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I. INTRODUCTION

Bilateral judgment enforcement treaties entered into between China and foreign countries (hereinafter bilateral treaties) are still very much a mystery after three decades in use.[1] There are two official ways for a foreign judgment to be enforced in China,[2] either through "reciprocity" or through a bilateral treaty.[3] Commentators have suffered from a number of misconceptions about bilateral treaties. These misconceptions range from regarding bilateral treaties as unimportant,[4] overgeneralizing the

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1. The first enforcement treaty entered into by China was the Judicial Assistance Treaty in Civil and Commercial Affairs, May 4, 1987.

2. *See* Civil Procedure Law of the People's Republic of China (promulgated by President of the People's Republic of China, Apr. 9, 1991, effective 2012) arts. 281-82(China) (hereinafter, Civil Procedure Law).

3. It is possible to argue that there are two more ways to recognize or enforce foreign judgments. First, Hong Kong, Macau and Taiwan all have entered into specific enforcement arrangements. However, due to their respective unique status within China's legal system, it is clear that none of these arrangements are regarded as treaties. Second, for the recognition of foreign divorce judgment, it will be recognized unless (1) it is not legally effective, (2) the judgment rendering state does not have jurisdiction, (3) the defendant was not properly summoned and absent from the proceedings, (4) there is a parallel proceeding on the same divorce case in China; the Chinese court has already made a judgment on the same case; or China has already recognized a third country judgment on the same case, or (5) the foreign judgment was contrary to the basic legal principles of China, sovereignty, security or public order. *See Supreme People's Court, Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court*, 64 ZUIGAO RENMIN FAYUAN GONGBAO 61 (2000) (Chinese text). Ironically, despite both technically falling into the "reciprocity" branch, the Hong Kong, Macau, and Taiwan arrangements are closer to the bilateral treaties, while the recognition of foreign divorce judgments does not require reciprocity. *See* Supreme People's Court, Interpretation of the SPC on the Application of the PRC Civil Procedure Law art. 544 (2015), www.ipkey.org/en/ip-law-document/download/2649/3380/23 (hereinafter 2015 Interpretation).

4. Duelling with Dragons: Managing Business Disputes in Today's China (Sept. 20, 2011), http://www.jurisconferences.com/2011/duelling-with-dragons-managing-business-disputes-in-todays-china-september-20-2011/. ("Unfortunately, the [bilateral treaties] are of limited application

similarities between them[5] or confusing them with "reciprocity."[6] Moreover, there has been little discussion on their effectiveness, despite the fact that these bilateral treaties serve as the best available precedents for China in her consideration on whether to enter into multinational enforcement conventions, such as the Hague Convention on Choice of Court Agreements[7] (hereinafter Hague Convention). It can be noted that few commentators have ever made the comparison between the proposed Hague Convention and the bilateral treaties.[8]

This article seeks to establish a true understanding of bilateral treaties through an empirical survey of the 33 bilateral treaties of judicial assistance China has entered into with foreign countries, the relevant judicial cases, and government data relating to them. From the facts obtained through this survey, it is argued that these treaties deserve much more attention than they currently receive and efforts should be exerted to understand them properly. While this article cannot realistically resolve all the uncertainties surrounding bilateral treaties, it can strive to identify the right issues that demand further attention from courts and scholars in the future. Finally, the article will discuss how these existing bilateral treaties will have a bearing on whether China will enter into the Hague Convention.

Section B provides background on the enforcement regime of China and existing bilateral treaties. In particular, it seeks to dispel the misperception that bilateral treaties are not important due to the lack of such treaties with China's major trading partners. Section C looks into the content of each of the treaties. It shows the inappropriateness of exaggerating the similarities between the treaties, and the danger of confusing bilateral treaties and "reciprocity" when enforcing foreign

since China does not have judicial assistance arrangements with many of its key trading partners, including the USA, the United Kingdom, Germany and Japan.").

5. *See* MICHAEL MOSER, DISPUTE RESOLUTION IN CHINA, 398 (Michael Moser ed., 2012).

6. *See* Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a US Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 767 (2004) ("the [Civil Procedure Law's] standard of review provision does not specify the circumstances under which a Chinese court may refuse to recognize and enforce a foreign judgment. In practice, however, [it is] reflected in the bilateral treaties for judicial assistance between China and a number of foreign countries.") *See also* JIANG WEI & BANGQING SUN, CIVIL PROCEDURE LAW 381 (2008) (summarizing bases of enforcement rejection into four grounds while failing to distinguish the two branches).

7. Hague Conference on Private International Law, Convention on Choice of Court Agreements, Nov. 25, 1965, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

8. One commentator did compare the Hague Convention against the jurisdictional regime of China, *See* Guangjian Tu, *The Hague Choice of Court Convention – A Chinese Perspective*, 55 AM. J. COMP. L. 346, 347-49 (2007).

judgments. The uncertainties in the provisions of the bilateral treaties are also highlighted. Section D examines the enforcement cases involving the bilateral treaties and further shows how the current judicial practices have contributed to the uncertainties associated with them. Finally, based on the findings of the above sections, Section E discusses whether China should join the Hague Convention.

II. BACKGROUND

China's current regime on enforcement of foreign judgments started in 1982 when the Civil Procedure Law of the People's Republic of China (For Trial Implementation) was passed.[9] Article 204 of the Civil Procedure Law (For Trial Implementation) provides that a foreign judgment can be enforced in China if either (1) there exists a treaty between China and the judgment rendering country (hereinafter, F1[10]), or (2) the foreign judgment is enforceable on the principle of "reciprocity."[11] This two-way regime continues despite a number of amendments to the Civil Procedure Law.[12] The current version of the regime can be found in Articles 281 and 282 of the Civil Procedure Law.[13]

Article 281 sets out the procedures for recognition of a foreign judgment. In order to have a foreign judgment recognized or enforced in China, a party may apply directly to the intermediate people's court with jurisdiction or apply to the foreign court and request recognition and enforcement by the people's court in accordance with the provisions of an international treaty, or under the principle of reciprocity.[14]

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9. Civil Procedure Law of the People's Republic of China (for Trial Implementation) (promulgated by Standing Comm. of the Nat'l People's Cong., Mar. 8, 1982, effective Oct. 1, 1982). Prior to the passing of the law, there were reports of enforcement of judgments from the Soviet Union and Germany. *See also* CHENGDI YUAN, GENERAL PRINCIPLES OF PRIVATE INTERNATIONAL LAW 47-48 (2003).

10. Similarly, "F2" will be used to refer to judgment enforcing country. Republic of China (for Trial Implementation), *supra* note 9.

11. *Id.* ("When a people's court of the People's Republic of China is entrusted by a foreign court with the execution of a final judgment or order, the people's court shall examine it in accordance with any international treaty concluded or acceded to by the People's Republic of China or on the principle of reciprocity. If the court deems that the judgment or order does not violate the fundamental principles of the law of the People's Republic of China or her national and social interests, it shall order to recognize the validity of the judgment or order and execute it according to the procedure specified in this Law; otherwise, the people's court shall return the judgment or order to the foreign court.").

12. *See* Civil Procedure Law of the People's Republic of China (promulgated by President of the People's Republic of China, Apr. 9, 1991, effective 2007) arts. 265-68 (China); Civil Procedure Law, *supra* note 2.

13. Civil Procedure Law, *supra* note 2.

14. *See* Civil Procedure Law, *supra* note 2, art. 281.

Article 282 then sets out the substantive requirements:

> After examining an application or request for recognition and enforcement of an effective judgment or ruling of a foreign court in accordance with an international treaty concluded or acceded to by the People's Republic of China or under the principle of reciprocity, a people's court shall issue a ruling to recognize the legal force of the judgment or ruling and issue an order for enforcement as needed to enforce the judgment or ruling according to the relevant provisions of this Law if the people's court deems that the judgment or ruling does not violate the basic principles of the laws of the People's Republic of China and the sovereignty, security and public interest of the People's Republic of China. If the judgment or ruling violates the basic principles of the laws of the People's Republic of China or the sovereignty, security or public interest of the People's Republic of China, the people's court shall not grant recognition and enforcement.[15]

Thus, a foreign judgment will generally be enforced[16] if:

(1) The foreign judgment is legally effective;

(2) There is (i) a bilateral treaty or (ii) reciprocity between China and F1; and

(3) The foreign judgment does not violate the basic principles of the laws of the People's Republic of China and the sovereignty, security and public interest of China.[17]

In spite of its long history, the general consensus on the Chinese enforcement regime, in particular of foreign countries, is one of suspicion. It is said that "[e]nforcement of [foreign] court judgments … in the People's Republic of China has often been considered both challenging and unpredictable."[18] For foreign companies doing business with China, the conventional wisdom is to advise these companies to enter into an arbitration agreement with their counterparts in China regarding dispute resolution.[19] While the legal system of China has a lot to do with the unsatisfactory state of the enforcement regime,[20] the

15. Civil Procedure Law, *supra* note 2, art. 282.

16. 2015 Interpretation, *supra* note 3, art. 546. For ease of reference, "enforce" or "enforcement" will be used to cover both concepts unless otherwise specified.

17. *Enforcing Your Judgment in China: The Truth* 2, KING & WOOD MALLESONS (Oct. 26, 2016), http://www.kwm.com/en/hk/knowledge/downloads/enforcing-your-judgement-in-china-20160915.

18. MOSER, *supra* note 5, at 381.

19. *Id.* at 2-4.

20. *See* Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 85-7 (2002) (citing inter alia local

negative perception of the current regime in China must also be attributed to the uncertainties in the laws.[21]

Of the two types of enforcement, bilateral treaties have received very little attention. It is usual for commentators to lay out the two types at the outset and then instantly brush aside bilateral treaties for their insignificance.[22] This is the first and most common misconception of bilateral treaties.

Their apparent insignificance is due to the lack of such treaties with the major trading partners of China, such as the USA, Japan, Korea and Germany.[23] This network of enforcement treaties has been regarded as "patchy."[24] All China has at the moment are bilateral treaties with 33 individual countries that contain arrangements on judgment enforcement.[25] China is also not a party to any multinational convention, such as the Hague Convention, that specializes in the enforcement of foreign judgments.[26] In addition, it has also been said that those countries which have entered into enforcement treaties with China have mainly been developing countries.[27] This all suggests that bilateral treaties are insignificant to judgment enforcements.

Although it is true that China has never entered into bilateral enforcement treaties with her largest trading partners, it does not necessarily mean that the countries with which she has entered into bilateral treaties are insignificant. To date, China has entered into Sino-

protectionism and government interference in favor of state-owned enterprises as reasons for difficulty in enforcing foreign judgment in China).

21. Yuan, *supra* note 6, at 763 (calling the enforcement regime of China "sketchy, skeletal, and replete with ambiguity").

22. Duelling with Dragons: Managing Business Disputes in Today's China, *supra* note 4.

23. MOSER, *supra* note 5, at 406. ("Although enforcement is in theory possible in accordance with several treaties to which the PRC is a party – including enforcement treaties with jurisdictions such as France and Italy – the network of treaties is patchy, and there are no relevant treaties between China and most of its major trading partners.").

24. MOSER, *supra* note 5, at 395.

25. *See infra* Table 1.

26. Note that China has acceded to the International Convention on Civil Liability for Oil Pollution Damage (1969), which provides for enforcement of foreign judgments on oil pollution cases in limited circumstances. However, contrary to the view of some commentators, the Bilateral Treaty on Encouragement and Protection of Investment between China and Australia does not contain enforcement arrangements on enforcement of foreign judgment. Cf. ZHENG SOPHIA TANG ET AL., CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA 149 n. 31 (Edward Elgar, 1st ed. 2016).

27. King & Wood Mallesons, *supra* note 17, at 2. ("While [the bilateral treaties] may sound promising, China has to date not acceded to any international convention or multilateral treaty in this regard and has only entered into a limited number of bilateral enforcement treaties, most of which are with developing nations. China is yet to enter into applicable bilateral treaties with its major trading partners (including England, Germany, Australia and the USA).").

foreign judicial assistance treaties with 36 countries,[28] of which 33 include enforcement of foreign judgments.[29] It is noted that Singapore, Thailand and South Korea have entered into Sino-foreign judicial assistance treaties with China, but treaties with these three countries do not cover enforcement of foreign judgments.[30] Instead, they represent agreement on other areas such as cooperation in obtaining evidence, service of process, arbitration, exchange of judicial information and criminal areas. These other areas are certainly relevant to judgment enforcement but are out of the scope of this article.[31]

Table 1 sets out the 33 countries that have agreed on judgment enforcement, the effective date of the treaties,[32] trading volumes[33] and relevant percentage in China's overall trading volume in 2015.

Table 1 - Bilateral Treaty Countries

Country	Treaty Effective Date	2015 Trade Vol (in 10,000 USD)	% of Total Trade
France	1988/02/08	5137005	1.300%
Poland*	1988/02/13	1708682	0.432%
Mongolia*	1990/10/29	536608	0.136%
Romania*	1993/01/22	445719	0.113%
Russia*	1993/11/14	6801554	1.721%
Byelorussia*	1993/11/29	175972	0.045%

28. Under Chinese law, other than judgment enforcement, "judicial assistance" can include service of process for a foreign proceeding, taking evidence for a foreign proceeding, and enforcement of foreign arbitral awards. Yuan, *supra* note 6, at 764.

29. China has entered into 36 Sino-foreign judicial assistance treaties, but only 33 of them include arrangements on enforcement of foreign judgment. Ministry of Foreign Affairs, Status of Sino-Foreign Treaties on Civil and Criminal Judicial Assistance (2016), http://www.fmprc.gov.cn/web/ziliao_674904/tytj_674911/wgdwdjdsfhzty_674917/t1215630.shtml. The table below shows the types of judicial assistance covered by the 36 treaties.

Areas Covered by Judicial Assistance Treaties

	Judgment Enforcement	Evidence	Service of Process	Arbitration	Info Exchange	Criminal	Judicial Record
No. of Countries	33	36	36	28	36	19	1

30. Some commentators only refer to Singapore and South Korea for not including judgment enforcement arrangements. This is certainly not correct. TANG ET AL., *supra* note 26, at 149.

31. *See infra* Section IV(B)(1) on how improper service of legal documents could be regarded as a ground of refusal for judgment enforcement under public policy.

32. Ministry of Foreign Affairs, *supra* note 29.

33. *See Total Value of Imports and Exports by Country (Region) of Origin/ Destination*, NAT'L BUREAU OF STAT. OF CHINA, http://data.stats.gov.cn/english/easyquery.htm?cn=C01.

Spain	1994/01/01	2743954	0.694%
Ukraine*	1994/01/19	707151	0.179%
Cuba	1994/03/26	221637	0.056%
Italy	1995/01/01	4465424	1.130%
Egypt*	1995/05/31	1287642	0.326%
Bulgaria*	1995/06/30	179157	0.045%
Kazakhstan*	1995/07/11	1429019	0.361%
Turkey*	1995/10/26	2155148	0.545%
Cyprus	1996/01/11	63958	0.016%
Greece	1996/06/29	395048	0.100%
Hungary*	1997/03/21	807300	0.204%
Kirghizia*	1997/09/26	434069	0.110%
Uzbekistan*	1998/08/29	349582	0.088%
Tadzhikistan*	1998/09/02	184743	0.047%
Morocco	1999/11/26	341870	0.086%
Vietnam*	1999/12/25	9584877	2.425%
Tunisia	2000/07/20	142123	0.036%
Laos*	2001/12/15	277310	0.070%
Lithuania*	2002/01/19	134969	0.034%
United Arab Emirates*	2005/04/12	4853419	1.228%
Korea DPR	2006/01/21	551061	0.139%
Argentina	2011/10/09	1452259	0.367%
Peru	2012/05/25	1430489	0.362%
Algeria*	2012/06/16	835071	0.211%
Kuwait*	2013/06/06	1126974	0.285%
Brazil	2014/08/16	7150159	1.809%
Bosnia and Herzegovina*	2014/10/12	11371	0.003%
Total		58121324	14.703%

* Belt and Road Countries[34]

While countries like the USA, Japan and South Korea – the three largest trading partners of China – are missing from the list, there are bilateral treaties with Vietnam and Brazil, the 9th and 14th largest trading partners with China in 2015.[35] More importantly, combined together, these 33 countries constitute 14.70% of the overall trading volume of China in 2015. While they are a minority, one cannot dispute that the

34. For a list of 65 Belt and Road countries and their general profile, *see Country Profile*, H.K. TRADE DEV. COUNCIL, http://beltandroad.hktdc.com/en/country-profiles.

35. *See* National Bureau of Statistics of China, *supra* note 33.

aggregate trading volume with these countries is still a sizeable part of overall trading activities and warrants close attention. In fact, as Table 2 shows, not even the USA, which has long been the largest trading partner of China, has such a proportion in the overall trading volume with China.

Table 2 - Trade Volume of Bilateral Treaty Countries vs USA (2006-2015)

	Countries with Bilateral Treaty				USA		
Year	No.	Trade Vol (in 10,000 USD)	% of Total Trade	Year-to-Year Change	Trade Vol (in 10,000 USD)	% of Total Trade	Year-to-Year Change
2015	33	58121324	14.70%	1.72%	55702297	14.09%	1.19%
2014	31	55834967	12.98%	0.96%	55512355	12.91%	0.38%
2013	30	50008710	12.02%	0.56%	52074870	12.52%	-0.01%
2012	28	44341751	11.47%	0.10%	48467425	12.53%	0.27%
2011	27	41379050	11.36%	0.23%	44658227	12.26%	-0.70%
2010	27	33103561	11.13%	-0.02%	38538528	12.96%	-0.55%
2009	27	24607458	11.15%	-0.83%	29826260	13.51%	0.49%
2008	27	30701078	11.98%	0.75%	33374348	13.02%	-0.86%
2007	27	24427283	11.22%	1.24%	30206716	13.88%	-1.04%
2006	26	17571485	9.98%		26265947	14.92%	
Average				0.52%			-0.09%

In 2006, there were only 26 countries that had signed a bilateral treaty with China, with the aggregate trading volume accounting for just 9.98% of the total trading volume of China. This can be contrasted with 14.92% of the USA during the same period. However, the gap has since closed as the number of bilateral treaties has increased. In 2014, the treaties countries' trading volume exceeded that of the USA for the first time in history. The lead of the treaties countries continues to grow as their trading volume accounted for 14.70% of the total trading volume of China in 2015, when the USA only accounted for 14.09% in the same period. Over the ten years from 2006 to 2015, the average year-to-year change in trading volume of the treaties countries was 0.52% compared to -0.09% of the USA. This clearly shows that the importance of the treaties countries continues to climb, while that of the United States is in decline, or at least has plateaued.[36]

36. Treaties countries: t = 2.0747, df = 8, p = 0.0717; USA: t = -0.3726, df = 8, p = 0.7191

Another reason for the lack of attention to these bilateral treaties is the fact that most of these countries are developing countries.[37] In fact, treaties with these developing countries require more attention because of the trading potential in the future. For example, China, Brazil and Russia represent three of the four members of BRIC.[38] The 33 countries also included 8 of the 15 members of the former Soviet Union.[39] More recently, as China is leading in the much discussed "One Belt One Road" project, it is important to note that 22 of the 33 treaties countries also happen to be Belt and Road countries.[40]

Table 3 - Belt and Road Countries (2006-2015)

	21 Countries (Without Iran)			22 Countries (With Iran)		
	Trade Volume (in 10,000 USD)	% of Total Trade	Change	Trade Volume (in 10,000 USD)	% of Total Trade	Change
2015	34026337	8.61%	-0.26%	37409093	9.46%	-0.61%
2014	38165468	8.87%	0.54%	43349702	10.08%	0.80%
2013	34662097	8.33%	0.22%	38604748	9.28%	0.23%
2012	31373658	8.11%	0.34%	35020242	9.06%	0.04%
2011	28310018	7.77%	0.53%	32820358	9.01%	0.78%
2010	21543458	7.24%	0.01%	24482565	8.23%	0.03%
2009	15978575	7.24%	-0.60%	18100483	8.20%	-0.73%
2008	20100914	7.84%	0.75%	22876677	8.92%	0.89%
2007	15435279	7.09%	0.86%	17494244	8.04%	0.99%
2006	10971431	6.23%		12416172	7.05%	
Average			0.26%			0.27%

As Table 3 shows, there has been a continual increase in trading volumes of the 22 Belt and Road countries with China, reaching 8.61% of trading volumes of China in 2015. As the Belt and Road project continues to develop, it is expected that the trading volume between China and these 22 countries will increase at an even faster rate.

37. *See* KING & WOOD MALLESONS, *supra* note 17.

38. For economic growth of BRIC, *see International Trade Statistics 2015*, WORLD TRADE ORG., https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf.

39. *See Union of Soviet Socialist Republics*, ENCYCLOPEDIA BRITANNICA (last updated Mar. 10, 2017), https://global.britannica.com/place/Soviet-Union.

40. *See* Hong Kong Trade Development Council, *supra* note 34.

Finally, China has reportedly entered into a new bilateral treaty with Iran recently.[41] Once it comes into effect, it will further boost the proportion of the treaties countries in the overall trading volume of China from 14.70% to 15.56% based on the 2015 trading numbers. The share of the total trading volume of Belt and Road countries will also increase from 8.61% to 9.46%.

In short, a sizeable part of China's trading activities are starting to fall into the bilateral treaties regime. It is also likely that this regime's importance is going to increase over time compared with the "reciprocity" arrangements. Accordingly, the real question is not whether the bilateral treaties are significant, but whether they are effective in enforcing foreign judgments. To answer that question, the next section looks at the substantive content of the bilateral treaties and compares them with each other.

III. SUBSTANTIVE CONTENTS OF THE BILATERAL TREATIES

A common misconception about bilateral treaties is that there are many similarities between them.[42] However, this is untrue. While they do share some similarities at a very general level, it is dangerous for litigating parties to rely on such general similarities in pursuing enforcement based on a particular treaty. This section shows the differences between the bilateral treaties in terms of the scope, refusal grounds for enforcement and other relevant aspects.

Another problem in the contemporary analysis of bilateral treaties is the practice of confusing the discussion with reciprocity.[43] As will be shown below, some of the treaties' provisions are in fact contrary to the general provisions of the Civil Procedure Law (which applies to reciprocity). Although the status of international treaties in the hierarchy of the Chinese legal system is not clear, it is generally believed that treaties enjoy a higher legal standing than domestic law.[44] For

41. *See Sino-Iran Joint Declaration on the Establishment of Complete Strategic Partnership Relationship*, XINHUANET (Jan. 23, 2016), http://news.xinhuanet.com/world/2016-01/23/c_1117872814.htm. While the treaty is not publicly available, it is believed that it contains provisions regarding judgment enforcement, *See Ministry of Justice, Delegates participating in Sino-Iran Judicial Assistance on Civil and Commercial Affairs Negotiation*, http://www.moj.gov.cn/sfxzjlzx/content/2014-12/17/content_5890548.htm?node=24391.

42. *See* MOSER, *supra* note 5, at 2.

43. *See* Yuan, *supra* note 6.

44. *See* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH 163 (Duncan B. Hollis et al. eds., 2005). ("In regard to the legal status of treaties in Chinese law, the Chinese Constitution does not contain any specific provisions on the matters. However, in practice… if a treaty to which China is a party contains provisions inconsistent with Chinese laws, treaty provisions should prevail, unless China has made reservations to relevant provisions.").

discrepancies between bilateral treaties and the requirements in the Civil Procedure Law, it is specifically provided in Article 260 that the provisions of the treaties will prevail.[45] Thus, identifying those discrepancies becomes significant. Differences between the treaties in terms of scope, refusal grounds and enforcement procedures will be examined below.

A. Scope

While all the bilateral treaties are designed to enforce foreign "civil" judgments, the definitions of "civil" in fact vary across different treaties. The substantial differences are shown in the tables below.

Table 4 - Scope of the Bilateral Treaties

	No. of Countries
Civil	33
Criminal damages	33
Commerce	27
Labor	16
Marriage	12
Family	10
Economic	5
Fee	5
Status	2
Succession	1
Exclusion	5

Chinese scholars have generalized the scopes into just three types of judgments, namely, civil, commercial and criminal compensation.[46] Table 4 shows much more variety in the types of judgment covered by the bilateral treaties. Although it is clear that all the bilateral treaties cover civil judgments and damages which compensate the victims in criminal judgments, the treaties also cover various other types of judgments, including those related to commerce, labor, marriage, family, economic

45. *Id.* Where there is any discrepancy between an international treaty concluded or acceded to by the People's Republic of China and this Law, the provisions of the international treaty shall prevail, except clauses to which the People's Republic of China has declared reservations.

46. TANG ET AL., *supra* note 26.

aspects, court fees, status and succession. To make it more complicated, five countries have also included explicit exclusions on certain sub-types of judgments from the aforementioned categories.[47] Table 5 shows the different combinations of the types above.

Table 5 - Scope of the Bilateral Treaties (Combinations)

	Combination	No. of Countries	Percentage
1	Civil & Criminal damages	3	9%
2	Civil, Criminal damages & Commercial	3	9%
3	Civil, Criminal damages & Fee	3	9%
4	Civil, Criminal damages, Commercial & Status	2	6%
5	Civil, Criminal damages, Commercial & Labor	2	6%
6	Civil, Criminal damages, Commercial & Family	1	3%
7	Civil, Criminal damages, Commercial & Exclusion	5	15%
8	Civil, Criminal damages, Commercial, Labor & Family	1	3%
9	Civil, Criminal damages, Commercial, Labor & Marriage	3	9%
10	Civil, Criminal damages, Commercial, Labor, Family & Fee	1	3%
11	Civil, Criminal damages, Commercial, Labor, Family & Marriage	3	9%
12	Civil, Criminal damages, Commercial, Labor, Succession & Marriage	1	3%
13	Civil, Criminal damages, Commercial, Labor, Family, Marriage & Economic	5	15%
	Total	33	100%

Among the 33 bilateral treaties, there are 13 different combinations created out of the 11 different types of judgments referred to in Table 4. As Table 5 shows, no combination has more than five countries. Thus, while *prima facie*, the scopes of the treaties are all "civil," they could be substantially different. To make them more different, even if two treaties have the same scope on paper, they might not always mean the same things. For example, both the treaties with Turkey and Egypt have only

47. *See* bilateral treaties with Spain, United Arab Emirates, Algeria, Peru and Tunisia.

included civil and criminal damages within their scope.[48] However, an article of the treaty with Egypt[49] contains references to judgments relating to contract, tort, immovable properties, succession, family, status and business, while the treaty with Turkey does not contain such references. It can, of course, be argued that the word "civil" in the Egypt treaty should be broadly interpreted to include all these additional types of judgments, but can the same be said of the Turkey treaty? What about those five treaties that expressly include civil, criminal damages, commercial, labor, family, marriage and economic aspects (combination 13 in Table 5)?[50] These treaties apparently define the word "civil" much more narrowly than the treaty with Egypt. Thus, it is dangerous to over-generalize the similarities between the treaties in terms of scope even if they all broadly cover "civil" judgments in general. If the differences in scope appear confusing, the refusal grounds for enforcement are even more so.

B. Refusal grounds

Once it is established that the foreign judgment falls within the scope of the relevant bilateral treaty, the foreign judgment is presumably enforceable subject to a number of specific refusal grounds.[51] It is common for commentators to summarize these refusal grounds generally. For example, one commentator summarized the refusal grounds as follows:

> 1) the foreign court judgment was issued by a foreign court that would have lacked jurisdiction under PRC law;
> 2) the defendant was not served with proper notice of the foreign proceedings …;
> 3) an effective judgment has been issued by a People's court for the same cause of action between the same parties; or

48. *See* Judicial Assistance Treaty in Civil, Commercial and Criminal Affairs, China-Egypt, art. 20, Apr. 21, 1994, [no official citation available] and Judicial Assistance Treaty in Civil, Commercial and Criminal Affairs, China-Turk., art. 21, Sept. 28, 1992, [no official citation available].

49. *See* Judicial Assistance Treaty in Civil, Commercial and Criminal Affairs, China-Egypt, art. 20, Apr. 21, 1994, [no official citation available].

50. *See* bilateral treaties with Ukraine, Kazakhstan, Uzbekistan, Tajikistan and Belarus.

51. Three treaties do not specify any refusal grounds per se, but express them as positive conditions for enforcement. In practice however, the effect should be the same. *See* Article 17 of Judicial Assistance Treaty in Civil and Commercial Affairs, China-Hung., art. 17, Oct. 9, 1996, [no official citation available], Judicial Assistance Treaty in Civil and Criminal Affairs, China-Laos, art. 21, Jan. 25, 1999, [no official citation available], and Judicial Assistance Treaty in Civil and Criminal Affairs, China-Cyprus, art. 25, Apr. 25, 1995, [no official citation available].

4) recognition and enforcement of the foreign court judgment would cause harm to the national, social or public interests of the PRC.[52]

Similarly, it is also common for commentators to discuss the refusal grounds of the bilateral treaties and reciprocity arrangements as if they were the same.[53] However, none of these practices could stand detailed analysis of the treaties.

Table 6 - Refusal Grounds

	No. of Country	Percentage
Effective Judgment	33	100%
Jurisdiction	33	100%
Due Process	33	100%
Res judicata	33	100%
Public policy	33	100%
Governing law on Status	2	6%
Unenforceability under F2 Law	2	6%
Inconformity of Document	1	3%
Total	33	100%

52. *See* MOSER *supra* note 5, 398. *See also* Jie Huang, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS 74 (Hart Publishing, 1st ed. 2004). ("Widely recognized by scholarship and bilateral… treaties ratified by Mainland China, refusal is generally based on the following four grounds: (1) incompetent indirect jurisdiction; (2) unfair procedures; (3) *res judicata*; and (4) public policy exception."). There are however different categorizations by other commentators.

53. *See* Zhang *supra* note 20, at 88-89 ("The [Civil Procedural Law] does not dictate the conditions under which a people's court may refuse to recognize and enforce a foreign judgment. In practice, however, the people's courts may strike down a petition or request for recognition and enforcement if the foreign judgment is found to have one of the following defects: [(1) lack of jurisdiction; (2) ineffective foreign judgment; (3) due process; (4) parallel proceedings or (5) public policy].)

Table 6 shows that, while the five refusal grounds are present in all 33 treaties, five other treaties actually have additional refusal grounds. For example, in the bilateral treaties in France and Spain, an additional refusal ground is that a foreign judgment will be rejected if, in terms of a natural person's status and civil capacities, F1 does not apply the choice of law rule of F2, unless the substantive law applied by F1 led to the same result as the choice of law of F2.[54] For the five general refusal grounds, the similarities of the relevant provisions among the bilateral treaties are very limited, as shown in the discussion below.

1. Effectiveness of Foreign Judgment

Table 7 - Effectiveness of Foreign Judgment

Type of Formulation	No. of Countries	%
Not effective or unenforceable under F1 law	20	61%
Not final or unenforceable under F1 law	8	24%
Not effective under F1 law	2	6%
Not final or unenforceable under F1 law; Not enforceable under F2 law	2	6%
Not certain or unenforceable under F1 law	1	3%
Total	33	100%

All treaties have articles requiring that the foreign judgment has become legally effective under the law of F1. However, the details of such articles vary across different treaties. It is common for commentators to over-generalize these articles as requiring the judgment to be "not effective or unenforceable" under F1 law.[55] As Table 7 shows, however, only 20 of the 33 treaties adopt such a formulation. The rest of the treaties adopt alternative formulas. For example, eight of the treaties provide that the foreign judgment can be rejected for enforcement if they

54. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-Kaz. art. 22(2), May 4, 1987, [no official citation available] and Judicial Assistance Treaty in Civil and Criminal Affairs, China-Spain, art. 22(2), May 2, 1992, [no official citation available]. *Cf.* HUANG, *supra* note 52 (referring only to France having such a requirement).

55. *See* YONGPING XIAO, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 24 (2007) (stating only such formulation as the requirement of the bilateral treaties. In particularly, reference was made to the treaties with Belarus, Bulgaria, Cuba, Egypt, France, Greece, Italy, Kazakhstan, Kyrgyzstan, Mongolia, Poland, Morocco, Romania, Russia, Spain, Turkey, Tajikistan, Ukraine, Uzbekistan. However, France, Bulgaria, Morocco and Italy all in fact have different formulations.).

are not *final* or are unenforceable under F1 law. It is unclear whether there is a real difference between a legally effective judgment and a final judgment.[56] What makes it even more complicated is the fact that the treaties with Laos and Cyprus both add an extra requirement on enforceability of judgments. Under both treaties, enforceability is not only required under F1 law but also under F2 law.[57]

Even if the 20 treaties which adopt the "effectiveness and enforceable" format account for the majority, one must not forget that the actual requirements vary substantially across different countries on what constitutes "legally effective," "enforceable" and "final." Since the relevant provisions in the 33 treaties all have F1 law as the governing law, it is foreseeable that these terms might not always mean the same thing in different jurisdictions.

Finally, the general requirement of Articles 281 and 282 is that the judgment must be "effective."[58] No definition is provided for the term "effective" in the Civil Procedure Law, nor is there any reference to "final" or "unenforceable."[59] There is also no specification in the governing law of the effectiveness requirement. As argued above, where there is a discrepancy between bilateral treaties and the Civil Procedure Law, the provision in bilateral treaties will prevail.[60] It is therefore submitted that parties should only consider the relevant provision of the bilateral treaty under F1 law if there exists a bilateral treaty between F1 and China. On the other hand, in cases where there is no bilateral treaty, parties should be cautious in drawing an analogy with the relevant provisions of the bilateral treaty in the interpretation of effectiveness in reciprocity cases.[61]

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56. Whether there is a difference shall ultimately depend on the law of F1. However, *see* discussion on Schneider Electric SA v. Xu Xiao-Xu, Chongqing No. 1 IPC, (2011), Yu Yi Zhong Fa Min Chu Zi No. 385, *infra* note 159 below.

57. Judicial Assistance Treaty in Civil and Criminal Affairs, China-Laos, art. 21, Jan. 25, 1999, [no official citation available]; Judicial Assistance Treaty in Civil and Criminal Affairs, China-Cyprus, art. 25, Apr. 25, 1995, [no official citation available].

58. Civil Procedure Law, *supra* note 2.

59. *Id.*

60. *See* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH, *supra* note 44.

61. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-Kaz., *supra* note 54 art. 22(2) [no official citation available]; the treaty with France, the first ever bilateral treaty signed by the PRC adopts the rare "not certain or unenforceable" format, and does not use the term "effective" in the treaty. For practice of discussing the respective requirement under the bilateral treaties and Civil Procedure Law as if they are the same, *see* Xiao, *supra* note 55, at 25.

2. Jurisdictional Requirement

Table 8 – Jurisdictional Requirement

	Type 1 – Exclusive Jurisdiction Only	Type 2 – Respective Jurisdiction	Type 3 – Objective Jurisdiction	Total
List of Countries				-
No. of Countries	8	14	11	33
Percentage	24%	42%	33%	100%

All 33 treaties require the judgment rendering court to have satisfied some jurisdiction requirements, but such requirements vary across the bilateral treaties. There are generally three types of jurisdictional requirements.[62] The first type simply requires the foreign judgment not to be in an area that is designated as the exclusive jurisdiction of F2. Thus, when China is the judgment enforcing country, reference will need to be made to the jurisdictional rules of China and particularly the rules regarding exclusive jurisdiction. For example, if the foreign judgment is on immovable properties located in China, it will be a ground to reject the enforcement in China since immovable property is designated as being subject to the exclusive jurisdiction of the Chinese courts.[63]

The second type of jurisdiction requirement is much broader than the first type and requires the F1 court to have complied with the jurisdiction requirements of F2 as if the latter is taking the case in the first place. This will have the effect of equating the direct jurisdictional rules

62. These three types of indirect jurisdictional bases are recognized by a number of commentators, despite not giving them the same labels herein. *See, e.g.*, TANG ET AL., *supra* note 26.

63. *See* Moses, *supra* note 5, at 110. ("The Civil Procedure Law contains provisions concerning exclusive jurisdiction, one of the most important principles of which states that a dispute over real estate shall be under the jurisdiction of the court where the property is located [under CPL, Art 34]. In relation to foreign-related disputes, Article [266] provides that disputes related to joint venture contracts or joint exploration and development of natural resources shall be under the jurisdiction of the people's courts. Such disputes may be arbitrated, but may not be heard by a court outside of China.").

This is actually one of the advantages of arbitration over litigation for disputes involving China. *See supra* note 5, at 4 ("it should be noted that PRC law prohibits parties from submitting certain disputes to foreign courts, but does allow the parties to select arbitration [under CPL, arts. 34 and 246]. The types of disputes covered include those involving real estate and natural resources projects and those arising out of Sino-foreign joint ventures.").

with the indirect jurisdictional rules in enforcement.[64] Thus, if France rendered a judgment on the sole basis that the plaintiff is a French national,[65] and no other jurisdictional basis is found, enforcement of this French judgment could be rejected in China since the Chinese nationality of the plaintiff is not a basis for Chinese courts to take jurisdiction if the case were to be tried in China.[66]

Finally, instead of having regard to the direct jurisdictional rules of F2, some bilateral treaties set out a laundry list of acceptable jurisdictional bases. However, these jurisdictional bases are still subject to the exclusive jurisdictional bases of F2. Thus, even if having a business representative in F1 is an acceptable jurisdictional basis under the Sino-Spanish bilateral treaty in business disputes,[67] the Spanish judgment would not be enforceable in China if, for example, the business dispute is on the equity interests in a Sino-foreign joint venture which is one of the areas designated as being within the exclusive jurisdiction of the Chinese courts.[68] Some commentators have argued that there were no such reservations of exclusive jurisdiction in the Type 3 bilateral treaties, but this is simply incorrect as a matter of fact.[69]

The distributions of the three types of jurisdiction requirement are relatively even as shown in Table 8 above. Although Type 2 constitutes the majority, it consists of no more than 42% of the 33 treaties.[70] Type 1 which has the fewest treaties adopted still constitutes 24%.

Looking at the three types of jurisdiction bases, it is clear that the common thread is the exclusive jurisdiction reserved for Chinese law, but there is substantial difference beyond that, with Type 1 being the easiest to enforce and Type 2 being the most difficult.

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64. The term indirect jurisdiction is often used in Chinese legal literature, *see, e.g.*, ZHONGBO ZHANG, STUDY ON PRIVATE INTERNATIONAL LAW (GUOJI SIFA XUE) 497 (2012). For a general discussion of direct and indirect jurisdictions, *see* Huang, *supra* note 52 at 220-23.

65. *See* CODE CIVIL [C. CIV.][CIVIL CODE] art. 14 (Fr.).

66. *See* Arts. 265-66, Civil Procedure Law.

67. *See* Arts. 21(1)(2) and 22(1) and of Judicial Assistance Treaty in Civil and Criminal Affairs on 2 May 1992 between the PRC and Spain.

68. *See* Arts. 21(2)(1) and 22(1) of Judicial Assistance Treaty in Civil and Criminal Affairs on 2 May 1992 between the PRC and Spain, and art. 266 of the Civil Procedure Law.

69. TANG ET AL., *supra* note 26. ("Exclusive jurisdiction in Chinese domestic law has a broad scope, which makes it easy to conflict with the treaty jurisdiction rules. Taking the China-Spain Treaty as an example, it does not expressly reserve exclusive jurisdiction rules of either country and the treaty jurisdiction rules are only consistent with the Chinese exclusive jurisdiction in terms of succession and immoveable property."). The authors have simply omitted art. 22(1)(2) which provides that the objective jurisdictional bases are subject to the regulations on exclusive jurisdiction of both countries.

70. MOSER, *supra* note 5, at 45-92.

Chinese commentators generally criticize Type 2 but prefer Type 3. According to them, Type 2 is problematic because "the diversity of domestic jurisdiction rules would render many judgments given by a court duly taking jurisdiction under its domestic law unenforceable in the other contracting state."[71] While this criticism against Type 2 may be justified, the preference for Type 3 is not. Commentators praised the objectivity of Type 3 rule as one that promotes certainty,[72] but this is far from the truth. In fact, the jurisdiction requirements for the enforcement of foreign judgments in China are relatively certain for Types 1 and 2 – one only needs to check the relevant exclusive jurisdictional bases of China for Type 1 and the general jurisdictional bases of China for Type 2 respectively. However, the requirements for Type 3 vary substantially.

In total, there are 16 different jurisdictional bases that have been adopted by 33 bilateral treaties. These range from bases that all treaties have adopted, such as F2 being the location of the immovable property or the place of residence of the defendant, to bases that only a few jurisdictions have adopted, such as the place of the debtor for custody cases.[73] More importantly, it is unclear which law is to be applied to determine whether the jurisdictional bases are satisfied. Most of the treaties are silent as to the governing law. This will be particularly problematic if the laws of F1 and F2 are different in a given jurisdictional basis.

71. TANG ET AL., *supra* note 26, at 154.

72. *See* WEIZUO CHEN, COMPARATIVE PRIVATE INTERNATIONAL LAW 62 (2008).

73. Detailed Breakdown of Objective Jurisdiction Bases

Jurisdictional Basis	No. of Country
Location of Immovable Property	11
Defendant Place of Residence	11
Business – Place of Agent	10
Contract – Place of Performance	11
Contract – Location of Subject Matter	9
Contract – Place of Execution	9
Tort – Place of Act	11
Tort – Place of Consequence	9
Preliminary Action	2
Exclusive Jurisdiction of F2	11
Succession – Place of Death of Deceased or Place where Major Assets are Located	7
Explicit Jurisdiction Agreement	11
Defendant Defensed on Merit and Did not Argue on Jurisdiction	8
Status – Place of the Subject Person	5
Custody – Place of Debtor	6
Defendant's representative in F2	1

For example, while the Sino-Italian bilateral treaty provides that the F1 court will have jurisdiction over a contractual dispute if F1 is the place of performance of the contract,[74] the definition of place of performance is different under PRC law and Italian law when it is not specified clearly in the contract. Under PRC law, when the place of performance is not specified in the contract, it is presumed as the place where the recipient of money is located if the subject matter of dispute is the payment of money.[75] However, under Italian law, in the case of the sale of goods, the place of performance is presumed to be the place where the goods were delivered, or should have been delivered.[76] Thus, in a sale of goods contract between a Chinese seller and an Italian buyer, if there is no jurisdiction clause nor a specific provision designating the place of performance, the place of performance will be presumed to be China under Chinese law, assuming that is where payment will be received, while it will be presumed to be Italy assuming delivery will be made in Italy. Note that the bilateral treaties with Kuwait and the United Arab Emirates provide that F1's determination of objective jurisdictional bases shall be binding on F2 unless it is a default judgment.[77] However, there is no equivalent in the rest of the Type 3 bilateral treaties and one simply cannot assume such a requirement is implied because of the existence of such articles in the bilateral treaties with Kuwait and the United Arab Emirates. The Type 3 treaties would be much improved if clauses, like those in the bilateral treaties with Kuwait and the United Arab Emirates, or further guidance within the treaty were included.

Finally, it must be noted that Chinese scholars have generally argued that a jurisdictional requirement is necessary in all enforcement cases, including cases not under the bilateral treaties regime (meaning therefore under the reciprocity regime), even though this is not stated in Articles 281 and 282 of the Civil Procedure Law.[78] On many occasions, the justification is simply that jurisdiction is a common requirement in the bilateral treaties.[79] One commentator further argued that jurisdiction

74. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-It., art. 22(2), May 20, 1991, [no official citation available].

75. 2015 Interpretation, *supra* note 16, art. 18.

76. *See* Reform of the Italian System of Private International Law, Law No. 218, art. 32, May 31, 1995.

77. Judicial Assistance Treaty in Civil and Commercial Affairs, China-U.A.E., art. 20, Apr. 21, 2004 [no official citation available]; Judicial Assistance Treaty in Civil and Commercial Affairs, China-Kuwait, art. 20, June 18, 2007, ST. COUNCIL GAZ. [no official citation available].

78. *See* QU GUANG QING, PRINCIPLES OF THE CONFLICT OF LAWS 153 (Beijing Law Press, 2004); *see also* WENLIANG ZHANG, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CHINA: RULES, PRACTICES, AND STRATEGIES (Kluwer Law International, 2014).

79. *Id.*

should be included under reciprocity since there is "no justification for Chinese national law to grant an even more favorable treatment by relinquishing the jurisdictional requirement, to judgments from the countries having no such bilateral agreements with China."[80] The validity of this argument, however, depends on how stringent the reciprocity requirement is, but it is certainly not supported by judicial practice. There is no reported case under the reciprocity regime that failed on lack of jurisdiction. Moreover, even without jurisdiction as a refusal ground, reciprocity appears to be much more difficult to satisfy than bilateral treaties. While the success rate under bilateral treaties is not high,[81] there is only one successful case under reciprocity.[82]

Even if it makes sense to include jurisdiction in the reciprocity regime, it is submitted that its omission should only been seen as regrettable, and one cannot imply such a requirement without solid legal sources.

3. Improper Procedure in the F1 Proceeding[83]

Table 9 - Improper Procedure in the F1 Proceedings

Summon legal rep under F1 law	Summon under F1 law	Legal rep under F1 law	Summon, defend legal rep under F1 law	Summon under F1 law; legal rep under F2 law	Summon under F1 law; legal rep (law not specified)	Summon under F1 law; defend/ rep (law not specified)	Total
23	3	1	2	2	1	1	33
70%	9%	3%	6%	6%	3%	3%	100%

In all 33 bilateral treaties, there are also refusal grounds that can be broadly categorized as ways to examine whether the proceedings in F1 are proper. Commentators again like to over-generalize the requirement.[84] However, the detailed requirements indeed vary between bilateral treaties.

80. *Id.*
81. *See infra* Section IV.
82. *See Kolmar Group AG v. Jiangsu Textile Industry (Group) Import & Export Co., Ltd.* (2016) Su01 Assisting Foreign Recognition No 3.
83. TANG ET AL., *supra* note 26, at 150-151
84. MOSER, *supra* note 5.

As Table 9 above shows, 23 of the 33 bilateral treaties provide that (1) the defendant must be summoned if absent from the proceedings, and (2) where the defendant is not capable, then he must receive proper legal representation.[85] Both these requirements are governed by the law of the judgment rendering country. However, in the remaining 10 bilateral treaties, the requirements are not the same. Some treaties only provide for one of the two aforementioned F1 procedural requirements (three only provide for proper summoning, and one only provides proper legal representation). Two treaties provide for an additional F1 procedural requirement, namely, the defendant has been provided with the opportunity to properly defend himself or herself in the F1 proceedings. Some treaties vary in the law governing the F1 procedural requirement. For example, two treaties state that the summoning requirement will be governed by the law of F1, while the requirement on legal representation will be governed by the law of F2. Some treaties do not specify the law governing some of the requirements. Finally, even among the 23 treaties that provide for proper summoning and legal representation, since they are all subject to F1 law, such as the requirement on effectiveness, the actual applications of this requirement could be very different depending on the F1 law involved.[86]

There is no equivalent requirement under the reciprocity regime.[87] One could, however, argue that the requirement is partly contained in Article 543 of the 2015 Interpretation which provides that "[i]f the judgment or ruling rendered by the foreign court is a default judgment or ruling, the applicant shall, at the same time, submit the certification documents on a legal summons from the foreign court."[88] That being said, Article 543 does not state that non-compliance will result in refusal of enforcement. Accordingly, like jurisdiction, it would not be proper to include improper procedure as a refusal ground for the reciprocity regime.

85. *Id*. (Note that the latter requirement was sometimes omitted by commentators).

86. For a brief summary of the equivalent rules under Chinese law, see supra note 5, 117-118, see MOSER, *supra* note 5, at 117-118 ("After the receipt of the complaint, the defendant is granted a certain period to respond to the complaint by a written acknowledgement. During this period, the defendant may challenge the court's jurisdiction over the dispute by filing an objection, on grounds of [subject matter jurisdiction], by territory, by agreement, exclusive jurisdiction and forum non conveniens… The court is required to review the issue of jurisdiction before proceeding with trial procedures, and to make a decision and issue an order accordingly. The defendant is entitled to a reconsideration if the defendant is not satisfied with the order.").

87. Civil Procedure Law of the People's Republic of China (for Trial Implementation), *supra* note 9, art. 281-282.

88. 2015 Interpretation, *supra* note 16, art. 543.

4. Parallel Proceedings[89]

Table 10 - Parallel Proceedings

F2 made judgment + in process +enforced 3rd country judgment	21	64%
F2 made judgment + enforced 3rd country judgment	5	15%
F2 made judgment + in process (before F1) +enforced 3rd country judgment	3	9%
F2 made judgment + in process (before F1)	2	6%
F2 in process (before F1) or enforced 3rd country judgment	1	3%
F2 initiated proceeding	1	3%
Total	33	100%

In all 33 bilateral treaties, F2 may refuse enforcement of the foreign judgment if it has engaged in some form of parallel proceedings. Some commentators simply refer to a requirement to ensure "an effective judgment has been issued by a People's court for the same cause of action between the same parties."[90] However, the differences between the bilateral treaties are significant as reflected in Table 10.

The most common provision is that F2 (1) has already made a judgment, (2) has a proceeding in process, or (3) has enforced a judgment from a third country that involved the same parties and subject matter.[91] This provision accounts for 21 of the 33 bilateral treaties. However, 12 other treaties have different requirements. For example, five treaties only cover the first and third types of parallel proceedings above, while three other treaties specify that for parallel proceedings in process in F2 (the second situation above), the proceedings must be initiated prior to the one which rendered the judgment in F1. Together, there are six different sets of requirements.

89. HUANG, *supra* note 52.

90. MOSER, *supra* note 5, at 398.

91. One commentator claimed that only Poland and France treaties have such requirements, *see* DEPEI HAN, RESEARCH ON CHINESE CONFLICT OF LAWS 399 (1993); However, even at the time it was written, at least one more bilateral treaty contains such requirements, *see* Judicial Assistance Treaty in Civil and Criminal Affairs, *China-Mong*., art. 18(3), Aug. 31, 1989 [no official citation available].

Article 522 of the 2015 Interpretation provides for a similar requirement.[92] Under the said article, a foreign judgment will be rejected if the Chinese court has already rendered a judgment on the same action between the parties at the time of the enforcement request.[93] This requirement is expressly subject to international treaties.[94] Since all bilateral treaties have covered this ground, it is submitted that there will not be direct conflict in practice, but the bilateral treaties are apparently broader in scope.

This Article is significant for two additional reasons. First, parallel proceedings have never been an express refusal ground under Articles 281 and 282, nor their predecessors. The SPC was of the opinion that this is an essential addition thereto.[95] However, the SPC has never done the same for the jurisdiction requirement which is also not an express ground covered by Articles 281 and 282, thus adding to the argument against such a requirement being implied in the reciprocity regime.[96] Second, the fact that the provision is expressly subject to treaties is further confirmation by the SPC that the treaties are to prevail in case of conflict between the treaties and Civil Procedure Law.[97]

92. *See* 2015 Interpretation, *supra* note 75, art. 522.

93. *See* Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China (promulgated by Judicial Interpretation No.22 [1922] of the Supreme People's Court, Jul. 14, 1992) art. 306, http://www.cietac.org/index.php?m=Article&a=show&id=2408&l=en.. ("For the cases over which both the people's court of the People's Republic of China and the foreign court have jurisdiction, if one party files a lawsuit with the foreign court but the other party files a lawsuit with the people's court of the People's Republic of China, the people's court may accept the case. If, after a judgment was rendered, the foreign court or one party requests the people's court's to recognize and enforce the judgment or ruling rendered by the foreign court concerning this case, the people's court shall not consent to the request, unless it is otherwise prescribed by an international treaty concluded or acceded to by both countries.").

94. *Id.*

95. In fact, the same requirement could be found as early as 1992 when the SPC promulgated Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China. *Id.*

96. *See* QING *supra* note 78, at 92.

97. *See* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH, *supra* note 44.

5. Public Policy

Table 11 - Public Policy

Public Policy Requirement	No. of Treaties	%
Sovereignty/ Security/ Public order	13	39%
Sovereignty/ Security/ Public order/ Non-judicial	3	9%
Sovereignty/ Security/ Significant public interest/ Basic legal principles/ Non-judicial	3	9%
Sovereignty/ Security/ Public order/ Basic legal principles	2	6%
Sovereignty/ Security/ Public order/ Constitutional principles/ Current law	2	6%
Sovereignty/ Security/ Significant public interest/ Basic legal principles	2	6%
Sovereignty/ Security/ Public order/ Basic interests	2	6%
Sovereignty/ Security/ Public order/ Social public order/ Non-judicial	1	3%
F2 Basic principles	1	3%
Sovereignty/ Security/ Public order / Basic Interest/ Basic legal principles/	1	3%
Sovereignty/ Security/ Public order/ Basic interest/ Basic legal principles	1	3%
Sovereignty/ Security (decided by F2)/ Basic legal principles	1	3%
Sovereignty/ Security/ Public order/ Significant interests	1	3%

The bilateral treaties all provide that the foreign judgment will not be enforced if it is contrary to the public policy of F2. However, despite a view to the contrary, the formulations of what constitutes "public policy" vary.[98]

The definitions of all but one treaty include sovereignty and national security of F2.[99] However, all of them include additional elements beyond sovereignty and national security. Together, there are thirteen different

98. For common formulation, *see e.g.* MOSER *supra* note 5, at 398 ("recognition and enforcement of the foreign court judgment would cause harm to the national, social or public interests of the PRC.").

99. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-Hung., art. 17, Oct. 9, 1995, [no official citation available].

formulations of the public policy requirement. The most common formulation is sovereignty, security and public order, but it still only accounts for thirteen of the thirty-three treaties. More importantly, since no definition for these different terms has ever been provided in any of the relevant treaties, it is not clear what each of them mean. For example, are "significant public interests" the same as "significant interests"?[100] Or is there any real difference between "significant interests" and "basic interests"?[101] This uncertainty echoes the observation of Chinese scholars on *ordre public* in general who called the doctrine "neither precise nor uniform."[102]

Further, Article 282 provides generally that enforcement of a judgment should be subject to the foreign judgment not being inconsistent with China's sovereignty, security, public order and basic legal principles.[103] These terms are not defined there either.[104] In Table 11, only two treaties adopt the same formulation.[105] If the public policy requirements in the treaties are in conflict with Article 282, the treaties' requirement shall prevail.[106]

100. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Arg., art. 7, Aug. 31, 1989, [no official citation available]. (providing for "significant public interests"), and Judicial Assistance Treaty in Civil and Criminal Affairs, China-Lith., art. 9, Mar. 20, 2000, [no official citation available] (providing for "significant interests").

101. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Lith., *supra* note 100, art. 9, [no official citation available] (providing for "significant interests"), and Judicial Assistance Treaty in Civil, Commercial and Criminal Affairs, China-Egypt, art. 20, Apr. 21, 1994, [no official citation available] (providing for "basic interests").

102. *See* Yongping Xiao & Zhengxin Huo, *Ordre Public in China's Private International Law*, 53 AM. J. COMP. L. 653, 659 (2005).

103. *See* Civil Procedure Law, *supra* note 2, at Art. 282. This provision can in fact be traced back to Article 204 of the Civil Procedure Law (Trial Implementation)(1982), the earliest law that adopted the doctrine of *ordre public* in a formal manner. *See also id.* at 656.

104. *See id.*

105. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Cuba, art. 13, Mar. 20, 2000, [no official citation available]; Judicial Assistance Treaty in Civil and Criminal Affairs, China-Ukr., art. 11, Apr. 21, 1994, [no official citation available].

106. *See* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH, *supra* note 44, at 163.

6. Document Inconformity

Finally, it must be noted that all treaties provide for the documents to be submitted in the enforcement proceedings in F2.[107] However, as Table 6 has shown, only one treaty expressly provides that inconformity to the document requirement could lead to lack of enforcement.[108] As will be seen in Section D, the lack of a relevant refusal ground may have led to the Chinese courts applying public policy as a ground of rejection in case of documentary inconformity.[109]

C. Other Aspects

1. Partial Enforcement

Table 12 – Partial Enforcement

	Partial Enforcement Provided	Partial Enforcement Not Provided
No. of Treaties	10	23
Percentage	30%	70%

Generally, if a foreign judgment falls within the scope of the treaty and is not rejected on any of the refusal grounds set out above, the judgment will *prima facie* be enforceable in China. But what if only part of the foreign judgment fails on one or more of the aforementioned refusal grounds? What will be the consequence in that case? Presumably, that would mean the foreign judgment is not enforceable at all. However, in 10 of the 33 treaties, it is expressly provided that the foreign judgment can be partially enforced.[110] This is achieved by not enforcing the part that is contrary to the enforcement conditions.[111]

107. *See e.g.* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Lith., *supra* note 100, art. 17(2), [no official citation available] (requiring the submission to F2 documents, such as copy of the foreign judgment, document proving proper summons of the defendant in case of default judgment, and proof of proper legal representation of legally incapable defendant).

108. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Arg.,*supra* note 100, art. 18(5), Aug. 31, 1989, [no official citation available].

109. *See infra* Section D.

110. *See* bilateral treaties with Greece, Kuwait, Bulgaria, Argentina, Brazil, United Arab Emirates, Algeria, Peru, Tunisia, and Bosnia and Herzegovina.

111. *Id.*

2. Party Initiating Enforcement Proceedings

Table 13 – Party Initiating Enforcement Proceedings

	Party can directly file with no conditions			Party cannot directly file	
Who can initiate	Party Directly	Party Directly, or Party through F1 Court	Party Directly, or F1 Court Directly	Party through F1 Court, or Party Directly if Resident in F2	Court Directly
No. of Treaties	8	8	10	6	1
33	26			7	

Who can initiate the enforcement proceedings? Under the bilateral treaties, there are five different formulas which consist of combinations of initiations of the proceedings by the litigating party, and/or by the court. At one end, eight treaties allow only the party to file directly for enforcement in China. At the other, one treaty allows only the F1 court to file for enforcement.[112] However, in most cases it is a combination of both. In eight treaties, the party can file either directly in the F2 court or through the F1 court. In ten other treaties, both the F1 court and the party can file directly in the F2 court. In total, there are 26 treaties that make it possible for the party to file directly without any conditions. On the other hand, apart from one treaty which only allows the F1 court to file an enforcement directly, there are six other treaties that allow the party to file an enforcement directly to F2 but only if the filing party is resident in China.

This is to be contrasted with the requirement under Article 281. Generally, China allows both the parties and the F1 court to file the foreign judgment enforcement directly in Chinese courts.[113] Again, when the requirement of Article 281 is in conflict with the relevant requirement in the treaties, the treaties' requirement shall prevail.[114]

3. Definition of Judgment

Finally, there could be further complications regarding the definition of "judgment." Although the majority of treaties define

112. *See* Judicial Assistance Treaty in Civil, Commercial and Criminal Affairs, China-Turk., art. 21(1), Sept. 28, 1992, [no official citation available].

113. *See* Civil Procedure Law, *supra* note 2, art. 281.

114. *See* NATIONAL TREATY LAW AND PRACTICE: DEDICATED TO THE MEMORY OF MONROE LEIGH, *supra* note 44, at 163

"judgment" to include a "mediation agreement,"[115] treaties with France and Algeria do not have the same provision.[116] In addition, for the treaties with Italy, the United Arab Emirates and Kuwait, it is provided that the enforcement mediation agreement is only subject to compliance with the public policy of F2 without reference to any of the other refusal grounds above.[117]

Having regard to the various differences between the bilateral treaties, one can easily see the substantial variety, from the scope of the treaties and enforcement conditions, to other enforcement aspects. With all these differences, it is safe to say that no treaties are identical. This is hardly surprising considering that each of the treaties were entered into with a different country, at different times and under different negotiation backgrounds. While China might have initiated the negotiation of a given bilateral treaty using certain standard forms of treaty provisions, it is natural that the final products have deviated as a result of the actual negotiations. Even if the same terminology is used, it is expected that different countries might have a different understanding of it. Without a neutral umpire like the European Court of Justice in the Brussels Regulations, all the treaties provide that any disputes over the meaning of the treaties will be resolved ultimately by diplomatic negotiations.[118] The interpretation of certain terms in one treaty cannot therefore be relied on in another treaty. It is even more dangerous to use the provision and/or interpretation thereof to interpret the requirements under the reciprocity regime. Apart from avoiding these pitfalls, it is submitted that there exists plenty of uncertainties from the examination of treaties. The following

115. For a brief summary of mediation in Chinese court, *see* Moser, *supra* note 5, at 125, 369. *See also* MOSER, *supra* note 5, at 367. ("Mediation, also referred to as "conciliation," is an informal dispute resolution process whereby a mediator or neutral third party is used to facilitate negotiation and resolution between parties. There are many forms of mediation, ranging from collaborative to adversarial, informal to formal. Additionally, mediation can occur at anytime during the dispute, from inception to post-award."). *See also* MOSER, *supra* note 5, at 375. ("In civil suits, the courts are authorized to resolve disputes by mediation with the consent of the parties. This can occur at the courts initiative at anytime including after the close of trial prior to the issuance of a judgment. Mediation is generally not a separate process and judge has a lot of discretionary power to direct the parties.").

116. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-Kaz., *supra* note 54 [no official citation available] and Judicial Assistance Treaty in Civil and Commercial Affairs, China-Alg., Jan. 10, 2010, [no official citation available].

117. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-U.A.E., *supra* note 77, art. 25, [no official citation available], Judicial Assistance Treaty in Civil and Commercial Affairs, China-Kuwait, *supra* note 77, art. 25, and Judicial Assistance Treaty in Civil and Criminal Affairs, China-It., *supra* note 74, art. 27[no official citation available].

118. *See e.g.* Judicial Assistance Treaty in Civil and Commercial Affairs, China-U.A.E., *supra* note 77, art. 28 [no official citation available].

section seeks to explore whether such uncertainties could be clarified by Chinese courts in actual cases.

IV. JUDICIAL PRACTICES RELATING TO BILATERAL TREATIES

The cases were identified mainly through search phrases in four databases, China Judgement Online, LawinfoChina, Westlaw and LexisNexis. The first database is the official database of the Supreme People's Court.[119] LawinfoChina has been widely regarded as the best commercial database on Chinese cases,[120] while the latter two are market leaders in case databases worldwide. This is further supplemented by cases discussed in books, articles and other trustworthy sources that contain enforcement cases. For a case to be an enforcement case, recognition or enforcement of a foreign judgment must have been sought in a Chinese court therein. The survey identified in total 2,846 enforcement cases in China as of December 31, 2016, the last full calendar year at the time this article was written.

Table 14 - Enforcement Cases in China

	Treaties Cases	Reciprocity Cases	Total
No. of cases	29	2,817	2,846
Percentage	1%	99%	100%

It has always been the belief of commentators that enforcements of foreign judgments in China pursuant to bilateral treaties are rare.[121] Of the 2,846 enforcement cases, only 29 fall into treaty cases, which are defined in this article as cases involving enforcement of judicial decisions rendered by the court of a foreign state that has entered into a bilateral treaty with China on enforcement of judgments (hereinafter "treaty cases.") These treaty cases account for less than one percent of all enforcement cases, and the remaining cases are all cases under the reciprocity regime (hereinafter "reciprocity cases"). Government data released by the Ministry of Justice also supported the small number of treaty cases. For example, in the five years between 2010 and 2014, there

119. China Judgments Online, *Index*, WENSHU COURT, http://wenshu.court.gov.cn/Index.

120. *See* Hui Huang, *Piercing the Corporate Veil in China: Where Is It Now and Where Is It Heading?*, 60 AM. J. COMP. L. 743, 747 (2012) (calling the database "authoritative and widely-used").

121. *See* MOSER, *supra* note 5, at 398 ("In practice, there is a very limited record of enforcement of foreign court judgments in the PRC pursuant to the Sino-foreign judicial assistance treaties. In one case, involving a judgment issued by an Italian court, recognition was successful). *See* also Jingxia Shi, *Recent Developments in Chinese Cross-Border Insolvencies*, 2002 AUSTL. J. CORP. L. 18, 6 (2002).

were reportedly more than 3,100 cases regarding judicial assistance annually, of which only five cases were on judgment enforcement (0.16%).[122] In the first six months of 2015, there were 1,040 cases regarding judicial assistance generally, but only seven cases were on judgment enforcement (0.67%).[123] In the first nine months of 2016, there were 1,928 cases regarding judicial assistance generally, but only fourteen cases were on judgment enforcement (0.73%).[124] In addition, the government statistics do not make it clear that these enforcement cases are necessarily treaty cases, making them potentially rarer in practice.

Similar searches have been performed with the case databases in France[125] and Russia;[126] both are key trading partners of China (ranking as the 20th and 16th largest trading partners of China as of 2015, respectively)[127]and both have been in bilateral treaties with China for a long time (1987 for the French treaty and 1992 for the Russian treaty). There was only one divorce case that can be identified in the French database[128] and there is no relevant case in the Russian database. These limited data seem to suggest that the bilateral treaties are not only inefficient in enforcing foreign judgments in China, but also inefficient in enforcing Chinese judgments in the foreign signatories.

All of the above suggests that the bilateral treaties are not effective in enforcing foreign judgments in China. The real issue that requires our attention is the reason behind such ineffectiveness.

A. Not All Treaty Cases Applied the Treaties

While it is expected that the treaty cases will be decided based on the application of the relevant treaty, only eighteen cases (62%) cited the treaties in the judgment. For the remaining eleven cases (38%), the relevant treaties were never referred to, even though the cases were

122. *See Overview of Judicial Assistance on Civil and Commercial Affairs*, MINISTRY OF JUST. (Dec. 17, 2014), http://www.moj.gov.cn/sfxzjlzx/content/2014-12/17/content_5890548.htm?node=24391.

123. *See Statistic on Judicial Assistance on Civil and Commercial Affairs cases in the first half of 2015*, MINISTRY OF JUST. (Jul. 27, 2015), http://www.moj.gov.cn/sfxzjlzx/content/2015-07/27/content_6190902.htm?node=24391.

124. *See Judicial Statistics on Civil and Commercial Matters*, MINISTRY OF JUST. (Sept. 26, 2016), http://www.moj.gov.cn/sfxzjlzx/content/2016-09/26/content_6817093.htm?node=24391.

125. Search has been performed using phrases "4 mai 1987" + "entraide" in legifrance.gouv.fr.

126. Search has been performed in http://www.consultant.ru.

127. Russia and France were the 3rd and 4th largest trading partners of China in 2015 among the 33 countries, just behind Vietnam and Brazil. *See infra* Table 1.

128. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., May 25, 2016, 15-14754 (Fr.).

rendered by the court of a country which had such a bilateral treaty with China. The low percentage of treaty cases utilizing the bilateral treaties suggests that not all Chinese judges are even aware of the existence of the bilateral treaties.

B. Success Rate is Not High

Table 15 - Success Rate

	Enforced	Recognized	Partially Enforced/ Recognized	Denied	Total
No. of Cases	2	12	7	8	29
Percentage	7%	41%	24%	28%	100

Only about half of the treaties cases were either fully enforced or recognized. Eight cases were completely rejected and six were partially rejected. The low success rate will no doubt negatively affect the motivation of the litigating parties to utilize the bilateral treaties to seek enforcement in China. Table 16 below summarizes the bases of rejections.

Table 16 - Rejection Grounds

Bases of Rejections	No. of Cases	Percentage
Public policy	3	7%
Ineffective judgment	1	7%
Document inconformity	1	20%
Involvement of 3rd party interest	1	7%
Improper venue	1	7%
Not presented for enforcement	1	7%
No explanation	7	47%
Total	15	7%

The first observation on the grounds of denial is the small number of cases that were denied under the official rejection grounds of the bilateral treaties. No case actually failed for lack of jurisdiction, F1 improper procedure, or parallel proceedings. Only one case failed on ineffective judgment and three cases failed on public policy. In other words, Chinese courts have been finding additional grounds to reject enforcement beyond the specified refusal grounds. Among these cases, seven of them (almost half of the failed cases) are without explanation in

the judgments. The different grounds of rejection will be examined in turn below.

1. Public Policy

As the designated "very unruly horse,"[129] Chinese academics echoed the pledge of their counterparts in the west to limit the application of public policy.[130] It should be "interpreted restrictively and invoked prudently."[131] With three of the 15 rejections coming from public policy, it certainly demands deeper examination, particularly when two such cases were actually decided by the Supreme People's Court.

In *Minsk Automatic Production Corporation United v. CNMTC*,[132] the judgment creditor sought to enforce a judgment from the Supreme Economic Court of the Republic of Belarus in the No. 2 Intermediate Court of Beijing.[133] It was argued that the judgment could not be enforced because it had been served on the defendant in China directly by post by the Belarus court instead of through the relevant Chinese authority. Since service by post is neither allowed under the Hague Service Convention[134] nor the Sino-Belarusian bilateral treaty,[135] the enforcement was rejected. This was confirmed by the Supreme People's Court.[136]

The most controversial part of the judgment was the basis of rejection. The Beijing court suggested that it should be rejected under Article 21(5) of the Sino-Belarusian bilateral treaty.[137] This basis of rejection was expressly approved by the Supreme People's Court in its reply to the Beijing court.[138] As Article 21(5) provides for rejection due to contravention of F2's sovereignty, security and public order, the case is thus categorized as failing on public policy in Table 16 above, even

129. *See* Xiao & Huo, *supra* note 102, 654.

130. *See* SHUANGYUAN LI, GENERAL INTRODUCTION TO PRIVATE INTERNATIONAL LAW 612 (1996) (arguing that China should avoid utilizing public policy to reject judicial assistance to foreign countries as much as possible in practice for fear of adversely affecting comity).

131. *See* Xiao & Huo, *supra* note 102, 676.

132. *Minsk Automatic Production Corp. United v. CNMTC*, ER ZHONG MIN RENZI NO. 01815 (No. 2 Interm. People's Ct. 2001); *Supreme Econ. Ct. of the Rep. of Belr. v. CNMTC*, ER ZHONG MIN RENZI NO. 01817 (No. 2 Interm. People's Ct. 2001) (China).

133. Letter of Reply of the Supreme People's Court on Request for Instructions on Application of Minsk Automation Production Line United Corp. for Recognition and Enforcement of Judgment of the Supreme Econ. Tribunal of the Republic of Belarus (date unavailable).

134. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 [no official citation available].

135. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Belr., art. 8, Jan. 11, 1993, [no official citation available].

136. *See supra* note 133.

137. *See supra* note 132.

138. *See supra* note 133.

though neither the Supreme People's Court nor the Beijing No. 2 Intermediate Court explained why the improper service constituted a breach of Chinese public policy.

This issue was subsequently discussed in the *Chorvanaslxizmat* case.[139] Similar to *Minsk Automatic Production*, the Uzbekistan summons and judgment were not served in compliance with the Sino-Uzbek bilateral treaty.[140] As such, upon submission from the High Court of the Xinjiang Uyghur Autonomous Region, the Supreme People's Court again utilized the public policy section of the Sino-Uzbek bilateral treaty[141] to reject enforcement.[142] Most importantly, the Supreme People's Court explained that it was a breach of public policy since the failure of proper service constituted a breach of the judicial sovereignty of China.[143]

It is submitted that the Supreme People's Court has interpreted public policy too extensively in both cases. It can be recalled that in Section C improper procedure in an F1 proceeding is an established ground for refusal.[144] However, the relevant articles in the bilateral treaties (including the bilateral treaties with Uzbekistan and Belarus) do not contain any requirement on improper service of judgment.[145] Even if the Sino-Uzbek treaty did contain a requirement on the service of summons, it is explicitly governed by the law of F1 (Uzbekistan law).[146] Thus, it seems that the Supreme People's Court felt compelled to utilize the public policy exception as a catch-all provision.

However, this takes the public policy exception too far for a technical breach of procedure, and there are certainly alternative ways to reach the same result within the framework of the treaties. First, in both treaties, the articles containing the specified refusal grounds are not

139. Letter of Reply of the Supreme People's Court on Request for Instructions on Chorvanaslxizmat case, Aug. 6, 2001 (Sup. People's Ct. Aug. 6, 2011) (China).

140. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Uzb., art. 3, Dec. 11, 1997, [no official citation available].

141. *See id.*, art. 21(5)(providing for refusal of enforcement if the foreign judgment is in violation of F2's "sovereignty, security and public order."

142. *See* Letter of Reply of the Supreme People's Court on Request for Instructions on Chorvanaslxizmat case, *supra* note 139.

143. *Id.*

144. *See supra* Section III(A)(3).

145. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Uzb., *supra* note 140, art. 21 (3), [no official citation available]; Judicial Assistance Treaty in Civil and Criminal Affairs, China-Belr. art. 21, Jan. 11, 1993, [no official citation available].

146. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Uzb., *supra* note 140, art. 21 (3)[no official citation available].

described as exhaustive,[147] and it is thus possible to reject enforcement on other grounds. The best way to handle this procedural irregularity is to reject the enforcement proceeding for failing to observe procedural law which is reserved by both bilateral treaties to be governed by F2 law (and in this case, Chinese law).[148] When service of foreign judgment is not in compliance with the bilateral treaties, the service could only be legally effective if it is in compliance with the default Chinese law.[149] When the service fails under the default Chinese procedural law, the foreign judgment can be rejected accordingly. This is no different from rejecting the enforcement of a foreign judgment based on the violation of a limitation period under Chinese procedural law.[150]

Another case that was rejected on public policy grounds is *Application of Li Yili for recognition and enforcement of foreign court judgment and civil ruling*.[151] It was a partially recognized/enforced case. The foreign judgment involved was an Italian judgment that held, inter alia, (1) that the couple was to be divorced, (2) the custody of the couple's son and maintenance arrangement, (3) the distribution of real properties (both in Italy and China) and (4) the debt involving the couple's car. When recognition and enforcement were sought in China, the court only agreed to recognize the divorce part of the judgment, but refused to enforce the latter parts. The reasoning provided by the court was that the latter parts of the Italian judgment were contrary to the public policy of China as they contravened the basic principles of the Chinese Marriage Law.[152]

It is submitted again that the court in this case applied the public policy ground too lightly. Under each of the bilateral treaties (including the Sino-Italian bilateral treaty), the merits of the case cannot be opened by the F2 court.[153] The governing law of divorce chosen under the conflict rules of F1 should be regarded as a substantive matter and should be

147. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Uzb., *supra* note 140, art. 21 (3) [no official citation available]; Judicial Assistance Treaty in Civil and Criminal Affairs, China-Belr., *supra* note 135, art. 21, [no official citation available].

148. *See id.*

149. *Minsk Automatic Production Corp. United v. CNMTC*, ER ZHONG MIN RENZI NO. 01815 (No. 2 Interm. People's Ct. 2001) (China) (apparently, this is why the Hague Service Convention was discussed in the *Minsk Automation Production* case.)

150. *See* Supreme People's Court, Interpretation of the SPC on the Application of the PRC Civil Procedure Law art. 547 (2015), www.ipkey.org/en/ip-law-document/download/2649/3380/23 (hereinafter 2015 Interpretation).

151. Application of Li Yili for Recognition and Enforcement of Foreign Court Judgment and Civil Ruling (Wenzhou Interm. People's Ct. Jan. 21, 2010).

152. *Id.*

153. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-It., *supra* note 74, art. 25(2) [no official citation available].

recognized in the F2 court, unless it is so offensive as to violate the public policy of F2. It is also interesting to note that the public policy exception in the Sino-Italian bilateral treaty only refers to "sovereignty, security and public order,"[154] but not "basic legal principles" as some other treaties do.[155]

The non-divorce part of the judgment, while it might not be the kind of judgment awarded by a Chinese court under Chinese family law, does not appear to be an extreme type either. The real problem probably lies in the allocation of matrimonial property located in China under the Italian judgment. The court could have easily rejected the enforcement of this part of the judgment by utilizing the article in the Sino-Italian bilateral treaty that specifically reserves the exclusive jurisdictions of F2.[156] Regarding the custody arrangement and the debt of the couple's car, there is simply no indication in the judgment that they are offensive to the "sovereignty, security and public order" of China.[157] The fact that the court did not cite the Sino-Italian treaty in the judgment seems to suggest that the court might not have been aware of the existence of the Italian Treaty.[158]

Thus, having regard to the three public policy cases above, it is clear that the Chinese courts have overused the public policy ground as a basis of rejection unnecessarily. Instead, the Chinese courts should have utilized the more rule-based grounds to reach the same results. These cases therefore have done little to clarify the uncertainty involving public policy but have set up bad precedents for future cases.

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154. *See id*., art. 21(6).

155. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Cuba, *supra* note 105, art. 13, [no official citation available].

156. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-It., *supra* note 74, at art. 22(2). For discussion on reservation of exclusive jurisdiction in bilateral treaties in general, *see supra* note 69.

157. Note that if there were no bilateral treaty, such arrangements included in a foreign divorce judgment will not generally be enforced under the Supreme People's Court. *Supreme People's Court, Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court*, *supra* note 3. *See* further discussions in infra Section D(2)(iv).

158. *See supra* Section IV(1).

2. Ineffective Judgment

Another ground for refusal that has been utilized in the court is ineffective judgment. In *Schneider Electric SA v Xu Xiao-Xu*,[159] the Chinese court rejected enforcement by citing the lack of effectiveness of the French judgment under French law. It argued that since it was possible under French law to appeal the case, the judgment was therefore ineffective.[160] However, this reasoning is problematic for various reasons. First, the judgment seems to suggest that the possibility of an appeal of the judgment equates to ineffectiveness. This is a very narrow reading of effectiveness and also does not fit with the literal meaning of the terms used in the Sino-French bilateral treaty. Under Article 22(3) of the treaty, a foreign judgment can be rejected if it is "not certain or unenforceable."[161] There was also no report of the defendant appealing the case in France; therefore, the appeal was no more than a possibility. If one adopts the Chinese court's interpretation, a foreign judgment could only be effective if all the appellate processes in F1 have been exhausted. Such interpretation will have the effect of substantially restricting the applicability of the bilateral treaty.

More importantly, Article 22(3) is expressly subject to French law. In the case, the judgment creditor actually submitted to the Chinese court a certification of effectiveness of judgment issued by the Paris appellate court. Although Article 22(3) falls short of saying that the French court's determination of effectiveness is binding and conclusive, the French court's certification appears to be the best proof one can get of the effectiveness of the French judgment under French law. It seems absurd that the Chinese court could just overrule such certification according to its own interpretation of French law, particularly when there was no record of an expert witness on French law in the judgment. Accordingly, the *Schneider* case is another bad precedent by the PRC court to reject enforcement of a foreign judgment.

A better way to achieve the same result is to attack the enforcement request on the ground of improper service of judgment. The case actually pointed to the service of judgment and other required documents not meeting the requirements of the Sino-French bilateral treaty.[162] This is similar to what happened in *Chorvanaslxizmat* and *Minsk Automatic*

159. Schneider Electric SA v. Xu Xiao-Xu, Chongqing No. 1 IPC, (2011), Yu Yi Zhong Fa Min Chu Zi No. 285.

160. *Id.*

161. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-Fr., art. 22(3), May 4, 1987.

162. *See id.*, art. 22(3).

Production (discussed above). Instead of utilizing public policy, the court in *Schneider* opted to reject the case on the grounds of ineffectiveness. The case would have been far better handled if the court had just rejected enforcement based on the judgment creditor's failure to comply first with the service requirement under the Sino-French bilateral treaty,[163] and then the default procedural rule on service under Chinese law.[164]

3. Document Inconformity

In *Iras-engineering Ltd. v. Jiangsu Hengyuan Machinofacture Co.,Ltd. and Jiangsu Hengyuan International Engineering Group*,[165] the court rejected enforcement of the default judgment from Kazakhstan because the plaintiff failed to produce documentary proof that the defendant was properly summoned under Article 18(2) of the Sino-Kazakh bilateral treaty in time.[166] Document inconformity is not a specified ground of refusal under the treaty,[167] but failure to observe the proper summoning of the defendant at the F1 proceeding is.[168] When the treaty expressly requires the plaintiff to produce proof of proper summoning, the burden of proving this appears to lie with the plaintiff. Thus, the most appropriate way to handle the decision is to refuse enforcement based on improper procedure in F1 proceedings. While this decision is clearly better than the one handed down in *Chorvanaslxizmat* and *Minsk Automatic Production*, as the court did not try to force the decision into public policy, it clearly passed on an opportunity to apply the proper refusal ground.[169]

4. Other Rejection Grounds

This part covers rejection grounds that do not appear in Section C(b) above. *In Re Petition of B&T Ceramic Group SRL for Recognition and Enforcement of the Judgment on Bankruptcy Rendered by the Italian*

163. *Id.*, art. 23(1).

164. *See id.*

165. *Iras-engineering Ltd. v. Jiangsu Hengyuan Machinofacture Co., Ltd. & Jiangsu Hengyuan International Engineering Group*, Mar. 28, 2012 (Yangzhou Interm. People's Ct. Dec. 12, 2012) (China).

166. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Kaz., art. 18(2), Jan. 14, 1993, [no official citation available].

167. *See id.*, art 21.

168. *See id.*, art 21(3).

169. It is also possible to adopt similar reasoning advanced above in discussion of *Chorvanaslxizmat* case and *Minsk Automatic Production* case, namely, failure to comply with treaty service requirement and also the default Chinese procedural law.

Court,[170] a claimant sought to enforce an Italian insolvency judgment in China. While the court recognized the Italian insolvency judgment, it held that it could not enforce the judgment by transferring the shares of PRC assets to the liquidator because the shares had been transferred to a third party.

Two points can be noted. First, the involvement of a third party interest is not a ground for rejection under the Sino-Italian bilateral treaty,[171] and the court failed to refer to any provision for the want of third party protection. Second, the scope of the treaty only covers judgments on civil, criminal compensation, commercial, marriage and labor, but not bankruptcy or insolvency.[172] While the Chinese court may be commended for being willing to consider enforcement of a foreign judgment that does not clearly fall into the specified scope of the treaty, this case again shows the difficulty of fitting a square peg into a round hole.[173]

Two other cases were rejected on procedural grounds, though not expressly stated in the relevant bilateral treaties. In *Wu Yonglin and Chen Alan v. Zhang Wencheng*,[174] and *Tedelon Holding Group Co., Ltd. v. F.A.C.I.BDICORTESI&C.S.P.A.*,[175] the foreign judgments were rejected because enforcement proceedings were filed at the wrong venue in China and for failure to present the case for enforcement.[176] While these refusal grounds are not expressly specified in the respective treaties,[177] they do fit within the argument that China should be able to refuse enforcement of a judgment for failing Chinese procedural requirements.

Finally, there is a high percentage of unexplained rejections. Five of these seven cases are partially recognized/enforced cases involving foreign divorce judgments which are similar to the *Li Yili* case.[178] In these

170. Judgment on Bankruptcy Rendered by the Italian Court, Guangdong Province Foushan IPC, CLI.C.829134.

171. *See* Judicial Assistance Treaty in Civil and Criminal Affairs, China-It., *supra* note 74, at art. 21

172. *See id*., arts. 1, 20.

173. For a general discussion of the difficulty of enforcing foreign bankruptcy judgment in China, *See* Emily Lee, *Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency* Lee *Matters between Hong Kong and Mainland China*, 63 AM. J. COMP. L. 439 (2015).

174. Wu & Chen v. Zhang (Wenzhou Interm. People's Ct. Aug. 22, 2012) (China) (The civil judgment of second instance of dispute over right to life, health and body on Aug. 1, 2012).

175. Tedelon Holding Group Co., Ltd. v. F.A.C.I.BDICORTESI & C.S.P.A., (Hangzhou Interm. People's Ct. Apr. 22, 2014) (China).

176. *See id*.

177. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-Fr., supra note 161, at art. 22; Judicial Assistance Treaty in Civil and Criminal Affairs, China-It., *supra* note 74, at art. 21.

178. Application of Li Yili for Recognition and Enforcement of Foreign Court Judgment and Civil Ruling, *supra* note 151.

five judgments, the Chinese courts simply stated that the foreign divorces decrees were recognized without reference to other parts of the judgments that required enforcement. The effect, therefore, is the same as the *Li Yili* case,[179] but for the lack of express rejection and reasoning. Again, this might be attributed to a lack of understanding of the treaties.[180] Under reciprocity enforcement, divorce cases are generally recognized, but the property distribution, custody, and maintenance parts of the foreign judgment will not be enforced.[181] These cases might therefore have been wrongly decided because of a lack of awareness or understanding of the bilateral treaties. In any event, the Chinese courts should have specified the reason for rejection as they are generally required to do so under the bilateral treaties.[182]

In short, the low success rate could be attributed to uncertainties resulting from the lack of understanding of the treaties by Chinese courts (both in scope and refusal grounds), and, particularly, the over-utilization of the public policy exception. Instead of clarifying the uncertainties discussed in Section D, examination of the cases actually shows further confusion.

C. Treaties Are Ineffective in Enforcing Commercial Cases

Table 17 - Type of Cases

	General Commercial	Marriage / Family	Insolvency	IP	Criminal Compensation	Total
No. of cases	6	18	3	1	1	29
%	21%	62%	10%	3%	3%	100%
Success case	2	12	1	0	0	
Success rate	33%	33%	33%	0%	0%	

The majority of the cases are family cases, accounting for eighteen of the twenty-nine treaty cases. Considering one of the perceived functions of an enforcement treaty is to promote economic

179. *Id*.

180. Two of these five cases did not refer to the relevant bilateral treaty.

181. *See Supreme People's Court, Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court*, *supra* note 3, art. 2.

182. *See e.g.* Judicial Assistance Treaty in Civil and Criminal Affairs, China-Rom., art. 22(2), Jan. 16, 1991, [no official citation available].

developments,[183] the small amount of commercial cases (eleven out of twenty-nine, combining general commercial, insolvency and IP) is disappointing. The success rate is also slightly lower than family cases (27% to 33%). Further, the Chinese courts have been willing to go beyond the expressly specified scopes of the treaties. Both IP and insolvency are not within the range of the scope of treaties set out in Table 4. While judicial creativity might be admirable, it does create further uncertainties on the scope of the treaties, as seen in the discussion on the *B&T Ceramic Group* case above.

In summary, treaty cases are rare, especially regarding the trading volume of the thirty-three countries, as well as, in comparison to the reciprocity regime. This could be attributed to the Chinese courts' lack of awareness of the treaties, the uncertainties in the treaties (both because of their drafting and subsequent interpretation by the courts), and the ineffectiveness in enforcing commercial judgments. Considering that the first bilateral treaty with France entered into force in 1987, the current stage of the bilateral treaties regime is disappointing. The next section explores whether China should be a signatory to the Hague Convention and if that will present an improvement.

V. HAGUE CONVENTION

Commentators have spent a disproportionate amount of time debating whether China should join the Hague Convention.[184] Since the European Union, Mexico and Singapore have ratified the Convention, it has become effective.[185] Its influence is only going to grow as soon as the United States, which has already signed the Convention, ratifies it.[186] However, whether to join the Convention is a much bigger question as it involves considering China's whole enforcement regime, particularly the issue of reciprocity. The structure of the Convention can be compared to the existing bilateral treaties. This will shed light on whether the Convention is conceptually acceptable to China.

183. Twenty-seven of the thirty-three bilateral treaties expressly provided for enforcement of commercial judgments. In addition, foreign divorce judgments are generally recognized (though not enforced) by the Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court, and thus one can argue that the real value of the bilateral treaties is in the enforcement of commercial judgments. *See Supreme People's Court, Opinions on Relevant Questions Concerning People's Courts' Handling Petition for Recognition of Divorce Judgment Made by a Foreign Court*, *supra* note 3.

184. *See* Tu, *supra* note 8.

185. *See* Hague Convention of Private International Law, Status Table, Jun. 6, 2016, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

186. *See id.*

The Hague Convention is modeled on the Brussels Convention,[187] which facilitates enforcement of judgments through harmonizing the jurisdictional rules of member states.[188] Due to the need to compromise the different views on the proper bases of jurisdiction, the jurisdictional ground of the final version of the Hague Convention is only limited to jurisdiction agreement, which makes it similar to the New York Convention.[189]

Previously, some commentators compared the jurisdictional bases of the Hague Convention with the direct jurisdictional bases of China.[190] While this is certainly relevant, it will also be essential to compare the enforcement bases of China against its counterpart to the Hague Convention.

The Hague Convention governs three different roles that a member state plays: (1) the court that is designated as the court with jurisdiction by the jurisdiction agreement,[191] (2) the court that is not designated by the jurisdiction agreement but is where the proceeding is initiated,[192] and (3) the court that is to enforce the judgment rendered by a court designated by the jurisdiction agreement.[193] Since the bilateral treaties do not set out requirements on the first two roles, the last role is the most relevant for our purposes. The first two roles will only be briefly set out below.

A. Role 1 – Court Designated by the Jurisdiction Agreement

The basic jurisdictional requirement of the Hague Convention is found in Article 5(1) which provides that the court of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction, unless the agreement is null and void under the law of that state.[194] There is no question that a jurisdiction agreement can enable a PRC court to assume jurisdiction generally if it is designated as such by the agreement.[195] However, the fact that the jurisdiction agreement could

187. *See* CHRISTOPHER CLARKSON & JONATHAN HILL, THE CONFLICT OF LAWS (4th ed. 2011), 183.

188. *Id.*

189. *Id.*

190. *See* Tu, *supra* note 8.

191. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, art. 5.

192. *See id.* art. 6.

193. *See id.* arts. 8, 9.

194. *See id.* art. 5.

195. *See* 2015 Interpretation, *supra* note 3, art. 531 (The parties to a dispute over a foreign-related contract or any other right or interest in property may, by a written agreement, choose the foreign court at the place of domicile of the defendant, at the place where the contract is performed or signed, at the place of domicile of the plaintiff, at the place where the subject matter is located,

potentially be void under Chinese law[196]narrows the application of the Convention. This includes (a) only foreign related matters can have jurisdiction agreement,[197] and foreign joint venture and wholly-owned foreign enterprises are not considered a foreign party; (b) the chosen jurisdiction must have an actual connection with the dispute;[198] and (c) some matters are reserved to the exclusive jurisdiction of China.[199] While these matters could be excluded from the scope expressly pursuant to Article 21 of the Convention, it would substantially limit the effectiveness of the Convention.[200] One commentator even called the exclusion mechanism of Article 21 a "Trojan Horse" in effect, "with the potential to reduce the Convention to a hollow shell."[201]

Further, under Article 5(2), a court designated by the jurisdictional agreement should not decline to exercise jurisdiction because the case should be decided in a court of another state. This will not be a problem to China even if it has now recognized the principle of *forum non conveniens* under Article 532 of the 2015 Interpretation.[202] One of the conditions of its application, however, is the lack of an agreement specifying the jurisdiction of a court of the PRC.[203] Accordingly, the restriction under Article 5(2) of The Hague Convention exists under current Chinese law.

B. Role 2 – Court Not Designated by the Jurisdiction Agreement

Unless expressly allowed under Article 6 of The Hague Convention, a court not designated by the jurisdiction agreement shall suspend or dismiss proceedings to which the jurisdiction agreement applies.[204] This again involves *forum non conveniens*. Under Article 532 of the 2015 Interpretation, China can theoretically decline such proceedings, but it is up to the Chinese court's discretion after considering a list of factors, which does not include a jurisdiction agreement in favor of a foreign

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at the place where the infringement is conducted or at any other place actually connected to the dispute to have jurisdiction over the dispute.).

196. *See id.* (definition of "foreign related" matters); *see* 2015 Interpretation, *supra* note 3, at art. 522.

197. *See id.*

198. *See id.*

199. *See id.*

200. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, art. 21.

201. *See* Richard Garnett, *The Hague Choice of Court Convention: Magnum Opus or Much Ado About Nothing?*, 5(1) J. PRIVATE INT'L L. 161, 176 (2009).

202. 2015 Interpretation, *supra* note 3, art. 532.

203. *See id.* art. 532(2).

204. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, art. 6.

court.[205] Thus, adjustments are required to meet the requirements under Article 6 of The Hague Convention.

C. Role 3 – Court Requested to Enforce Judgment from Another Signatory

This role is the most relevant to our discussion. The question is the extent to which the experience of the bilateral treaties provides a blueprint as a matter of legal framework for joining The Hague Convention. Throughout this section, treaty precedents will be used to compare the corresponding requirements under The Hague Convention. This is by no means to suggest that the relevant bilateral treaty provision is universal among the treaties, but simply an indicator that China has previously agreed to a similar arrangement.

1. Jurisdictional Bases

The enforcement provisions under The Hague Convention are found in Articles 8 and 9.[206] Generally, a judgment given by a court chosen by the jurisdiction agreement shall be recognized and enforced in other Contracting States unless otherwise specified.[207]

The question, therefore, is whether under the existing bilateral treaties, a jurisdiction agreement is an acceptable indirect jurisdictional basis.[208] As mentioned in Table 8 and the accompanying discussions, there are three types of jurisdictional bases.[209] The exclusive jurisdiction bases are the common thread among the three types of jurisdiction bases.[210] For the Convention's requirement on jurisdiction agreement to fit with the indirect jurisdictional bases of China's bilateral treaties regime, the bottom line is that the exclusive jurisdiction bases of China must be expressly reserved under Article 21 from the Hague Convention.[211]

In particular, for Type 1, exclusive jurisdiction, as long as the foreign judgment does not concern the exclusive jurisdiction of China, then it will be enforced. For Type 3, objective jurisdictional bases, the

205. *See* 2015 Interpretation, *supra* note 3, art. 532.

206. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, arts. 8 & 9.

207. *See id*., art. 8(1).

208. One commentator compares the direct jurisdictional basis under Chinese law with that of the Hague Convention. *See* Tu, *supra* note 8. However, since direct and indirect jurisdictional bases may be different under current Chinese law (Type 2 is the same, but not the other two types), it is more appropriate to compare the indirect jurisdiction bases instead.

209. *See supra* Table 8.

210. *See id*.

211. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, art. 21.

Chinese will enforce a judgment that is based on an express jurisdiction agreement. While there is no difference in exclusiveness under such treaties,[212] it should not be a problem as the current requirement is broader than that of The Hague Convention. In addition, exclusiveness is presumed unless contrary intention is proved under The Hague Convention.[213] This will further narrow the gap between the two regimes.

For Type 2, respective jurisdiction, a foreign judgment will be enforced in China if its jurisdiction basis is acceptable under Chinese jurisdiction rules. Thus, the analysis will be the same as in *Role 1* above. Apart from the exclusive jurisdictional bases, additional reservations will have to be made to exclude jurisdiction agreements such as (a) foreign-related, and (b) substantial connection between the dispute and the designated court.[214] That said, most foreign judgments that satisfy Article 3 of The Hague Convention are expected to be able to meet this additional requirement in practice. In the end, China has certainly accepted different types of indirect jurisdiction (see Types 1 & 3); therefore, this should not be a main problem even if these extra reservations are not made under Article 21 of The Hague Convention.

2. No Review on Merits

Article 8(2) provides that F2 cannot review the merits of the foreign judgments, unless the judgment in question was given by default. Almost all bilateral treaties require that the Chinese courts cannot review the merits of the foreign judgment.[215] In fact, no exception is made for a default judgment. Again, the existing enforcement regime under the bilateral treaties has been shown to be even more flexible on this point.

3. Effectiveness of Foreign Judgment

Under Article 8(3), a foreign judgment will be recognized only if it has effect in F1 and enforced only if it is enforceable in F1.[216] As mentioned in Section C, the ineffectiveness of a foreign judgment is one of the common refusal grounds in bilateral treaties.[217] While the

212. *See e.g.* Judicial Assistance Treaty in Civil and Criminal Affairs, China-It., *supra* note 74 (providing that F1 court will have jurisdiction if the defendant has explicitly accept the jurisdiction thereof).

213. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, art. 3(b).

214. *See* 2015 Interpretation, *supra* note 3.

215. The only exceptions are the bilateral treaties with Poland and Romania.

216. Hague Convention, *supra* note 7, art. 8(3).

217. *See supra* Table 7.

formulations vary, the relevant clauses are always governed by F1 law which is the same as the requirement under Article 8(3).[218]

4. Refusal Grounds

Article 9 of The Hague Convention provides for a number of refusal grounds against the recognition and enforcement of foreign judgments.[219] In Article 9(a), enforcement may be refused if the jurisdiction agreement was null and void under the law of the state of the chosen court. Among the three types of jurisdiction bases, this does not appear to be a problem in Types 1 and 3. For Type 1, as long as it is not within the exclusive jurisdiction, there is no additional requirement on the jurisdiction agreement. For Type 3, most treaties opting for objective jurisdiction bases do not provide for which law governs the jurisdiction agreement and the governing law question remains unresolved.[220] However, in the bilateral treaties with Kuwait and the UAE, satisfaction of the objective jurisdictional bases is expressly provided to be conclusively decided by F1 court.[221] Thus, arguably, China could accept this rejection ground based on F1 law. Type 2 is more problematic. As mentioned above, this will have to make reference to Chinese law which may be different substantially from F1 law.[222] This is, however, just one of the three types of jurisdiction.

Article 9(b) provides that a party's inability to conclude the agreement under the F2 law is a ground of rejection.[223] This is not expressly provided for in the bilateral treaties. This restriction could arguably be present in bilateral treaties adopting Type 3 jurisdiction bases which could reject such an agreement for failing to have a valid jurisdiction agreement. Alternatively, an even worse possibility is to reject on the ground of public policy.[224] However, the case must be really extreme to apply, such as if the agreement was entered into by a person without mental capacity. The PRC law on capacity is rather reasonable

218. *See id.*

219. This Article is expressed as "may be refused," implying that F2 court could still enforce/recognize the foreign judgment in the appropriate case. This is similar to most of the treaties (three provide the conditions in positive manner). *See supra* note 51.

220. *See* Section C(B)(2).

221. Judicial Assistance Treaty in Civil and Commercial Affairs, China-U.A.E., *supra* note 77.

222. *See* discussion in *supra* Section D – Role 1.

223. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, art. 9(b).

224. *See* discussion in *supra* Section III(B)(5).

and will only hold a contracting party incapable of entering into a contract if he or she lacks of mental capacity or is underage.[225]

Article 9(c) rejects enforcement on improper procedure in F1 proceedings.[226] In particular, enforcement will be rejected if (i) the defendant was not notified of the document instituting the proceedings in sufficient time and in such a way as to enable him to arrange for his defence, or (ii) it was notified to the defendant in F1 in a manner that is incompatible with fundamental principles of F2 concerning service of documents.[227] This clause fits with most of the F1 procedural clauses in the bilateral treaties. As seen in Table 9, most bilateral treaties reject enforcement for lack of a proper summons under F1 law.[228] A few of them will also reject enforcement for lack of an opportunity to arrange for a proper defence. It is noted, however, "no proper legal representative," a rather common ground for rejection, is not a basis for rejection under the Hague Convention, although China has entered into bilateral treaties without such grounds.[229] For (ii) above, this is not expressly provided for in the bilateral treaties. As mentioned in the discussion on *Chorvanaslxizmat* and *Minsk Automatic Production*, the Supreme People's Court actually utilized the public policy ground to reject enforcement. Adopting the Hague Convention will therefore be an improvement as it will limit the occasions where public policy is utilized and limit the potential to be trampled on by the "unruly horse."

Article 9(d) rejects enforcement of a judgment that was obtained by fraud in connection with a matter of procedure.[230] This, again, is not expressly provided for in the bilateral treaties nor discussed in any case. It has been suggested that fraud could be covered by public policy under the current enforcement regime in China.[231] Thus, China should not have a problem with this ground of rejection. If China were to adopt the Hague Convention, fraud would become an express ground of rejection and the

225. *See* General Principles of Civil Law of the People's Republic of China (adopted at Fourth Session of the Sixth National People's Congress, Apr. 12, 1986, effective Jan. 1, 1987) art. 11, 13 (China).

226. Hague Convention on Choice of Court Agreements, *supra* note 7, art. 9(c).

227. *Id.*

228. *See supra* Table 9.

229. *See* Judicial Assistance Treaty in Civil and Commercial Affairs, China-Kaz., *supra* note 54, art. 22(4) [no official citation available], Judicial Assistance Treaty in Civil and Criminal Affairs, China-Laos, *supra* note 51, art. 21(3)[no official citation available], and Judicial Assistance Treaty in Civil and Criminal Affairs, China-Cyprus, *supra* note 51, art. 25(3) [no official citation available].

230. *See* Hague Convention on Choice of Court Agreements, *supra* note 7, art. 9(d).

231. *See* Zhang, *supra* note 78, 164-65 ("recourse to [the fraud] defense by Chinese courts in the course of the [recognition and enforcement of foreign judgments] in China is probably in the name of the public policy exception.").

enforcement regime would be improved by reserving public policy for the really extreme cases.

Article 9(e) provides a ground of refusal on the basis of F2's public policy.[232] This clause basically equates the public policy clauses of the bilateral treaties. It must be emphasized, however, that this ground is only limited to those cases where it would be manifestly incompatible with the public policy of F2, including situations where the specific proceedings leading to the judgment were incompatible with the fundamental principles of procedural fairness of that state. Thus, the Hague Convention has made an effort to limit the scope of application of the public policy ground. With the establishment of Articles 9(c)(ii) and 9(d) on separate grounds, this article is clearly narrower than those of the bilateral treaties. Adopting this format would therefore be an improvement on the current regime.

Finally, Articles 9(f) and (g) reject enforcement in parallel proceedings.[233] If the foreign judgment is inconsistent with (i) a judgment given in F2 in a dispute between the same parties, or (ii) an earlier judgment given in another state between the same parties on the same cause of action, enforcement would be rejected.[234] As shown in Table 10, bilateral treaties usually cover both grounds, and, in fact, at times go beyond that to include cases where Chinese proceedings on the same matter between the parties have been initiated at the time of the request.[235] But China has clearly accepted these types of parallel proceedings provisions previously.[236]

In the end, three observations can be made after comparing the Hague Convention with the bilateral treaties. First, the bilateral treaties have mostly covered all the grounds of enforcement and rejection contained in the Hague Convention. They are certainly not identical, but they can serve as precedents where China has agreed to similar arrangements. Second, even in cases where they are different, bilateral treaties' grounds for rejection are generally more lenient. Thus, agreeing to the Hague Convention would not open the floodgates. The added restrictions in the Hague Convention also appear to be optional,[237] so it would not substantially damage the Chinese court's flexibility which it has enjoyed thus far.

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232. *See id.* art. 9(e).
233. *See id.* art. 9(f)-(g).
234. *Id.*
235. *See supra* Table 10.
236. *See* bilateral treaties with France (art. 22(6)), Vietnam (art. 17(4)), UAE (art.21(6)), Egypt (art. 21(4)) and Brazil (art 23(4)-(5)).
237. *See supra* Section III(A)(1).

Finally, on public policy, the Hague Convention makes a number of possible public policy rejections into separate, bright-lined rejection grounds. This will have the effect of limiting the opportunity to utilize the public policy ground and give more certainty to the parties.

In conclusion, the adoption of the Hague Convention will not be problematic from the perspective of the legal design, compared with the existing bilateral treaties. If anything, it will be an improvement, particularly regarding the design of the rejection ground on public policy. The legal design is, however, only one perspective for consideration by the Chinese government. The enforcement regime of China also involves reciprocity. Due consideration should also be paid to the comparison between China and other countries in terms of the number of judgments as well as the judgment amounts. Before this decision to join the Hague Convention is made, China will continue to enter into new bilateral treaties with her trading partners. In these negotiations, however, China should try to include more guidelines in the areas discussed in Section C. In particular, an explicit refusal ground on improper service under F2 law should be added to avoid reliance on the public policy exception in relevant cases.