of reciprocity.[12] For instance, a judgment rendered by a foreign court may be enforceable in China if the state of the foreign court had already concluded a treaty concerning judgment enforcement with China, or acceded a treaty on

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[7] United Nations, South-South Cooperation in International Investment Agreements 36 (2005), <http://unctad.org/en/Docs/iteiit20053_en.pdf> accessed 29 July 2017.

[8] *Yinan Zhang and Nan Zhong, 'China, ASEAN set 2015 as goal for upgrading FTA' (China Daily, 14 November 2014) <http://english.gov.cn/premier/news/2014/11/14/content_281475009904007.htm> accessed 9 July 2017.*

[9] *Qisheng He, 'The Recognition and Enforcement of Foreign Judgments between the United States and China: A study of Sanlian v. Robinson' (2013) 6:23 Tsinghua China Law Review 24, 39.*

[10] *Civil Procedural Law of People's Republic of China 2012 ('CPL'), promulgated by the National People's Congress 9 April 1991, came into force 9 April 1991) <http://www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Civil-Procedure-Law-2012.pdf> accessed 5 July 2017.*

[11] *Interpretations of the Supreme People's Court on Applicability of the (CPL Zhu Shi [2015] No.5) ("CPL Interpretations") issued by the Supreme People's Court, came onto force 4 February 2015. <http://www.ipkey.org/en/ip-law-document/download/2649/3380/23> accessed 7 July 2017.*

[12] *CPL (n 11) art 281.*

recognition and enforcement of foreign judgments where China is a Contracting Party to such treaty.[13]

Pursuant to the Framework Agreement and the Agreement on Investment, neither treaty addressed the proposition of foreign judgment recognition and enforcement. One reason contributing to the failure of incorporating the foreign judgment enforcement regime into the Agreements is that the domestic legislation of each state chooses different approach governing such issue, so it will be difficult to reach a unified standard applicable to the CAFTA. For instance, Thailand does not have domestic legislation and lacks international, regional, or bilateral international agreements regarding the recognition and enforcement of foreign judgments. In addition, China had only concluded a judicial assistance treaty with Laos,[14] Vietnam,[15] Singapore,[16] and Thailand[17] respectively, but only the treaties concluded with Laos and Vietnam explicitly provided provisions governing foreign judgment recognition and enforcement.

Due to the lack of treaties on the enforcement of foreign judgments between China and other ASEAN Sates, this Article aims to answer whether judgments rendered in the ASEAN States (except Laos and Vietnam) can be recognized and enforced in China based on the principle of reciprocity. Section II firstly reviews the general rules applicable to the recognition and enforcement of

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[13] *ibid.*

[14] *Treaty on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the Lao People's Democratic Republic ("China-Laos Judicial Assistance Treaty") (China-Laos) (singed 25 January 1999, entered into force 15 December 2001) <http://www.moj.gov.cn/sfxzws/content/2003-03/31/content_19550.htm?node=219>* accessed 7 July 2017.

[15] *Treaty on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the Socialist Republic of Vietnam ("China-Vietnam Judicial Assistance Treaty") (China-Vietnam) (singed 19 October 1998, entered into force 25 December 1999) <http://www.moj.gov.cn/sfxzws/content/2003-03/31/content_19554.htm?node=219>* accessed 7 July 2017.

[16] *Treaty on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and Singapore ("China-Singapore Judicial Assistance Treaty") (China-Singapore) (singed 28 April 1997, entered into force 27 June 1999) <http://www.npc.gov.cn/wxzl/gongbao/2001-01/03/content_5007108.htm>* accessed 7 July 2017.

[17] *Treaty on Judicial Assistance in Civil and Commercial Matters and Cooperation in Arbitration between the People's Republic of China and the Kingdom of Thailand "China-Thailand Judicial Assistance Treaty") (China-Thailand) (signed 16 March 1994, entered into force 6 July 1997) < http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/10/10-4-05.html > accessed 7 July 2017.*

foreign judgments in China pursuant to the CPL and its Interpretations. After identifying the legal justifications of enforcing a foreign judgment in China, Section III explores the practice of enforcing foreign judgments based on the treaties on judicial assistance concluded with Laos and Vietnam and then demonstrates how was the first application regarding foreign judgment enforcement granted by the Chinese court. Section IV aims to provide the current approach chosen by China to enforce foreign judgments based on the principle of reciprocity and the criticism of using such approach. Section V, in order to preserve the right holders to enforce their legally effective judgments in a Chinese court, proposes several pragmatic steps to promote the formation of reciprocal relationship between China and ASEAN. The last section gives a short conclusion to the issues examined in this Article.

II : Overview: Rules Governing Recognition and Enforcement of Foreign Judgments under the Chinese Laws

As mentioned above, China lacks a specific law applicable to the issue of foreign judgments recognition and enforcement, and such proposition is generally addressed under the provisions of the CPL and the CPL Interpretations. Pursuant to Article 281 of the CPL:

> "If a legally effective judgment or written order made by a foreign court requires recognition and enforcement by the people's court of the People's Republic China, the party may directly apply for recognition and enforcement to the intermediate people's court of the People's Republic of China which has jurisdiction. The foreign court may also, in accordance with the provisions of the international treaties concluded or acceded to by both the foreign country and the People's Republic of China or with the principle of reciprocity, request recognition and enforcement by the people's court."[18]

Pursuant to the provision, a party holding a legally effective judgment or a foreign court rendered the judgment can apply for the recognition and enforcement of the judgment to a competent intermediate court. In order to provide the Chinese courts a detailed guideline concerning the determination on

[18] *CPL (n 11) art 281.*

the application for foreign judgment recognition and enforcement, Article 282 sets forth the statutory criteria. In the first place, a foreign judgment must be final, conclusive, and is already effective. Also the competent intermediate court has to ascertain that there is a bilateral or multilateral treaty, or a reciprocal relationship on recognition and enforcement of foreign judgment existed between the home country and China. Furthermore, the said judgment should not contradict the basic principles of the law of China nor violate state sovereignty, national security and social public interests.[19] Failing to meet the above requirements, the intermediate court could examine its power to reject recognition and enforcement. Otherwise, the court shall recognize the validity of the judgment and, if required, issue a writ of execution to enforce it in accordance with the relevant provisions of the CPL.[20]

With respect to the legal documents that need to be submitted to the intermediate court, the CPL left the issue to be addressed by the Chinese Supreme People's Court ("the SPC"). The SPC issued an Interpretation on the CPL, the CPL Interpretations, on 30 January 2015. Article 543 explicitly provided, in order to enforce a legally effective judgment in a competent intermediate court, an applicant should submit "a written application and attach thereto the original of the effective judgment/ruling rendered by the foreign court or the duplicate thereof that is certificated to be true and the Chinese translation thereof."[21] If the judgment is a default judgment, the applicant should also submit relevant documents to prove that the court has summoned the respondent party(ies) pursuant to the applicable law, except that the default judgment has identified.[22] Besides the documents listed under Article 543, there are additional documents need to be submitted pursuant to those treaties on judicial assistance concluded by China. For instance, pursuant to Article 23 of the China-Laos Judicial Assistance Treaty, apart from submitting the written application, the effective judgment, and the relevant documents proving that the court has summoned the party in a default judgment, it also requires, if the judgment involves any party with no capacity to engage in litigation, the submission of documents proving such party

[19] *ibid, art 282.*
[20] *ibid.*
[21] *CPL Interpretations (n 12) art 543.*
[22] *ibid.*

has been represented by appropriate agents, except that the judgment has provided.[23]

The current provisions of the CPL failed to provide specific rules addressing the issues of time bar as well as competent jurisdiction relating to the enforcement of foreign judgments. Article 547 of the CPL Interpretations states: "the time limit set forth for a party to apply for recognition and enforcement of an effective judgment/ruling rendered by a foreign court....shall be governed by Article 239 of the Civil Procedure Law ("CPL")."[24] Referring to Article 239 of the CPL, applications for enforcement of a foreign judgment shall be subject to the time limit requirement applicable to the enforcement of domestic judgments, which is two years.[25] The said time limit shall be calculated from the last day of the period of performance specified by the legal judgment, or failing to specify the period of performance, it shall be calculated from the date of the legal judgment comes into effect.[26] The CPL also failed to provide specific provisions concerning the identification of competent court. In order to clarify the court's jurisdiction over the recognition and enforcement of foreign judgments, the SPC, on 25 February 2002, issued the Provision of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements[27] ("SPC Provision"). Pursuant to Article 1, application for recognition and enforcement of foreign judgments shall be subject to the jurisdiction of the following people's courts:

> "(1) the people's court of an economic and technological development zone (such a zone shall be established under the approval of the State Council);

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[23] *China-Laos Judicial Assistance Treaty (n 15) art 23.*

[24] *ibid, art 547.*

[25] *CPL (n 11) art 239(1)*

[26] *ibid, art 239(2).*

[27] *Provision of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements [Fashi (2002) No. 5] ("SPC Provision") (issued 25 February 2002, came into force 1 March 2002), <http://www.lawinfochina.com/display.aspx?lib=law&id=2295&CGid= > accessed 7 July 2017.*

(2) the intermediate people's court at the locality of a provincial or autonomous regional capital or a municipality directly under the Central Government;

(3) the intermediate people's court of a special economic zone or a city directly under the State planning;

(4) any other intermediate people's court designated by the Supreme People's Court;

(5) the higher people's court."[28]

After reviewing the current rules applicable to recognition and enforcement of foreign judgments under the CPL and the CPL Interpretations, next section aims to explore the standards of review under the treaties of judicial assistance in civil and commercial matters concluded between China and two ASEAN states, namely Laos and Vietnam. In addition, relevant case concerning the recognition and enforcement of foreign judgments will be presented subsequently.

III : Recognition and Enforcement of Foreign Judgments Based on Judicial Assistance Treaty Concluded between China and ASEAN States

Up to present, China has concluded a treaty on judicial assistance in civil and criminal matters with 19 countries respectively,[29] including Laos and Vietnam from ASEAN. In addition, 17 countries,[30] including Thailand and Singapore, have

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[28] *ibid, art 1.*

[29] *1. Poland (came into force on 13 February 1988); 2. Mongolia (came into force on 29 October 1990); 3. Romania (came into force on 22 January 1993); 4. Russia (came into force on 14 November 1993); 5. Turkey (came into force on 26 October 1995); 6. Ukraine (came into force on 19 January 1994); 7. Cuba (came into force on 26 March1994); 8.Belarus (came into force on 29 November 1993); 9. Kazakhstan (came into force on 11 July 1995); 10. Egypt (came into force on 31 May 1995); 11. Greece (came into force on 29 June 1996); 12. Cyprus (came into force on 11 January 1996); 13. Kyrgyzstan (came into force on 26 September 1997); 14. Tajikistan (came into forth on 2 September 1998); 15. Uzbekistan (came into force on 29 August 1998); 16. Vietnam (came into forth on 25 December 1999); 17. Laos (came into force on 15 December 2001); 18. Lithuania (came into force on 19 January 2002); 19, North Korea (came into force on 21 January 2006).*

[30] *1. France (came into force on 8 February 1988); 2. Italy (came into force on 1 January 1995); 3. Spain (came into force on 1 January 1988); 4. Bulgaria (came into force on 2 July 1993), Thailand*

entered into a treaty on judicial assistance in civil and commercial matters.[31] After reviewing the judicial assistance treaties concluded with the 4 ASEAN States, only the treaties conclude with Laos and Vietnam explicitly provided provisions on recognition and enforcement of foreign judgments. In the following sections, the Article will mainly focus the issues that have not been addressed by the CPL as well as the CPL Interpretations based on the provision of both treaties.

1. Central Authorities Responsible for the Communication of Judicial Assistance

It has been illustrated that, pursuant to Article 281 of the CPL, either a party who is directly related to a judgment or a foreign court rendered a judgment may apply for recognition and enforcement of the said judgment before a competent intermediate court. The foreign court may, "in accordance with the provisions of the international treaties concluded or acceded to by both the foreign country and the People's Republic of China or with the principle of reciprocity, request recognition and enforcement by the people's court."[32] With respect to the issue of specific authorities responsible for requesting recognition of judgments, which is governed by the provisions of the treaty. Under Article 4 of the China-Vietnam Judicial Assistance Treaty, the Central Authority of each State is responsible for the communication of judicial assistance.[33] The Central Authority of China is the Chinese Ministry of Justice or the Chinese Supreme People's Procuratorate, and the Authority in Vietnam refers to the Vietnamese Ministry of Justice or the Vietnamese Supreme People's Procuratorate.[34] In terms of the Central Authorities under the China-Laos Judicial Assistance Treaty, it refers to the

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(came into force on 6 September 1997); 6. Hungary (came into force on 21 March 1997); 7. Morocco (came into force on 26 November 1999); 8. Singapore (came into force on 27 July 1999); 9. Tunisia (came into force on 20 July 2000); 10. Argentina (came into force 9 October 2011); 11. South Korea (came into force on 27 April 2005); 12. The United Arab Emirates (came into force 12 April 2005); 13. Kuwait (came into force 6 June 2013); 14. Brazil (came into force 16 August 2014); 15, Algeria (came into force 16 June 2012); 16. Peru (came into force 25 May 2012); 17. Bosnia and Herzegovina (came into force 12 October 2014).

[31] *Recent Statistics released by the Ministry of Foreign Affairs, China. <http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml> accessed 7 July 2017.*

[32] *CPL (n 11) art 281.*

[33] *China-Vietnam Judicial Assistance Treaty (n 16) art 4(1).*

[34] *ibid, art 4(2).*

Ministry of Justice of each State.[35] Based on the provisions, if a Lao court aims to enforce its judgment in China, the communication of judicial assistance shall be conducted between the Ministries of Justice of both States. After receiving the request of enforcing the judgment, the Chinese Ministry of Justice shall communicate the said request to the intermediate court with jurisdiction.

2. Grounds Justifying Non-Enforcement of Foreign Judgments

Before moving to illustrate the grounds concerning non-enforcement of foreign judgments, there is a need to clarify the meaning of foreign judgments under the provisions of judicial assistance treaties in the first place. Even if a treaty on recognition and enforcement of foreign judgments has been established between China and a foreign country, which does not imply all of the judgments rendered by a court of the foreign country can be enforced in China. Pursuant to Article 15 of the China-Vietnam Judicial Assistance Treaty and Article 20 of the China-Laos Judicial Assistance Treaty, three types of judgment can be recognized and enforced, namely judgments of civil cases; civil damage compensations attached to judgments of criminal cases; and arbitral awards.[36] In addition, litigation costs attached to judgments of criminal cases can be recognized and enforced pursuant to Article 21(1)(2) of the China-Laos Judicial Assistance Treaty. Thus any judgment falling out of the scope cannot be recognized and enforced in China.

As stated above, the CPL only provided a basic framework concerning the criteria to be applied for the recognition of foreign judgments in China. On the contrary, the judicial assistance treaties concluded between China and ASEAN States provided a more specified list concerning the grounds justifying non-enforcement of foreign judgments. Referring to Article 21 (1) of the China-Laos Judicial Assistance Treaty, 10 grounds can justify the rejection of recognition and enforcement. Besides the grounds listed under the CPL, such as the non-final or unenforceable judgments, the recognition of a foreign judgment violates the sovereignty, national security or public policy of China, and the improper notice to defaulting party, Article 21(1) requires, in order to be entitled recognition and enforcement, a judgment shall satisfy the following requirements.

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[35] *China-Laos Judicial Assistance Treaty (n 15) art 6(1).*

[36] *China-Vietnam Judicial Assistance Treaty (n 16) art 15(1); China-Laos Judicial Assistance Treaty (n 15) art 20(1).*

Firstly, in accordance with the Chinese Laws, a dispute shall not subject to the exclusive jurisdiction of the Chinese court.[37] To be more specific, a judgment rendered by a Lao court cannot be enforced in China if such dispute is subject to the exclusive jurisdiction of the Chinese court. Pursuant to Article 266 of the CPL, the people's court of China shall have exclusive jurisdiction over disputes arising from three kinds of contract: namely the contract for Sino-foreign equity joint venture, the contract for Sino-foreign contractual joint venture, and the contract for Sino-foreign cooperative exploration and development of natural resources.[38] Secondly, a dispute shall be resolved by a competent foreign court with jurisdiction, so if the foreign court lacks jurisdiction over the dispute, then the application for enforcement will be denied consequently.[39] Furthermore, if a foreign judgment needs to be recognized in China, the requested intermediate court shall confirm that: (1) whether a judgment involving the same action between the same parties has been rendered by a Chinese court;[40] or (2) whether the same dispute between the same parties has been brought before a Chinese court for judicial determination.[41] If the requested court finds that any of the above circumstances exists, it must reject the application for recognition and enforcement of the judgment.

Pursuant to the recent statistics released by the SPC, in accordance with the judicial assistance treaties analyzed above, there is no case record concerning the enforcement of Vietnamese and Lao Judgments in China. So in order to explore how the judgments rendered by ASEAN States will be recognized and enforced in China based on judicial assistance treaties, there is a need to review the previous Chinese SPC decisions that permitted the applications for foreign judgment enforcement. Even though judgments rendered by Chinese courts shall have no binding effect on subsequent cases, those judgments concerning foreign judgment enforcement would be regarded as a great help for the ASEAN parties who aim to enforce their legally effective judgments in China. For instance, an Italian Applicant,

[37] *China-Laos Judicial Assistance Treaty (n 15) art 20(1)(2).*
[38] *CPL (n 11) art 266.*
[39] *China-Laos Judicial Assistance Treaty (n 15) art 20(1)(10).*
[40] *ibid, art 20(1)(4).*
[41] *ibid, art 20(1)(5).*

B&T Ceramic Group s.r.l ("B&T"),[42] on 18 December 2000, filed an application with the Foshan Intermediate People's Court for recognition and enforcement of the Bankruptcy Judgment No. 62673 and the Adjudication Order on the Transfer of Forfeited Assets rendered by the Italian courts. After the court hearing, the Foshan Court held that the judgments indicated above conformed to the conditions and requirements for recognition of foreign judgments as provided for in the CPL as well as Article 21[43] of the Treaty on Judicial Assistance in Civil Matters Between China and Italy, so the legal effects of the judgments should be recognized by the Foshan Court.

IV : Recognition and Enforcement of ASEAN'S Judgments Based on the Principle of Reciprocity

As indicated above, if a foreign judgment can be justified recognition and enforcement in China, one of the preconditions is that a treaty or a reciprocal relationship on recognition and enforcement of foreign judgments has been established between the foreign country and China. Pursuant to the CPL, the CPL Interpretations, and the treaties on judicial assistance concluded by China, the definition to the "principle of reciprocity" had not been explicitly addressed. Due to the blank, it became a controversial issue among the people's intermediate courts to interpret the term. Subsequently, the practice on determining the existence of reciprocal relationship has been gradually formed in accordance with the "Replies" concerning the recognition and enforcement foreign judgments made by the SPC.

1. Factual Reciprocity Requirement under the SPC "Replies"

Due to the undefined term of "principle of reciprocity", several intermediate people's courts, based on the reporting system, had to seek for clarification of the term from the SPC. The first case concerning foreign judgment

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[42] B&T Ceramic Group s.r.l. v. Nanhai Nassetti Pioneer Ceramic Machine Co. Ltd., RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY], 9 June 2004 (Foshan Interm. People's Ct. 2000). <http://www.pkulaw.cn/fulltext_form.aspx?Gid=1510089690> accessed 9 July 2017.

[43] *Treaty on Judicial Assistance in Civil Matters between the People's Republic of China and Italy ("China-Italy Judicial Assistance Treaty") (China-Italy) (singed 20 May 1991, entered into force 1 January 1995) < http://www.law-lib.com/law/law_view.asp?id=77074>* accessed 9 July 2017.

enforcement reported to the SPC for final guidance is *Gomi Akira v. Dalian Fari Seafoof Co., Ltd*[44] in 1994. Gomi Akira, as a Japanese citizen, filed an application to enforce a legally effective judgment and two rulings rendered by a Japanese court before the competent Dalian Intermediate People's Court. After confirming that there is no treaty governing mutual recognition of judgment between Japan and China, one of the crucial issues that needed to be determined was whether the two countries have established the reciprocal relationship already. In order to ensure that the interpretation of reciprocity would be consistent with the original intention of the drafters of the CPL, the Dalian Court, along with its superior court, the High People's Court of Liaoning Province, reported the application to the SPC for guidance. After reviewing the application, the SPC replied, Japan and China had neither concluded any treaty on recognition and enforcement of foreign judgments nor established the reciprocal relationship.

Based on the confirmation of non-reciprocal relationship pursuant to the Rely, the application was rejected by the Dalian Court.[45] Even though the Reply did not present the reasoning on the determination of reciprocal relationship, the SPC explicitly adopted that the principle of reciprocity shall be narrowly defined as factual reciprocity. According to the definition made by one famous Chinese scholar specializing in international law, in order to recognize and enforce a foreign judgment in China, factual reciprocity requires the Chinese competent court to confirm whether the foreign country rendering the judgment has already recognized and enforced a Chinese judgment.[46] Failing to meet the requirement, or in other words, the foreign country does not have any prior judgment or precedent regarding the enforcement of Chinese judgment, then the application for enforcing a judgment or ruling rendered by a court of the foreign country will likely be denied. Such practice has been followed by several Intermediate courts to reject the application for recognition and enforcement of foreign judgments subsequently, such as the application for recognition of an Australian court judgment in *DNT*

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[44] *Gomi Akira v. Dalian Fari Seafoof Co., Ltd, the Reply of the Supreme People's Court of China concerning Recognition and Enforcement of Japanese Judgment and Rulings on Credit and Debt ([1995] minta zidi N0. 17), issued by the SPC, effective on 26 June 1995.*

[45] *ibid.*

[46] *Haopei Li, An Introduction to International Civil Procedural Law (Chinese Law Publisher, 1996).*

France Power Engine Co., Ltd. in 2006, the application was rejected by the competent court due to the requirement of factual reciprocity reaffirmed by the SPC during the reporting process.[47]

Since China adopts a relatively narrow definition to the principle of reciprocity, in the absence of a treaty on recognition and enforcement of foreign judgment, a Chinese court may apply the principle of reciprocity to enforce a foreign judgment only based on the following condition: the country of the foreign court has previously recognized and enforced a Chinese judgment. Due to the requirement of factual reciprocity adopted by China, many scholars raised the concern that factual reciprocity would easily lead to retaliatory treatment.[48] And this concern has been illustrated between the judicial assistance relationship between China and Japan.

As noted earlier, in *Gomi*, since the Chinese SPC confirmed that there is no reciprocal relationship between Japan and China, the application for recognition the Japanese judgment was rejected. As one famous commentator identified: "the *Gomi Akira* case produced a negative influence on the recognition and enforcement of judgments between China and Japan."[49] In 2003, the Osaka High Court of Japan refused to recognize and enforce a Chinese court decision because China had already confirmed that there is no reciprocal relationship between the two Countries in accordance with the Reply made by the SPC in *Gomi*.[50] In 2015, the Tokyo District Court also refused to enforce a Chinese judgment based on the findings contained in the Reply of the SPC.[51] From the cases reviewed above, the

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[47] *DNT France Power Engine Co., Ltd. the Reply of the Supreme People's Court of China concerning the Request of an Australian Company for the Recognition and Enforcement of a Judgment Rendered by the Supreme Court of Western Australia ([2006] Minsi Tazidi No. 45), issued by the SPC, effective on 1 March 2007. <http://www.51wf.com/print-law?id=175699> accessed 8 July 2017.*

[48] *Tao Du, 'Recognition and Enforcement of Foreign Judgments: Principle of Reciprocity' (2007) 1 Global Law Review; He (n 10) 37.*

[49] *He (n 10).*

[50] *Application for Declaration of Investment Amount: Koso Appeal (Case No. 2481(Ne) of 2002), decided by Osaka High Court on 9 April 2003. <http://www.law.kyushu-u.ac.jp/~tomeika/procedure/E-label/LABEL2-037.pdf> accessed 9 July 2017.*

[51] *Tokyo District Court, 20 March2015, Westlaw Japan, Ref. No. 2015WLJPCA032080, also Béligh ELBALTI, 'Reciprocity and the Recognition and Enforcement of Foreign Judgments'(2017) 13 Journal of*

requirement of factual reciprocity adopted by China has leaded to the result of retaliatory treatment between Japan and China. In addition, such requirement could ultimately damage the legal interests or increase the litigation burdens of those parties who hold a legally effective judgment to be enforced in both Countries.[52]

2. Recognition and Enforcement of Chinese Judgments in Foreign Countries Based on Presumed Reciprocity

The Replies issued by the SPC confirmed the position that the Chinese courts adopt the requirement of factual reciprocity while deciding an application for recognition of foreign judgment, which could lead to retaliatory treatment. Some countries did not voluntarily involve themselves in the retaliatory treatment. Based on the case excerpts released by the official website of the Beijing Second Intermediate People's Court, even though a Chinese court had previously denied an application for enforcing a judgment rendered by a German court in 2001,[53] when a judgment rendered by the Wuxi Intermediate Court needed to be enforced in Germany, the Berlin Supreme Court did not adopt the same retaliatory treatment, on the contrary, permitted the recognition and enforcement of the Chinese judgment based on the theory of presumed reciprocity.[54]

Pursuant to the reasoning made by the Judge, there is no treaty concerning recognition and enforcement of foreign judgment between China and Germany, so judicial practice shall constitute the legal basis to decide the application relating to the issue of foreign judgment enforcement. Pursuant to the reasoning of the judge, if a German court, following the practice adopted by the Japanese court, requiring

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Private International Law, 184. <https://www.law.cam.ac.uk/repo-documents/pdf/events/PILConf/Reciprocity_and_the_Recognition_and_Enforcement_of_Foreign_Judgments.pdf> accessed 9 July 2017.

[52] *Junya Lian, 'Current Situation, Obstacles, and Revolution on the Recognition and Enforcement of Foreign Judgments Based on the Principle of Reciprocity under the "One Belt One Road" Stategy' (2016) 6 Henan caijingzhengfadaxue xuebao, 155, 159.*

[53] *Guozeng Gu, 'The right Determinations on the Jurisdiction of Foreign Civil Cases', (2004, Beijing Second Intermediate People's Court) <http://bj2zy.chinacourt.org/public/detail.php?id=107> accessed 10 July 2017.*

[54] *German Zueblin International Co. Ltd v. Wuxi Walker General Engineering Rubber Co., Ltd, The Court of Appeal of Berlin, 18 May 2006, document number 20 S ch 13/ 04. It is a case about the recognition by a German court of a Chinese judgment for the first time.*

that there must be a prior case or precedent recognizing and enforcing German judgment in China in the first place, the reciprocal relationship between China and Germany will never be established. This is not what the legislators and judiciaries originally expected for. In order to facilitate the practice on mutual recognition and enforcement of foreign judgments between the two countries, it is more valued to consider the following issue: if the German court permits to enforce the Wuxi judgment in this case, will China follow such practice in the future? Pursuant to the rapid growth of international business and economics, the judge presumed that China is likely to recognize and enforce German judgments in the future if Germany firstly recognizes and enforces the Wuxi judgment.[55] As indicated by one scholar, the Berlin Court chose a totally different approach governing the determination of reciprocity:

> "if the judgments of one State can be enforced in another State in the absence of a treaty arrangement, the reciprocity requirements of the enforcing forum should be considered met. Reciprocity should exist if, according to the statutory law or the case law of that country, Chinese judgments may be recognized and enforced. The message here is that a potential reciprocity relationship exists, even though no precedent or prior case has been recognized and enforced. This approach waives the factual reciprocity and adopts a presumed reciprocity."[56]

Besides Germany, Israel also adopted the same approach to enforce a judgment issued by a Chinese court during late 2009.[57] In the absence of a treaty on recognition and enforcement of foreign judgments between the two countries, one of the main issues that needed to be decided by the Tel Aviv District Court

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[55] *Yitong Liu, 'Rethinking the Role Played by the Principle of Reciprocity in the Recognition and Enforcement of Foreign Judgments-Based on the Judgment Rendered by Germen Court' (2009) 3 People's Justice, 96.*

[56] *He (n 10) 37.*

[57] *Jiangsu Overseas Group Co. Ltd. v. Reitman (File No. 48946-11-12) Case Commentary: Hadas Peled, 'Voluntary Reciprocity: Enforcement of a PRC Court Judgment by an Israeli Court in the Absence of a Governing Reciprocity Agreement' (Tsinghua China Law Review, 15 November 2015). <https://www.tsinghuachinalawupdate.org/single-post/2015/11/15/Voluntary-Reciprocity-Enforcement-of-a-PRC-Court-Judgment-by-an-Israeli-Court-in-the-Absence-of-a-Governing-Reciprocity-Agreement> accessed 11 July 2017.*

was to decide whether a reciprocal relationship does actually exist. Pursuant to the Judgment, even though the Court found that the absence of any example of a Chinese court enforcing an Israeli judgment, there is a reasonable potential that Chinese courts will enforce judgments rendered by Israeli courts in the future. In addition, "respecting the judgments of foreign courts advance important values including protecting the rights of litigants, legal efficiency and certainty and the encouragement of international collaboration with other legal systems."[58] Accordingly, the Israeli Court confirmed the reciprocal relationship between the two countries.

3. First Foreign Judgment Recognized by the Chinese Court Based on the Principle of Reciprocity

We have not seen any reported cases of Chinese courts recognizing a foreign judgment based on the principle of reciprocity before 2016. On 9 December 2016, even though the China-Singapore Judicial Assistance Treaty, as indicated above, lacks provisions concerning recognition and enforcement of foreign judgment, the Nanjing Intermediate People's Court, for the first time in Chinese history, handed down an unprecedented ruling enforcing a default judgment issued by a Singaporean court based on the principle of reciprocity. In the underlying case, *Kolmar Group AG v. a Nanjing based textile Co., Ltd*,[59] the Swiss applicant, Kolmar, had reach a settlement with the respondent, Nanjing Company. However, the respondent failed to comply with the settlement, which resulted the applicant's legal action against the respondent before the Singapore High Court. In October 2015, the Singapore High Court issued a default judgment against the respondent. Subsequently, after the judgment became legally effective, Kolmar filed an

[58] *David Hodak, Eli Barasch and Adi Weitzhandler, 'Israel's Courts are Enforcing Chinese Court Rulings to Encourage Cooperation' (GKH) <http://www.gkh-law.com/israels-courts-are-enforcing-chinese-court-rulings-to-encourage-cooperation-2/> accessed 11 July 2017.*

[59] *Kolmar Group AG v. Nanjing based textile Co., Ltd. the Reply of the Nanjing Intermediate Court concerning the Request of Kolmar Group AG for the Recognition and Enforcement of Foreign Civil Judgments Rendered by the Singapore High Court ([2016] Su 01 Xiewairen No. 3), issued by the Nanjing Intermediate Court, effective 9 December 2016. <http://openlaw.cn/judgement/343b42891a76499f92fb9a072bcf755b?keyword=%22申请承认和执行外国法院民事判决%22> accessed 9 July 2017.*

application before the Nanjing Intermediate Court to recognize and enforce the judgment.[60]

During the reviewing proceedings, the main issue that needed to be determined by the Nanjing Court is whether a reciprocal relationship does actually exist between Singapore and China.[61] As noted above, although the China-Singapore Judicial Assistance Treaty is silent on the recognition of judgments, the Court held that the reciprocal relationship between the two countries should be confirmed if a Singaporean court has already recognized a Chinese judgment. In accordance with the final judgment, the Nanjing Court found, pursuant to the *Giant Light Metal Technology (Kunshan) Co Ltd v. Aksa Far East Pte Ltd* [2014] SGHC 16,[62] the Singapore High Court had already enforced the judgment rendered by the Chinese Suzhou Intermediate Court in 2014, so the Singapore High Court's decision to enforce the Chinese judgment had established the factual reciprocity. Accordingly, the judgment rendered by the Singapore High Court in *Kolmar* was entitled to recognition and enforcement.[63]

In conclusion, the judgment of *Kolmar* is the first foreign judgment recognized and enforced by the Chinese court based on the principle of reciprocity, to be more precise, the requirement of factual reciprocity adopted by the SPC. The decision made by the Nanjing Court is undoubtedly a positive development in terms of the recognition and enforcement of ASEAN's judgments. Given the requirement of factual reciprocity, no one can predict whether the decision shall be deemed as an example for enforcing future judgments rendered by ASEAN States (expect Laos and Vietnam due to the judicial treaties concluded with China). In accordance with the reported cases released by the SPC, only Singapore previously recognized and enforced a Chinese judgment in the CAFTA. The writer can make the following conclusion: without voluntarily abandoning the factual reciprocity requirement adopted by the SPC, a Chinese court may only recognize a judgment rendered by other ASEAN countries if these countries firstly recognize and

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[60] *ibid.*

[61] *ibid.*

[62] *Giant Light Metal Technology (Kunshan) Co Ltd v. Aksa Far East Pte Ltd [2014] SGHC 16, rendered on 28 January 2014 by the Singapore High Court. <http://www.singaporelaw.sg/sglaw/> accessed on 8 July 2017.*

[63] *Kolmar (n 60).*

enforce a Chinese judgment where the judgment fully satisfies the requirements prescribed by their domestic laws.

V : Promoting the Formation of Reciprocal Relationship in the CAFTA

As indicated above, based on whether there is a treaty or a reciprocal relationship on the recognition and enforcement of foreign judgments, the applications to recognize foreign judgments rendered by courts of different ASEAN countries might be differently treated in China. Both the courts of Laos and Vietnam, through the provisions under the judicial assistance treaties concluded with China, shall request a competent Chinese court to recognize their judgments. Also applicants from Singapore, after successfully persuading the competent court that both China and Singapore have established the reciprocal relationship on mutual recognition and enforcement of judgments, may be granted the right to enforce their judgments within the territory of China. With respect to those judgments rendered by courts in other ASEAN member states, the Chinese courts might not be willing to recognize and enforce them due to the strict requirement of factual reciprocity.

1. Recent Development concerning the Recognition of Foreign Judgments Based on the “Belt and Road” Initiative

The adoption of the requirement of factual reciprocity has been questioned by numerous scholars from China and around the world. Basically speaking, an application concerning the recognition of a foreign judgment is normally submitted by a private party who holds a legally effective judgment, which generally isolates the behaviours of the government of the foreign country. Even if the foreign government aims to declare its intention to offer reciprocity to enforce Chinese judgments, without the direct involvement of the foreign government, it will be difficult for the judgment holder to prove that the foreign government is willing to offer reciprocity if no Chinese judgment was previously enforced in the foreign country. Accordingly, the application made by the judgment holder, of course, due to the strict requirement of factual reciprocity, will be rejected. A Chinese scholar pointed out: “it is unfair when a party obtains a favorable judgment but the

judgment cannot be enforced because of an act of the State. Thus, the strict requirements of factual reciprocity will put innocent parties at a disadvantage."[64]

The principle of reciprocity aims to revolve the issue of mutual recognition of judgments between two countries when there is no treaty provision applicable to the determination of such issue, but due to the strict requirement of factual reciprocity adopted by the SPC, which could lead to retaliatory treatment and damage the legal interests of innocent parties. Based on the above concerns, several scholars proposed that China should abandon the principle of reciprocity because the abandonment could encourage mutual enforcement of judgments between China and its counterparties.[65] On the contrary, as pointed out by one scholar, completely abandonment of the principle of reciprocity is infeasible or hard to be achieved in China so far. China is a civil law country, without repealing the requirement of reciprocity for the recognition and enforcement of foreign judgments by the National People's Congress of China, all Chinese courts should have to strictly follow such requirement. Simply due to the lack of sufficient judicial interpretations in determining the reciprocal relationship between China and foreign countries, raising the above argument to repeal the principle completely in China shall not be deemed as a sound suggestion.[66] Up to present, the primary task for China is not to repeal the principle of reciprocity but to search for an appropriate interpretation to serve the goals promoted by the principle.[67]

In order to strengthen international judicial assistance with countries along the "Belt and Road ("B&R")"[68] and effectively safeguard the lawful rights and interests of Chinese and foreign parties, on 16 June 2015, the SPC issued the Several Opinions on Providing Judicial Services and Guarantee for the Building of

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[64] *He (n 10).*

[65] *Du (n 49).*

[66] *Liu (n 56) 97.*

[67] *ibid.*

[68] *B&R is a development strategy, proposed by Chinese president Xi Jinping that focuses on connectivity and cooperation among countries primarily between the People's Republic of China and the rest of Eurasia, which consists of two main components, the land-based "Silk Road Economic Belt" (SREB) and oceangoing "Maritime Silk Road" (MSR). The strategy underlines China's push to take a bigger role in global affairs, and its need for priority capacity cooperation in areas such as steel manufacturing.*

One Belt One Road by People's Courts (“SPC Opinions”). Since ASEAN is one of the most important strategic partners of the B&R, the Opinions makes a huge positive impact to promote the formation of reciprocal relationship between China and ASEAN counterparties. Article 6 of the Opinions provides:

> “Under the circumstance where some countries have not concluded judicial assistance agreements with China, on the basis of the international judicial cooperation and communication intentions and the counterparty's commitment to offering mutual judicial benefits to China, the people's courts of China may consider the prior offering of judicial assistance to parties of the counterparty, positively promote the formation of reciprocal relationship, and actively initiate and gradually expand the scope of international judicial assistance.”[69]

Pursuant to the Opinions, if the intention concerning international judicial cooperation and communication has been established between China and a counterparty, or the commitment to offering reciprocity has been given by a counterparty, China may consider to recognize and enforce the counterparty’s judgments in the first place even under the circumstance where the counterparty has not concluded the treaty on foreign judgment recognition and enforcement with China. Even though the Opinions itself is regarded as one huge step towards the formation of the reciprocal relationship between China and its counterparties, compared with the adoption of presumed reciprocity, the former practice still requires the commitments made by the counterparties.

2. Pragmatic Steps to promote the Formation of Reciprocal Relationship with ASEAN Member States

As reviewed above, even though the Opinions issued by the SPC has changed the Court’s position from the requirement of fact reciprocity to counterparty’s commitment, without confirming the counterparty's commitment to offering reciprocity to China, seeking to recognize and enforce counterparty’s judgments in China should be rejected. Compared with the adoption of presumed

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[69] *Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the “Belt and Road” by People's Courts. ([2015] SPC No.9) (“SPC Opinion”) issued by the Supreme People’s Court, came into force June 2015. <http://en.pkulaw.cn/display.aspx?cgid=251003&lib=law> accessed 11 July 2017.*

reciprocity, obtaining counterparty's commitment should be voluntarily requested by the Chinese government, which is time consuming due to the large numbers of countries involved in the B&R Initiative. In addition, the bureaucratic organs of the counterparties responsible for judicial assistance may have many different priories competing for their time, resources and political capital, so it could be hard to justify action, particularly as there would not necessarily be an immediate payoff from making the commitment to offering reciprocity to China.

Due to the above concern, several scholars insist that the adoption of presumed reciprocity could be more efficient to strengthen judicial assistance on foreign judgment enforcement and safeguard the legal interests of foreign and Chinese parties to enforce their judgments. In determining whether presumed reciprocity exists, a competent Chinese court needs to confirm the following factors. Firstly, pursuant to the laws or precedent of the counterparty, a Chinese judgment is entitled to be recognized and enforced if such judgment satisfies the requirements prescribed by the laws or precedent, this does not require that the court of the counterparty has enforced a Chinese judgment before.[70] In addition, as Professor He proposed, if the conditions for China and its counterparties to recognize and enforce foreign judgments are similar, the presumed reciprocity shall be automatically established.[71]

In terms of the first requirement, pursuant to a recent research paper released by Kyushu University, Cambodia, Indonesia, Laos, Myanmar, the Philippines, and Vietnam have explicitly provided rules related to the recognition and enforcement of foreign judgments under their Civil Procedure Codes, also Brunei, Malaysia, and Singapore have incorporated the provisions on the recognition and enforcement of foreign judgments in the form of the Reciprocal Enforcement of Foreign Judgment Acts.[72] In contrast, in Thailand, there are currently no laws which deal with the recognition and enforcement of foreign judgments. Moreover, Thailand is not a contracting party to any treaty by which a foreign court judgment

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[70] *Liu (n 56) 99.*

[71] *He (n 10) 38.*

[72] *Bodisorn Tangpariyanon, 'The Recognition and Enforcement of Foreign Judgments in Today's World and the Approach of the ASEAN Economic Community' (Mater Thesis, Kyushu University, 2015), 25. <http://www.euij-kyushu.com/jp/EU-DPs/rp-award/1501-1.pdf> accessed 14 July 2017.*

may be entitled to recognition and enforcement in Thailand. Accordingly, there are no international obligations for Thai courts to either recognize or enforce foreign judgments.

Based on the findings made above, if a foreign judgment has been obtained, such judgment is not entitled recognition and enforcement automatically in Thai court. In order to enforce the judgment, the applicant should have to start a new civil proceeding in Thailand. However, the said judgment and the documentary evidence generated during the foreign litigation procedure may be admissible as evidence in the Thai court.[73] Given the absence of laws applicable to the recognition of foreign judgments, the writer found that only two applications concerning foreign judgment recognition were considered by the Supreme Court of Thailand so far, namely the Supreme Court Decision No. 585/2461(1918)[74] and Decision No. 6565/2554(2001). In the Decision No. 585/2461(1918), the Court held that

> "the principle underlying recognition and enforcement of foreign judgments is one of mutual respect among nations. The court of Siam will recognize and enforce judgment rendered by a foreign court provided that the judgment was given by the court of competent jurisdiction. The judgment must also be final and conclusive on the merits of the case."[75]

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[73] *ZICO, 'The Problem with Enforcement of a Foreign Judgment in Thailand' (ZICO 29 March 2017) <http://zico.group/blog/legal-alert-thailand-problem-enforcement-foreign-judgment-thailand/> accessed 14 July 2017.*

[74] *Vichai Ariyanuntaka, 'Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards' (an update version of the same article presented at the 8th Singapore Conference on International Business Law, Singapore, October 1996) <http://www.coj.go.th/en/pdf/AlternativeDisputeResolution04.pdf> accessed 13 July 2017.*

[75] *ibid. ("In this case, the plaintiff and the defendant were both Vietnamese citizens and thus, the Saigon Civil Court enjoyed competent jurisdiction over the case. However, the judgment of the Saigon Civil Court was given in default. The plaintiff failed to prove the Vietnamese civil procedural law concerning the finality and conclusiveness of the judgment given in default. Under the Civil Procedural Act B.E. 2452 (1909) of Thailand, the defendant who had been declared by the court to be in default of appearance and against whom a judgment had been given, may apply for a new trial within fifteen days from the date of judgment. Upon failure to prove otherwise, the Court of Siam will hold that judgment given in default is not final and conclusive.")*

According to this holding, if a foreign judgment was given by a court of competent jurisdiction, also such judgment be final and conclusive on the merits of the case, then it can be recognized and enforced in Thailand. As commentator pointed out, this holding has set forth the fundamental principles for recognition of foreign judgments in the Thai court.[76] "Considering that the doctrine of stare decisis is observed in the Thai judicial system,"[77] the holding of the Decision No. 585/2461(1918) served as the legal basis for the subsequent Supreme Court decision No. 6565/2554(2001). In accordance with the latter decision, the Supreme Court recognized and enforced a UK judgment since the judgment met the requirements of the above holding.[78] Based on the analysis made above, a foreign judgment can be considered "best evidence" if the judgment is final and conclusive and not contrary to Thai public policy, and has been given by a court with competent jurisdiction.[79]

With respect to the second factor, for instance, even though the CPL failed to provide the reviewing standard concerning the recognition of foreign judgments, pursuant to the judicial assistance treaties concluded by China, a competent court should not review substantive issues but only procedural issues of a foreign judgment. If the laws of a counterparty require its courts to conduct a comprehensive review, including both substantial and procedural issues of a Chinese judgment. Based on this scenario, China will obviously be unwilling to offer presumed reciprocity to the counterparty.[80]

In conclusion, pursuant to the national laws of the ASEAN counterparties (expect Thailand), Chinese court judgments may be effectively recognized and enforced by the courts of the ASEAN counterparties if the judgments satisfy all requirements prescribed by the laws and the precedents. In addition, if the reviewing standards concerning the recognition of foreign judgments in the ASEAN counterparties are similar, or even more favourable than the standards listed under the CPL as well as the CPL Interpretations, a presumed reciprocal relationship

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[76] *Pual Torremans, Research Handbook on Cross-border Enforcement of Intellectual Property (Edward Elgar Publishing, 2014), 106.*

[77] *Ariyanuntaka (n 75) 9.*

[78] *Tangpariyanon (n 73), 38.*

[79] *ZICO (n 74).*

[80] *He (n 10) 38.*

between China and each ASEAN counterparty shall be established. If China accepts the above suggestion on presumed reciprocity, the reciprocity issue will no longer be an obstacle blocking the recognition and enforcement of ASEAN's judgments in China.

VI : Conclusion

The traditional approach adopted by China to recognize foreign judgments is based on the strict requirement of factual reciprocity, which requires that a foreign court has already enforced a Chinese judgment before, and such approach has been criticized by many scholars mainly due to the concern of retaliatory treatment. Given the B&R Initiative actively promoted by China and the rapid economic development in the CAFTA, how to strengthen the cooperation on the recognition and enforcement of foreign judgments and effectively preserve the lawful rights and interests of private parties in the CAFTA have become the crucial tasks for China and all ASEAN countries. Although the SPC Opinions has changed the SPC's position from the requirement of factual reciprocity to the requirement of commitment, obtaining the commitment requires mutual cooperation between China and the counterparties, which is time consuming. Consequently, this Article aimed to suggest China to adopt the approach of presumed reciprocity, if pursuant to the laws or precedent of the ASEAN states, a Chinese judgment is entitled to be recognized and enforced if the judgment satisfies the requirements prescribed by the laws, in addition, the conditions to be applied to the recognition and enforcement of foreign judgments are similar between China and ASEAN states, the presumed reciprocity shall be automatically established. Adopting such approach could definitely improve transactional justice in the CAFTA in the future.