

TEMPERING THE EXTRATERRITORIALITY OF FOREIGN ISSUED ANTI-SUIT INJUNCTIONS IN CHINESE ADMIRALTY PROCEEDINGS

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TEMPERING THE EXTRATERRITORIALITY OF FOREIGN ISSUED ANTI-SUIT INJUNCTIONS IN CHINESE ADMIRALTY PROCEEDINGS

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Abstract: *To temper the extraterritoriality of the anti-suit injunctions (“ASIs”) issuing from the foreign courts in Chinese admiralty proceedings is integral to the construction of the foreign-related rule of law in China, as it is crucial for both sustaining the judicial sovereignty of the country and safeguarding the legitimate interest of Chinese litigants overseas before the foreign courts in the maritime realm. Premised on a synthesis of the inherent interfering feature of foreign issued ASIs, a shift in the responses from Chinese Maritime Courts to the undue interference such ASI has induced is highlighted in the article, from which a need for a structured and inherently cohesive mechanism for countering such interference is crystallised. The judicial objectives and principles pertaining to the court practices revolving around the ASI are revisited consequently. Diverse courses of action that the Maritime Courts may take in the differentiated and interrelated situations are formulated, as a corollary of the revisited judicial objectives and principles, with a view to combating the extraterritorial effect of foreign issued ASIs in Chinese admiralty proceedings.*

Key words: *anti-suit injunction, extraterritoriality, admiralty, judicial objectives, course of action, foreign-related rule of law*

I. INTRODUCTION

The courts of common law consider the anti-suit injunction (“ASI”) to be “amongst the most powerful judicial devices” they created.¹ The extraterritoriality inherent in the foreign issued ASI, nevertheless, is now an escalating threat to the exercise of admiralty jurisdiction by Chinese Maritime Courts, especially given that the prominent internationality of admiralty and maritime disputes underpins a higher probability of confronting with an ASI in this realm than might otherwise be the case in litigation generally.² In the past decade, the litigants who sought to enforce maritime claims before Chinese Maritime Courts have frequently been suppressed by the ASI issuing from the foreign courts.³ Such interference thus hinders the country’s achievement of its

¹ Rodolfo Donatelli, *A Multi-Factor Test for Anti-Suit Injunctions in ICSID Arbitration*, 30 AM. REV. INT’L ARB. 303, 303 (2019).

² Jason P. Waguespack, *Anti-Suit Injunctions and Admiralty Claims: The American Approach*, 24 U.S.F. MAR. L.J. 293, 294 (2011–12).

³ See, e.g., *Spliethoff’s Bevrachtungskantoor BV v. Bank of China Ltd.*, [2015] EWHC 999 (Comm.); *Crescendo Maritime Co & Alpha Bank AE v. Bank of Communications Co Ltd.*, [2015] EWHC 3364 (Comm.); *Qingdao Huiquan Shipping Co. v. Shanghai Dong He Xin Industry Group Co. Ltd.*, [2018] EWHC 3009 (Comm.); *Ulusoy Denizilik AS v. Cofco Global Harvest (Zhangjiagang) Trading Co. Ltd.*, [2020] EWHC 3645 (Comm.); *Grace Ocean Private Limited v. MV “Bulk Poland”*, [2020] EWHC 3343 (Comm.).

national strategy of building China into a rising international maritime judicial centre, which was officially pronounced by the Supreme People's Court ("SPC") of the People's Republic of China ("PRC") in 2016.⁴ By that national strategy, China vows to hoist the international credibility and influence of Chinese maritime adjudications insomuch as to increasingly protect the country's national interest in the ocean, marine ecology and environment as well as the maritime commerce.⁵

Among the extant Chinese literature have emerged a variety of recommendations on possible approaches to counterbalancing the unwanted interference from foreign courts with China's judicial sovereignty. Those recommendations have been made along four main dimensions—the transplantation of an ASI mechanism,⁶ the creation of an anti-anti-suit injunction ("AASI") mechanism,⁷ the innovation of rules on concurrent jurisdictions,⁸ and a resort to the existent mechanisms such as conduct preservation measures (including maritime injunctions)⁹—based on divergent goals and pathway thereof. Some of the

⁴ Supreme People's Court ("SPC") (PRC), *Report on the Work of the Supreme People's Court 2016*, Mar. 13, 2016, available at www.court.gov.cn/zixun-xiangqing-82592.html (last visited Apr. 4, 2023).

⁵ *Id.*

⁶ See, e.g., Zhang Limin (张利民), *Guoji Minsu zhong Jinsuling de Yunyong ji Woguo Jinsuling Zhidu de Goujian* (国际民诉中禁诉令的运用及我国禁诉令制度的构建) [*Application of Anti-suit Injunctions in International Civil Litigation and the Construction of an Anti-suit Injunction System in China*], 3 FAXUE (法学) [LEGAL SCIENCE] 122 (2007); Wang Juan (王娟), *Guanyu Woguo Yinru Jinsuling Zhidu de Sikao* (关于我国引入禁诉令制度的思考) [*Thought on Introduction of an Anti-suit Injunction into China*], 158 FAXUE PINGLUN (法学评论) [LAW REVIEW] 72 (2009); Peng Yi (彭奕), *Woguo Neidi Shiyong Jinsuling Zhidu Tanxi* (我国内地适用禁诉令制度探析) [*Studies on the Application of an Anti-suit Injunction System in Mainland China*], 65 WUHAN DAXUE XUEBAO (武汉大学学报) [WUHAN UNIVERSITY JOURNAL] 57 (2012); Yao Jianjun (姚建军), *Yingmei Faxi Guojia (Diqu) de Jinsuling Zhidu ji Dui Woguo de Jiejian* (英美法系国家(地区)的禁诉令制度及对我国的借鉴) [*The Anti-suit Injunction System in Anglo-American Countries (Regions) and Its Implications for China*], 1 RENMIN SIFA (人民司法) [PEOPLE'S JUDICATURE] 102 (2011); Zhang Weiping (张卫平), *Woguo Jinsuling de Jiangou yu Shishi* (我国禁诉令的建构与实施) [*Construction and Application of Anti-suit Injunctions in China*], 44 ZHONGGUO FALÜ PINGLUN (中国法律评论) [CHINA LAW REVIEW] 173 (2022); Huang Zhihui (黄志慧), *Woguo Shewai Minshi Susong zhong Jinsuling de Fali Chanshi yu Guize Shiyong* (我国涉外民事诉讼中禁诉令的法理阐释与规则适用) [*Jurisprudential Interpretation and Rule Application of Anti-suit Injunctions in China's Foreign-related Civil Litigation*], 5 FALÜ KEXUE (XIBEI ZHENGFA DAXUE XUEBAO) (法律科学(西北政法大学学报)) [SCIENCE OF LAW (JOURNAL OF NORTHWEST UNIVERSITY POLITICAL SCIENCE & LAW)] 178 (2022).

⁷ See, e.g., Yi Lu (伊鲁), *Lun Zhongguo Fan Jinsuling Zhidu de Goujian* (论中国反禁诉令制度的构建) [*On the Construction of Anti-anti-suit Injunction*], 31 ZHONGGUO HAISHANGFA YANJIU (中国海商法研究) [CHINESE JOURNAL OF MARITIME LAW] 106 (2020); Liu Fengxin (刘枫欣), *Guoji Minshi Sifa Hezuo Shiye xia Waiguo Jinsuling zhi Yingdui* (国际民事司法合作视野下外国禁诉令之应对) [*Coping with Foreign Anti-suit Injunctions in the Context of International Civil and Judicial Cooperation*], 178 HENAN CAIJING ZHENGFA DAXUE XUEBAO (河南财经政法大学学报) [JOURNAL OF HENAN UNIVERSITY ECONOMY & LAW] 64 (2021).

⁸ See, e.g., Zhang Liying (张丽英), *Zuixian Shousu Fayuan Yuanze yu Jinsuling de Boyi* ("最先受诉法院原则"与禁诉令的博弈) [*The Game between First-seized Court Approach and Anti-suit Injunction*], 1 ZHONGGUO HAISHANGFA YANJIU (中国海商法研究) [CHINESE JOURNAL OF MARITIME LAW] 77 (2012).

⁹ See, e.g., Li Xiaofeng (李晓枫), *Lun yi Woguo Xingwei Baoquan Zhidu Shixian Jinsuling Gongneng* (论以我国行为保全制度实现禁诉令功能) [*Discussion on the Use of Act Preservation System to Achieve the Functions of Anti-Suit Injunction*], 7 FAXUE ZAZHI (法学杂志) [LEGAL SCIENCE MAGAZINE] 132 (2015); Xu Junke & Yang Tongyu (许军珂、杨桐宇), *Zhongguo Yingdui Waiguo Jinsuling de Shizheng Yanjiu* (中国应对外国禁诉令的实证研究) [*Empirical Studies on China's Responses to Foreign Issued Anti-suit*

recommended approaches are formulated with the aim of curtailing the occurrence of parallel proceedings which may give rise to the issue of ASI;¹⁰ others with that of directly opposing the extraterritoriality that the ASI will provoke.¹¹ Some approaches revolve around legislature-led reforms;¹² others around judiciary-led innovations.¹³

The analysis in this article is premised on the following two perceptions that I hold with respect to the goal of, and the pathway to, tackling the challenges imposed by the foreign issued ASI, which is one of the essential approaches to combating interference from foreign courts. First, as to the goals, China's responses should target to curb the undue interference of the ASI, instead of diminishing the occurrence of parallel proceedings. The existence of parallel proceedings itself does not threaten the judicial sovereignty of the country. In effect, Chinese legal system has developed great tolerance towards parallel proceedings, and has rarely interfered with the decision of a foreign court to exercise jurisdiction.¹⁴ Given that the Chinese judiciary aims to sustain its own jurisdiction from foreign intervention, rather than to disturb the exercise of jurisdiction by foreign courts, it would be unnecessary to alter such conventional practices involving parallel proceedings. Second, as to the pathway, the attempts to temper the extraterritoriality of ASIs should be piloted by the judiciary. The fact that the first reactions from Chinese legal system to the interference with its exercise of jurisdiction in the judicial arena manifests the capability of the existing legal mechanisms in offering timely and effectively solutions to the challenges.¹⁵ The key to a success of the judicial attempts is a shift in the judicial objectives and principles that guide the employment of those mechanisms in a concerted and effective manner.

By virtue of the above two perceptions, an issue as to the approaches to tempering the extraterritoriality of foreign issued ASIs in Chinese admiralty proceedings is expounded in this article from a perspective that has not been observed in the extant literature—that is, with innovated judicial objectives and principles, coordinating existent legal mechanisms to address the different aspects of the jurisdictional interference from foreign issued ASIs, with a view to stiffening further the exercise of admiralty jurisdiction by the Maritime Courts and to safeguarding progressively the legitimate interest of Chinese litigants overseas in the foreign proceedings. This article is presented with some ambition to advise on the formulation of a structured and inherently cohesive mechanism in Chinese maritime adjudications for counteracting effectively and efficiently the extraterritoriality of foreign issued ASIs. To achieve that research

Injunctions], 27 ZHONGGUO GUOJISIFA YU BIJIAOFA NIANKAN (中国国际私法与比较法年刊) [CHINESE Y.B. PRIV. INT'L & COMP. L.] 18 (2020).

¹⁰ See, e.g., Wang, *supra* note 6; Zhang, *supra* note 8.

¹¹ See, e.g., Huang, *supra* note 6; Liu, *supra* note 7.

¹² See, e.g., Zhang Limin, *supra* note 6; Zhang Weiping, *supra* note 6; Wang, *supra* note 6.

¹³ See, e.g., Yi, *supra* note 7; Liu, *supra* note 7; Li, *supra* note 9; Xu & Yang, *supra* note 9.

¹⁴ See discussions in Part III.C, *infra*.

¹⁵ See discussions in Part III.A, *infra*.

goal, the discussions in this article are unfolded in this manner: Following a brief introduction to the research background in this Part I, the extraterritoriality of ASI is characterised in Part II, together with the jurisdictional clashes and criticisms it has induced from the enjoined jurisdictions. In Part III, based on a perceived shift in responses from the Maritime Courts to the threats to their exercise of admiralty jurisdiction, the objectives of Chinese maritime adjudications are revisited in the changing domestic and international context, with some attempts to strike a balance between tradition and modernity. In Part IV, specific courses of action are crafted for the purposes of enervating the extraterritoriality of foreign issued ASIs in Chinese admiralty proceedings. Concluding remarks are delivered in Part V.

II. EXTRATERRITORIALITY

The ASI is “a court order rendered against a private party with the aim either of preventing that party raising an action in another forum, or forcing that party to discontinue such an action if already started.”¹⁶ It was “first developed under English common law in the early 19th century, as a way to prevent the ecclesiastical courts’ expansive jurisdiction”.¹⁷ Then the English Court of Chancery employed the ASI “as [an equitable] remedy to stop parties from bringing duplicative suits in another common law court within the same jurisdiction or other jurisdictions overseas”.¹⁸ In the latter situation where a foreign forum is enjoined, the ASI carries, in truth, the extraterritorial effect. At common law, the enjoining court must have personal jurisdiction over the party against which the ASI is issued.¹⁹ The party which disregards the ASI and continues with the foreign proceedings will face sanctions in the enjoining court.²⁰

A. Characterisation of ASI

Lord Justice Hobhouse at the United Kingdom House of Lords (“UKHL”) summarised in *Turner v. Grovit* (“*Turner*”) the essential features of an ASI as follows:

- “(a) The applicant is a party to existing legal proceedings in [the UK];
- (b) The defendants have in bad faith commenced and propose to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in [the UK];

¹⁶ Neil A. Dowers, *The Anti-Suit Injunction and the EU: Legal Tradition and Europeanisation in International Private Law*, 2 CAMBRIDGE J. INT’L & COMP. L. 960, 960 (2013).

¹⁷ Grace Gunah Kim, *After the ECJ’s West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction*, 12 CARDOZO J. CONFLICT RESOL. 573, 576 (2011).

¹⁸ *Id.*, at 576–77.

¹⁹ See *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*, [1987] UKPC 12 (per Lord Goff of Chieveley). See also, C. J. S. Knight, *The Continued Rise (and Future Fall) of the Anti-Suit Injunction*, 20 K.L.J. 137, 138 (2009); Waguespack, *supra* note 2, at 295–96.

²⁰ Dowers, *supra* note 16, at 960.

(c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the English proceedings to grant the applicant a restraining order against the defendants.”²¹

Despite its case law origin, the ASI is now based on statutory law in the UK and some other common law jurisdictions such as the Hong Kong Special Administrative Region (“Hong Kong”) of the PRC. In the UK, the courts are empowered to grant an ASI pursuant to Section 37(1) of the Supreme Court Act 1981, which states that:

“The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be *just and convenient* to do so.” (emphasis added)

Section 21L of the High Court Ordinance (“HCO”) (Cap 4) of Hong Kong contains the similar provisions.²² In the same vein, the general rules in English jurisprudence on the grant of equitable relief—such as the doctrine of “clean hands”—and those governing the issue of ASIs have been repeatedly practiced by the Hong Kong courts.²³

Lord Justice Rix at the England and Wales Court of Appeal (“EWCA”) of the UK encapsulated in *Star Reefers Pool Inc v. JFC Group Co Ltd* (“*Star Reefers*”) the conditions under which the grant of ASI may be deemed as “just and convenient”, as is excerpted below:

“First, the threatened conduct must be ‘unconscionable’. It is only such conduct which founds the right, legal or equitable...., for the protection of which an injunction can be granted. What is unconscionable cannot be defined exhaustively, but it includes conduct which is ‘oppressive or vexatious or which interferes with the due process of the court’ The underlying principle is one of justice in support of the ‘ends of justice’ It is analogous to ‘abuse of process’; it is related to matters which should affect a person’s conscience Secondly, to reflect the interests of comity and in recognition of the possibility that an injunction, ... an injunction must be necessary to protect the applicant’s legitimate interest in English proceedings; he must be a party to litigation in this country at which the unconscionable conduct of the party to be restrained is directed, and so there must be a clear need to protect existing English proceedings It follows that the natural forum for the litigation must be in England, but this, while necessary, is not a sufficient condition.”²⁴

The ASI may be granted in pursuit of either a legal or an equitable right, as is indicated in the above quotation. In general, a legal right arises from an exclusive jurisdiction clause (“EJC”) or an arbitration agreement, and an equitable one from other circumstances.²⁵ Lord Justice Rix recapped in *Star Reefers* the

²¹ *Turner v. Grovit* (“*Turner*”), [2001] UKHL 65 (HL) 29.

²² High Court Ordinance (“HCO”) (Cap 4) sec. 21L states that: “The Court of First Instance may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so.”

²³ See, e.g., *Ever Judger Holding Co. Ltd. v. Kroman Celik Sanayii Anonim Sirketi* (“*Ever Judger*”), [2015] 2 H.K.L.R.D. 866, HCCT 6/2015, 602 (C.F.I.).

²⁴ *Star Reefers Pool Inc. v. JFC Group Co. Ltd.* (“*Star Reefers*”), [2012] EWCA (Civ) 14, [26].

²⁵ Knight, *supra* note 19, at 138.

differentiated thresholds for issuing the ASI with respect to these two categories of rights in the following way:

“What was needed [for the grant of an ASI] was either an agreement for exclusive English jurisdiction or, its equivalent, an agreement for arbitration in England, in which case the court would ordinarily enforce the parties’ agreement by granting an [ASI] in the absence of *strong reason not to do so*; or else two other conditions had to be satisfied, namely England had to be the *natural forum* for the resolution of the dispute and the conduct of the party to be enjoined had to be *unconscionable*.”²⁶ (emphasis added)

Functioning as an equitable relief, the ASI may be either a prohibitory injunction (which refrains the respondent from commencing the foreign proceedings) or a mandatory injunction (which compels the respondent to behave actively to discontinue the foreign proceedings). In *Daiichi v. Chubb*, Justice Henshaw clarified the relationship therebetween in the following manner:

“If a prohibitory injunction may not be enough to ensure that the injunction is practically effective (e.g. where the foreign action has a life of its own), a mandatory injunction requiring the injunction defendant to discontinue the foreign proceedings may be granted in an appropriate case More recently the court has recognised that there is no rigid dividing line between mandatory and prohibitory relief: a mandatory injunction requiring discontinuance may merely spell out the inevitable consequence of a prohibitory injunction”²⁷

In *Masri*, Lord Justice Collins at the EWCA posited that no legal or equitable right had to be shown, so long as “unconscionable conduct” is found in initiating foreign proceedings.²⁸ Nonetheless, an academician contests the above proposition by arguing that, by virtue of both *Glencore International AG v. Exter Shipping Ltd*²⁹ and *Turner*, unconscionable conduct on the part of the defendant could be sufficient to “found the legal or equitable right not to be sued and allow the grant of an injunction.”³⁰

B. Jurisdictional Interference

The English courts defend the use of ASI “by ensuring that the injunction is directed against a party and never against a foreign court, thereby minimising the extraterritorial jurisdictional effect on foreign sovereignty.”³¹ Lord Justice Hobhouse in *Turner* made the following statement by the same token:

“This terminology [of ASI] is misleading since it fosters the impression that the order is addressed to and intended to bind another court. It suggests that the jurisdiction of the foreign court is in question and that the injunction is an order that the foreign court desist from exercising the jurisdiction given to it by its own domestic

²⁶ *Star Reefers*, *supra* note 24, para. 25.

²⁷ *Daiichi v. Chubb*, [2020] EWHC (Comm.) 1223 [51].

²⁸ *Knight*, *supra* note 19, at 138.

²⁹ *Glencore International AG v. Exter Shipping Ltd.*, [2002] 2 All ER (Comm.) 1.

³⁰ *Knight*, *supra* note 19, at 138–39.

³¹ *Kim*, *supra* note 17, at 577–78.

law. None of this is correct. When an English court makes a restraining order, it is making an order which is addressed only to a party which is before it.”³²

The courts in the United States (“US”) have also endorsed that the ASI is directed exclusively at parties as opposed to the foreign court or tribunal.³³ Similarly, Justice Lim at the Court of First Instance of Hong Kong (“HKCFI”) expressed in *Ever Judger* that:

“... [T]he injunction is an order of the Hong Kong court addressed to a party before it, *in personam*, not an order addressed to or binding upon a foreign court. Its effectiveness depends on the defendant being amenable to the Hong Kong court’s jurisdiction.”³⁴

Notwithstanding the above exculpation for the ASI, common law jurisdictions have conceded its inference with the foreign courts—which they usually describe as “indirect”. Lord Justice Rix in *Star Reefers* reaffirmed that “an injunction, although directed against the respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings”.³⁵ The juridical principle that “the exercise of the jurisdiction to grant an [ASI] is restrained by the notion of ‘comity’”³⁶—which has been entrenched in common law jurisprudence—authenticates the jurisdictional interference the ASI will induce. Lord Goff at the UKHL construed “comity” in *Airbus Industrie GIE v. Patel* as follows:

“[C]omity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an [ASI] entails.”³⁷

Under the test of “comity”, “a sufficient interest” in or “sufficient connection” to the dispute empowers the English courts to outweigh the concern arising out of “indirect interference” with the foreign jurisdictions imposed by the ASI. Similarly, the US courts admit that, in issuing the ASI, the balance has to be made between the “extraterritorial” extension of their judicial power and the “substantial benefit to litigants in having all disputes related to a subject or factual transaction resolved in one forum.”³⁸ Despite the observation that the approaches to applying the test of “comity” in various common law jurisdictions differ from each other,³⁹ jurisdictional interference is inextricably an inherent feature of all the ASIs issued thereby.

³² Turner, *supra* note 21, para. 23.

³³ Waguespack, *supra* note 2, at 295.

³⁴ *Ever Judger*, *supra* note 23, para. 23.

³⁵ *Star Reefers*, *supra* note 24, para. 26.

³⁶ Ashley Files, *Airbus Industrie GIE v. Patel—High Ideals Ground the Anti-Suit Injunction*, 3 FLINDERS J.L. REFORM 287, 289 (1999).

³⁷ *Airbus Industrie GIE v. Patel*, [1998] 2 WLR 686 (HL) 699 (per Lord Goff of Chieveley).

³⁸ Waguespack, *supra* note 2, at 293–94.

³⁹ The English courts have traditionally employed the “laxer” approach by contrast to the “strict approach”. By the “strict approach”, comity requires that the court only grant the injunction “to protect its own jurisdiction or to prevent evasion of its public policies”. By the “laxer approach”, an ASI may be granted where the foreign proceedings are vexatious, oppressive or otherwise inequitable, and comity becomes just one factor to be taken

C. Clashes and Criticism

Being typically a common law device, the ASI has no identical equivalent in most civil law jurisdictions.⁴⁰ Civil law countries, unlike common law ones, generally view the ASI as violating the principles of national sovereignty and international comity.⁴¹ The foreign jurisdiction enjoined by the ASI will feel offended by the extraterritorial effect thereof “because [it] preempts the foreign court from hearing and deciding the jurisdictional question on its own (although theoretically, an injunction is only issued against the parties, and not the courts).”⁴² The common law reasoning that “any interference with the foreign judicial process is not unconscionable”⁴³ has come under much criticism and has been dubbed the “English artifice” in civil law jurisdictions.⁴⁴ An authority depicts the conflict as “a clash of legal traditions”, as the below quotations show:

“[T]he civil law tradition views the remedy [of ASI] as offensive against sovereignty and international law. Furthermore, the grant of [ASI] is self-evidently offensive to the principles of international comity....”⁴⁵

[By contrast,] [t]he English courts have long viewed themselves as having the prerogative to issue an [ASI], to the extent that the order has become a part of English, and indeed common-law, legal tradition.”⁴⁶

The core divergence between the two legal traditions in this regard lies in the issue whether common law courts have the natural jurisdiction (or built-in power) to issue the ASI. Common law courts uphold firmly such jurisdiction, whereas their civil law counterparts oppose the same strenuously. On the one side, for instance, the Lord Justices in *Turner* at the EWCA confirmed that the English court possesses the power to prohibit by injunction the respondent from

into account by the court in the exercise of the jurisdiction. The “laxer” standard seems to render more interference than the strict one with the foreign proceedings. *See* Files, *supra* note 36, at 290.

The US Circuits have adopted different approaches to international comity: The Second, Third, Sixth, Eighth, and D.C. Circuits adopt the “conservative” approach; the Fifth, Seventh, and Ninth Circuits adopt the “liberal approach”; the First Circuit adopts the “traditional” gloss. The courts using the “conservative” approach in granting an ASI take the view that “only in the most compelling circumstances does a court have discretion to issue an anti-suit injunction.” Those courts that apply the “liberal” test to the issuance of ASIs take a much less deferential tack. The minimisation of comity interests has to primary implications. The First Circuit has identified an approach somewhere between the above two. *See* Waguespack, *supra* note 2, at 299–306.

Whereas the English courts require the enjoining court be the “more appropriate” forum against the enjoined court, the Australian courts only require the enjoining court be not clearly inappropriate, thus increasing the number of cases to award the relief by the Australian courts. *See* Files, *supra* note 36, at 295.

⁴⁰ Pietro Ortolani, *Anti-Suit Injunctions in Support of Arbitration and EU Law*, 79 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 171, 174 (Mortimer Sellers & James Maxeiner eds., 2020).

⁴¹ Kim, *supra* note 17, at 577–78.

⁴² *Id.*, at 603–04.

⁴³ Dowers, *supra* note 16, at 961.

⁴⁴ *Id.* at 961–62.

⁴⁵ *Id.* at 962.

⁴⁶ *Id.* at 970.

continuing the foreign process in the other jurisdiction.⁴⁷ On the other side, domestic courts of certain civil law jurisdictions have exhibited hostility towards the ASI. In *Phillip Alexander Securities & Futures Ltd v. Bamberger and Others*,⁴⁸ the German Court rejected English ASIs as an infringement of the German sovereignty and refused to enforce them.⁴⁹ Similarly, a Greek court rejected in a case of 2004 an English ASI in support of a London arbitration clause in a shipping contract.⁵⁰

Prior to the Brexit, direct confrontations within the European Union (“EU”) between the ASI on the one hand and the Brussels Regime on the other came to light in *Turner* for the first time, and then in *West Tankers*.⁵¹ The use of ASI by the English courts within the EU was severely limited by the Court of Justice of the European Union (“CJEU”) in those decisions,⁵² especially given that the use of it was prohibited even in the situations involving EJs and arbitration agreements—where common law courts regard their jurisdiction (or prerogative) to issue the ASI to be nearly perfectly irrebuttable.

In *Turner* where an English ASI was issued against the party commencing the Spanish proceedings on the basis of an EJ providing for the exclusive jurisdiction of the English court, the CJEU found the ASI inconsistent with the Brussels Regime.⁵³ The Lord Justices at the UKHL argued before the CJEU, *inter alia*, that the ASI “be considered compatible with the Brussels Convention as it furthers a legitimate aim of the Convention by providing an effective mechanism to prevent parallel proceedings.”⁵⁴ This argument was rebutted by the CJEU on the grounds, *inter alia*, that the use of ASI would leave no room for the operation of the *lis pendens* rule, which could otherwise have been invoked by the respondent to compel the Madrid court to stay proceedings.⁵⁵ The use of ASI, the CJEU furthered, would create new conflicts.⁵⁶ In brevity, the

⁴⁷ *Turner v. Grovit*, [2000] 1 QB 345, at 356.

⁴⁸ *Phillip Alexander Securities & Futures Ltd. v. Bamberger and Others*, [1997] ILPr 73 (CA).

⁴⁹ Nicholas Pangelley, *The European Court of Justice, English Courts and the Continued Use of the Anti-Suit Injunction in Support of Agreements to Arbitrate: Through Transport v. New India*, 2 J. PRIV. INT’L L. 397, 405 (2006).

⁵⁰ *A & B v. C & D*, [2004] Piraiki Nomologia (Piraeus Cases) 92 (Court of Appeal (Maritime Cases Section)).

⁵¹ Ortolani, *supra* note 40, at 177.

⁵² Pangelley, *supra* note 49, at 399.

⁵³ The Brussels Regime consists mainly of the Brussels Convention, the Lugano Convention, and the Brussels I Regulation. The Brussels Convention, officially the “Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters” was agreed in 1968 by the member states of the EU, to increase economic efficiency and promote the single market by harmonising the rules on jurisdiction and preventing parallel litigation. The Lugano Convention refers to the “Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters”. After the Brexit, the UK seeks to join the Lugano Convention in its own name. The Brussels I Regulation refers to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (or Council Reg (EC) 44/2001 for short).

⁵⁴ Dowers, *supra* note 16, at 966.

⁵⁵ *Id.* at 967.

⁵⁶ *Id.*

CJEU took the position that it is the *lis pendens* rule under the Brussels Convention, rather than the ASI, that should be invoked to address the parallel-proceeding concerns between the EU Member States.⁵⁷

In *West Tanker*, the CJEU outlawed an English ASI issued against the Italian proceedings on the basis of an arbitration agreement which contained the choice of English law and the London arbitration. The issue of ASI was criticised for depriving an opportunity from the Italian court seized to determine whether it would exercise jurisdiction over the dispute by itself—an opportunity authorised to that court by the Brussels Regime.⁵⁸ As a commentator points out, the common law tradition in respect to the ASI has been eroded by the Europeanisation of International Private Law and the intervention of the CJEU,⁵⁹ despite some contentions about the CJEU's ruling in *West Tanker*.⁶⁰

In sum, notwithstanding the defence given by the common law courts to their use of ASI, extraterritoriality (i.e., jurisdictional interference) is nevertheless the inherent characteristic thereof. For the legal systems which do not conventionally acknowledge the practice of the ASI, they would not be prepared to accommodate the undue interference with their exercise of jurisdiction. Unless the issue of ASI is accepted under a regional or international arrangement to which the enjoined jurisdiction is a party, that jurisdiction will generally combat the interference with a view to safeguarding its judicial sovereignty, especially where that interference goes beyond its tolerance.

III. REVISITING JUDICIAL PRINCIPLES IN CHINESE CONTEXT

The backdrop against which the courts' attitude towards the ASI is shaped is evolving at both the domestic and international levels. In this part, the noticeable developments and changes which have called upon the reformulation of China's judicial objectives and principles pertaining to the ASI in admiralty proceedings, as well as the approaches to such reformulation, are scrutinised.

A. *A Shift in Responses from Chinese Maritime Courts*

It is unsurprising that Chinese admiralty proceedings have been increasingly interfered by the ASI issuing from the foreign courts, in particularly given the expanding scale of both international commerce and shipping industry in the country. Conventionally, the Maritime Courts had been striving to avoid direct contestation with the foreign enjoining courts, and thus had been restraining from resorting to maritime injunctions—which can function under the Special Maritime Procedure Law (“SMPL”) of the PRC in a way similar to the ASI—to counteract the undue extraterritoriality of foreign-issued ASIs.

⁵⁷ Thalia Kruger, *The Anti-Suit Injunction in the European Judicial Space: Turner v. Grovit*, 53 INT'L & COMP. L.Q. 1030, 1034 (2004).

⁵⁸ Case C-185/07, *Allianz SpA and Others v. West Tankers Inc.*, 2009 E.C.R. I-00663.

⁵⁹ Dowers, *supra* note 16, at 970.

⁶⁰ See, e.g., *Id.* at 972; Kim, *supra* note 17, at 574–75.

A turning point popped up in 2012 when the Qingdao Maritime Court issued a maritime injunction in *The Xin Tai Hai*, demanding the respondent—i.e., the complainant who instituted the *in rem* proceedings against the ship concerned in Australia—to get the ship released and to refrain from taking other restrictive measures against her owners, on the ground that the respondent commenced the Australian proceedings in bad faith after it had registered its credits with the Qingdao Maritime Court against the limitation fund established by the shipowner.⁶¹ That maritime injunction was issued not only against the ship arrest, but, impliedly, also against the Australian proceedings because the ship arrest was associated with the *in rem* jurisdiction of the Federal Court of Australian (“FCA”). Hence that maritime injunction demonstrated some primary feature of the ASI—that is, interference with the foreign proceedings.

Although the maritime injunction concerned was issued against foreign proceedings not an ASI, *The Xin Tai Hai* still represents a landmark move taken by the Maritime Courts from rejecting to employing maritime injunctions as equivalents for ASIs. That big move in judicial practice confers further discretion to the courts in utilizing maritime injunctions for other purposes including the counterbalance of the jurisdictional interference from foreign-issued ASIs.

In *Huatai v. Clipper* which arose from a charterparty (“C/P”) dispute, the respondent did not raise any challenge to jurisdiction of the Wuhan Maritime Court within the period prescribed by the law, but afterwards, applied successfully before the HKCFI for an ASI against the complaint in the Wuhan proceedings on the ground of an arbitration agreement. The Wuhan Maritime Court, upon an application made by the complaint, issued a maritime injunction against the respondent, demanding the latter to withdraw its application for the ASI in the Hong Kong proceedings.⁶² Similarly in 2021, the Guangzhou Maritime Court issued a maritime injunction to the effect of compelling the respondent to withdraw its application for the ASI in the English proceedings.⁶³

It warrants further notice that the effect of the maritime injunctions issued by the Wuhan and Guangzhou Maritime Courts differ somehow from that in *The Xin Tai Hai* issued by the Qingdao Maritime Court, in the sense that unlike the latter one which was issued against the foreign trial proceedings (albeit impliedly), the former ones aimed to intervene in the ASI proceedings at the

⁶¹ *Atlasnavios Navegacao, LDA v The Ship “Xin Tai Hai”* [2012] FCA 1497 (Austl.). The claimant, i.e., the plaintiff before the Federal Court of Australia (“FCA”), though did not enforce the maritime injunction, was ordered by the FCA to withdraw from claiming against the limitation fund established with the Qingdao Maritime Court.

⁶² *Huatai Caichan Baoxian Youxian Gongsi Shenzhen Fengongsi, Kelibo Zuchuan Gongsi Chuanbo Zuyong Hetong Jiufen* (华泰财产保险有限公司深圳分公司、克利伯租船公司船舶租用合同纠纷) [*Huatai v. Clipper*], (2017)鄂72行保3号 (Wuhan Maritime Court 2017).

⁶³ *Zhongguo Renshou Caichan Baoxian Gufen Youxian Gongsi Hunansheng Fengongsi yu Woba Haiyun Youxian Gongsi Haishang Huowu Yunshu Hetong Jiufen* (中国人寿财产保险股份有限公司湖南省分公司与沃巴海运有限公司海上货物运输合同纠纷) (2020) 粤72民初675号 (Guangzhou Maritime Court 2021) *Guangzhou Haishi Fayuan 2022nian Shida Dianxing Anli* (广州海事法院2022年十大典型案例) [*Guangzhou Maritime Court, Ten Typical Cases of 2022*], GUANGZHOU MARITIME COURT (Mar. 6, 2023), <https://www.gzhsfy.gov.cn/web/content?gid=94957> (last visited Apr. 17, 2023).

enjoining courts and thus assembled the feature of the AASIs. These occasional and isolated reactions signify, on the one hand, an emerging inclination of the Maritime Courts to respond in a vigorous manner in certain situations, and on the other hand, an urgent demand for a structured and inherently cohesive mechanism which can assist the courts to pace with the evolving judicial objectives of Chinese maritime adjudications pertaining to the extraterritoriality of foreign-issued ASIs.

B. Reframing Judicial Objectives

To better serve the national strategy of building China into a rising international maritime judicial centre and that of constructing the foreign-related rule of law, the foreign-related maritime adjudications are being enlisted to accelerate the erection of a new type of international maritime judicial relations which admires mutual respect, deep cooperation as well as fairness and justice. As for the ASI-related practices, the overarching goals of the admiralty adjudications—which has protruded from the backdrop embracing those national strategies—should attend to fortifying the admiralty jurisdiction assumed by the Maritime Courts and safeguarding the legitimate interest of Chinese litigants overseas in the foreign proceedings.

Any force that may undermine a success in achieving those goals, such as the jurisdictional interference from the foreign-issued ASI, has to be stifled. The judiciary should, thus, be conscripted to change the way it treats the ASIs—that is, from circumventing them in exercising its jurisdiction⁶⁴ to facing them head-on in sustaining its jurisdiction. Specifically, the main objectives of Chinese admiralty proceedings in thwarting the extraterritoriality of the foreign-issued ASI should embrace, at least, the following:

- to craft a structured and inherently cohesive mechanism that can effectively and efficiently temper the extraterritoriality of the foreign-issued ASI issued against Chinese admiralty proceedings;
- to accommodate theoretical and practical progresses in this realm at both the domestic and international levels insomuch as to ensure an increasing international credibility of Chinese maritime adjudications;
- to secure the juridical sovereignty of China by solidifying the admiralty jurisdiction exercised by the Maritime Courts in the foreign-related proceedings;
- to safeguard the legitimate interest of Chinese litigants—in particular their right to sue before Chinese Maritime Courts—at the foreign courts;
- to hoist the extraterritoriality of Chinese maritime judgments and rulings, where necessary, to combat the unjustifiable extraterritoriality of their foreign counterparts; and
- to bring the ASI-related judicial practices into the proximity of regional arrangements on judicial cooperation—to which China is a contracting party—for the benefits of judicial efficiency and assured comity.

⁶⁴ Xu & Yang, *supra* note 9, at 22.

C. *Tradition v. Progress*

As is specified in the following paragraphs of this subsection, the Maritime Courts have stuck to the following three typical practices in the situations involving parallel proceedings and the ASI. Briefly, those practices are (i) restraints from interfering with the foreign proceedings, (ii) deference to the enjoined party's decision on whether to comply with a foreign-issued ASI or not, and (iii) resistance to accommodating the ASI or the equivalent practices in the routine maritime adjudications.

Firstly, restraints from interfering with the foreign proceedings. The Chinese judiciary has been comfortable with the presence of parallel proceedings hosted by a foreign jurisdiction. Pursuant to Article 531 of the Judicial Interpretations of the SPC on the Application of the Civil Procedural Law ("SPC Judicial Interpretations on the Application of the CPL"), a Chinese court is entitled to file a case over which both a Chinese court and a foreign court have jurisdiction, regardless of the parallel proceedings in both places.⁶⁵ In addition, the Chinese legal system as an entirety embraces no provision aiming to suppress the parallel proceedings at the foreign court. Although Article 530 of the SPC Judicial Interpretations on the Application of the CPL introduces the ground of *forum non conveniens* into Chinese legal system, only the conditions under which a Chinese court may decide not to exercise its jurisdiction are set forth therein. The article provides for no conditions for assessing the appropriateness for a foreign court to exercise jurisdiction on a same dispute. Thus, the presence of that Article 530 does not bear any suppression on foreign proceedings.

Secondly, deference to the enjoined party's decision on whether to comply with a foreign-issued ASI or not. Where an ASI is issued by a foreign forum against the plaintiff in the Chinese proceedings and the plaintiff decides to comply therewith by applying to withdraw the Chinese actions, the Chinese court seised will in principle grant the application—as a usual result of exercising its discretion vested by the law. For instance, in *Servicios JHS2013 v. Master Bulk Private Ltd.*,⁶⁶ the plaintiff in the proceedings before the Shanghai Maritime Court applied to withdraw the actions on the ground that it decided to comply with an ASI issuing against it from the English and Wales High Court ("EWHC") of the UK. The Shanghai Maritime Court regarded the compliance of the English ASI as a justifiable ground and thus granted the application. I

⁶⁵ Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Judicial Interpretations on the Application of the Civil Procedural Law] (promulgated by Sup. People' Ct. Dec. 18, 2014, effective Feb. 4, 2015, amended Mar. 22, 2022, effective Apr. 10, 2022) art. 531 (Chinalawinfo).

⁶⁶ Saiwei Xiusi JHS2013 Gongsi yu Maisiteboke Siren Youxian Gongsi Haishang Huowu Yunshu Hetong Jiufen Yishen Minshi Caidingshu (塞维休斯JHS203公司与麦斯特波克私人有限公司海上货物运输合同纠纷一审民事裁定书) [Servicios JHS203 v. Master Bulk Private Ltd.], (2018)沪72民初516号之一 (Shanghai Maritime Court 2018).

characterise this approach as one of “non-intervention” to the plaintiff’s compliance with a foreign-issued ASI.

Thirdly, resistance to accommodating the ASI or the equivalent practices in the regular maritime adjudications. Having seen the ASI as a remedy exclusive to common law jurisdictions, the Chinese maritime judiciary, like its civil law counterparts, has been reluctant to establish an operative system for using ASI or its equivalent. Consequently, although maritime injunctions can be employed as an equivalent for the ASI under the SMPL, they have not been utilised routinely to that effect.

Those conventional practices that the Maritime Courts have followed towards the ASI is now faced with some progresses. Domestically, the use of ASI has been perceived to extend to some other judicial realms such as intellectual property.⁶⁷ In 2020, the SPC in *Huawei v. Conversant* issued a conduct preservation order to the effect that, prior to the delivery of a judgment by the Chinese trial court, the respondent was prohibited from seeking the enforcement of a judgment delivered in the parallel proceedings at a German court.⁶⁸ The SPC described the conduct preservation order as carrying the functions of an ASI,⁶⁹ implying the compatibility between the ASI equivalents and the current Chinese legal system.

At the regional level, progresses have been observed in the field of judicial cooperation between the Mainland and Hong Kong. According to the Arrangement concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of Hong Kong (“Arrangement concerning Interim Measures in Arbitral Proceedings 2019”), an ASI issued by a Hong Kong court to sustain the arbitral proceedings instituted in Hong Kong is treated as a kind of interim measure, the enforcement of which can be assisted by a court in the Mainland.⁷⁰ Such arrangement, albeit focussing on arbitral proceedings, indicates also some changes that Chinese courts would like to make in embracing ASI issues into the judicial cooperation regimes.

In the international arena, the developments are eye-catching as well. In *Gazprom*, the CJEU—which once held an attitude strongly against the use of ASI within the EU—confirmed the validity of an ASI issued by an arbitral

⁶⁷ See, e.g., *Huawei Jishu Youxian Gongsi Deng yu Kangwensen Wuxian Xuke Youxian Gongsi Queren Buqinhai Zhuanliquan ji Biaozhun Biyao Zhuanli Xuke Jiufen An* (华为技术有限公司等与康文森无线许可有限公司确认不侵害专利权及标准必要专利许可纠纷案) [*Huawei v. Conversant*], (2019) 最高法院知民终732、733、734号之一 (Sup. People’s Ct. 2019).

⁶⁸ *Id.*

⁶⁹ *Zuigao Renmin Fayuan Zhishi Chanquan Fating Caipan Yaozhi* (2020) *Zhaiyao* (最高人民法院知识产权法庭裁判要旨 (2020) 摘要) [*Judgment Digests of the Intellectual Property Court of the Supreme People’s Court* (2020)], THE SUPREME PEOPLE’S COURT OF THE PEOPLE’S REPUBLIC OF CHINA (Feb. 6, 2021), <https://www.court.gov.cn/zixun-xiangqing-288131.html> (last visited Apr. 10, 2023).

⁷⁰ *Zuigao Renmin Fayuan Guanyu Neidi yu Xianggang Tebie Xingzhengqu Fayuan Jiu Zhongcai Chengxu Xianghu Xiezhu Baoquan de Anpai* (最高人民法院关于内地与香港特别行政区法院就仲裁程序相互协助保全的安排) [Arrangement concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administration Region] (promulgated by Sup. People’s Ct. Sep. 26, 2019, effective Oct. 1, 2019).

tribunal in an investor-state arbitration between a Russian company, Gazprom, and the Republic of Lithuania. The tribunal ordered the latter to halt a legal action seeking to initiate an investigation into the activities of the company and its top managers.⁷¹ In effect, the investor-state arbitral tribunals have been observed to deploy the ASI increasingly—“not simply to interrupt parallel state proceedings, but to interfere with related proceedings, i.e., bankruptcy proceedings and criminal investigations”,⁷² especially given that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”)—to which China is a contracting party—do not distinguish between the ASI and other provisional measures.⁷³

In the same vein, some scholars purport that the ASI is consistent with the purposes of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention” or “NYC”) to which China is also a contracting party. The emerging viewpoint supports that, the contracting parties to the NYC may be obliged to sustain an ASI issued based on an arbitration agreement covered by the convention, because they assume an obligation thereunder to uphold such an agreement to arbitrate.⁷⁴ It is further maintained that, in such a situation, as the purposes of the ASI concur with those of the NYC,⁷⁵ the issue of the injunction should not be regarded as offending foreign jurisdiction.⁷⁶ The following excerpt contains a synthesis of that viewpoint:

“[W]here the issues involve ‘ordinary contract enforcement issues concerning the existence, validity, and scope of the arbitration agreement,’ the use of an [ASI] is less likely to interfere with the principle of ‘international comity,’ or to violate the ability of a foreign court to decide its own jurisdictional question[.]”⁷⁷

The changes in both the judicial and academic arenas as expounded above portend a possible growing acceptance of the ASI by Chinese and civil law jurisdictions, especially where the implementation of pertinent international conventions requests so and where arbitration agreements are involved. It is also a detected trend that modern arbitrators in the arbitral tribunals begin to actively use the ASI as an instrument to protect their own jurisdiction.⁷⁸ A credible and accountable response to the possible rebound of ASI under the aegis of international conventions and arbitration agreements enlists Chinese maritime judiciary to step from the rigidity of its conventional attitude towards the ASI forward to the inclusiveness of those perceived progresses.

⁷¹ Case C-536/13, *Gazprom*, 2015 E.C.R.

⁷² Donatelli, *supra* note 1, at 304.

⁷³ *Id.* at 304–5.

⁷⁴ Kim, *supra* note 17, at 579.

⁷⁵ *Id.* at 581.

⁷⁶ *Id.*

⁷⁷ *Id.* at 604.

⁷⁸ Donatelli, *supra* note 1, at 303–04.

D. Reaction v. Deterrence

All measures that the Maritime Courts have taken to fight with the belligerent proceedings and foreign-issued ASIs—as are elaborated in Part III.A, *supra*—are reactions accidental and isolated. There is no difficulty in apprehending that a workable mechanism of counteracting the extraterritoriality of the ASI should not only rescue the plaintiff in the Chinese proceedings out of the disadvantages brought about by an extant ASI, but also prevents the party from being threatened thereby at all.

The absence of a pre-set mechanism which specifies routine and coherent countermeasures to the ASI makes it impractical for the ASI applicant to evaluate the possible (adverse) consequences of its belligerent legal actions against the Chinese proceedings, and thus renders Chinese judicial system ineffective to deter that party from requesting the foreign court to issue an ASI against the Chinese proceedings. An ASI applicant who does not foresee any detrimental consequences arising in the interfered Chinese proceedings with respect to the application before a foreign court will behave with less caution in initiating the ASI proceedings.

Conversely, a structured and inherently cohesive mechanism addressing the ASI-related practices in the Chinese judicial system will compel such an applicant to seriously weigh the advantages and disadvantages of getting an injunction against the Chinese proceedings, and thus provide it with increasing disincentive to commence or continue the ASI proceedings. It becomes conspicuous, therefore, that the presence of the maritime injunction itself does not suffice to deter the institution of the ASI proceedings. Rather, a mechanism capable of enabling the ASI applicant to predict reasonably the possible (adverse) consequences of such an application is essential for reducing the risks that the party commencing the Chinese proceedings may face by that application.

E. Restraint v. Initiative

The Chinese judiciary has exerted judicial restraint under the consideration of international comity for jurisdictional conflicts.⁷⁹ In most cases, it defers to foreign proceedings paralleling its own on the merits of the dispute concerned. The maritime courts have abstained from issuing a countermeasure against the foreign proceedings unless the situation is extremely compelling. As is revealed in Part III.A, *supra*, the situations deemed exceptional have pointed to the same one in which the ASI applicant had submitted to jurisdiction of the Maritime Court before instituting the ASI proceedings at the foreign court. In other words, only where the belligerent ASI proceedings at the foreign court have conspicuously disrespected the established jurisdiction of the Maritime Court will the Maritime Court consider resorting to a countermeasure; otherwise, it is

⁷⁹ See, e.g., Xu & Yang, *supra* note 9, at 20; Zhang Weiping, *supra* note 6, at 184; Huang, *supra* note 6, at 182, 184–85.

not inclined to react on the sole ground that the foreign proceedings inherently bear the extraterritorial effect.

I argue here that the Chinese judiciary should respond in a bolder manner, especially given the contemporary judicial objective of hoisting the extraterritoriality of Chinese judgements and rules to advocate the construction of the foreign-related rule of law. In the modern context, it will no longer be necessary to limit rigidly the legal effect of Chinese judicial decisions within the country, as the extraterritoriality of those decisions, if any, does not mean automatically unjustifiable intervention with juridical sovereignty of the foreign jurisdiction affected, in particular where such extraterritoriality is induced to push back its counterpart from that foreign jurisdiction. The Chinese judiciary should seize the initiative by devising comprehensive and diverse courses of action to boost the extraterritoriality of its judicial instruments and to expand broadly the scope of situations in which those instruments should be engaged.

F. Cooperation v. Combat

Judicial cooperation at the regional level can play a crucial role in addressing the ASI predicament in two possible patterns. One is to constrain the issue of ASI between the regional partners, as is observed in the EU's Brussels Regime. The other is to prompt the mutual recognition and enforcement of ASI, as is detected under the Arrangement concerning Interim Measures in Arbitral Proceedings 2019.⁸⁰

What the CJEU ushers in the Brussels Regime in suppressing the ASI is the doctrine of "mutual trust". In *Turner* and *West Tanker*, the CJEU found the ASI could not be tolerated as it contravenes the principles of mutual trust between the EU Member States.⁸¹ The implication of those principles is that "the Member States of the [EU] not only have respect, but also *blind trust* in each other's courts."⁸² In *Erich Gasser GmbH v. Misat Srl* ("*Gasser*") where a reference from an Austrian court relates to whether the Austrian court which had exclusive jurisdiction over the matter pursuant to the contract between the parties might proceed to hear and give judgment in a matter that had first been brought before the Italian courts,⁸³ The CJEU's answer is "no". A summary of the court's opinion is as these:

"[T]his rule [of mutual trust] applies even where there is an exclusive jurisdiction clause in favour of the courts of the country second seised and no matter whether the action may have been brought in bad faith or where extreme delay may have been a factor."⁸⁴

The CJEU stressed in *Gasser* that in the situations where jurisdictional conflicts between the EU Member States arise, it is the regional jurisdictional rules,

⁸⁰ Arrangement concerning Interim Measures in Arbitral Proceedings 2019, *supra* note 70.

⁸¹ Pengelly, *supra* note 49, at 397.

⁸² Kruger, *supra* note 57, at 1035 (emphasis added).

⁸³ *Gasser*, [2003] EUECJ C-116/02 (CJEU).

⁸⁴ Pengelly, *supra* note 49, at 399.

rather than the ASI, that should be provoked to resolve those conflicts.⁸⁵ This significance of the mutual trust doctrine is summarised by a scholar as follows:

“This is a move from legal imperialism to legal communitarianism; from unilateralism to multilateralism. It is a new way of approaching cases of *lis pendens* more in line with [International Private Law] in an internationalised form, such as the Brussels I Regulation or the proposed worldwide equivalent Hague Convention [on Choice-of-Court Agreements]. This new approach is better suited to our increasingly globalised world.”⁸⁶

By contrast, the approach to “mutual trust” as adopted in the Arrangement concerning Interim Measures in Arbitral Proceedings 2019 stands on the opposite side—that is, to embrace mutual recognition and enforcement of ASI. Under this regional framework, the ASI granted by the Hong Kong court falls within the scope of “interim measures” covered thereby and is entitled to recognition and enforcement by a Mainland court, to support the Hong Kong arbitral proceedings, upon the satisfaction of the conditions set forth therein.⁸⁷

Whereas cooperation is an optimal leverage for tackling the ASI predicament, the negotiations it will entail are time-consuming and the vicinity of regional arrangements is limited. It has been noted that both before and after the Brexit, there has always been no sign that the English courts would allow the ASI to wither.⁸⁸ In *Masri* the EWCA even attempted to extend the availability of the ASI.⁸⁹ After the Brexit, the Brussels I bis Regulation became inapplicable in the relation between the UK and the EU.⁹⁰ Though it is unclear whether the 1968 Brussels Convention is still applicable therebetween, the UK government has notified the EU its intention not to be bound thereby after the Brexit.⁹¹ Combining the observations on a possible rebound of the use of ASI under the aegis of international conventions and arbitration agreements at the international level and those on a strong resistance from common law jurisdictions to curtail the use of ASI, it is rational to presume that combating the ASI predicament will be normalcy, rather than contingency, for the Chinese judiciary in a relatively long run. Consequently, a structured and inherently cohesive mechanism rather than a group of isolated and independent fragments should stand, side by side, with the admired regional arrangements.

⁸⁵ *Id.*

⁸⁶ Dowers, *supra* note 16, at 970–71.

⁸⁷ Arrangement concerning Interim Measures in Arbitral Proceedings 2019, *supra* note 70, art. 1.

⁸⁸ Knight, *supra* note 19, at 137.

⁸⁹ *Id.*

⁹⁰ Matthias Lehmann, *Brexit and the Brussels Convention: It's All Over Now, Baby Blue?* (Feb. 12, 2021), available at <https://eapil.org/2021/02/12/brexit-and-the-brussels-convention-its-all-over-now-babyblue/#:~:text=Brexit%20has%20dealt%20a%20major%20blow%20to%20judicial,the%20relation%20between%20the%20UK%20and%20the%20EU> (last visited Apr. 10, 2023).

⁹¹ *Id.*

IV. DEVISING COURSES OF ACTION UNDER CHINESE LAW

Regarding the reformulated judicial objectives and principles pertaining to the maritime adjudications involving the foreign-issued ASIs, diverse courses of action available to the Maritime Courts within the prevalent Chinese legal system are explored in this part. As is revealed below, each of them has its roots in the existent legal mechanisms and may be employed severally or jointly with others as the circumstance may require.

A. *Non-Intervention to ASI Compliance*

Where the plaintiff in the Chinese proceedings intends to comply with the ASI issued against it by the enjoining foreign court and applies to the Chinese court seised to withdraw the actions, the court is vested with the discretion by Article 148 of the CPL to decide whether the application should be granted. The past practices show that the Maritime Courts barely intervene in such an application for withdrawal based on a foreign-issued ASI as they in principle deem themselves not being empowered to intervene the plaintiff's exercise of its right not to sue.⁹² Such judicial opinion is rooted in the pertinent provisions of the Judicial Interpretation of the Application of the CPL. According thereto, the court may, at the first instance, refuse an application for withdrawing the proceedings only when certain acts of the applicant need to be redressed by the law,⁹³ and, at the second instance, refuse such an application based on the needs for protecting the national interest, public interest or legitimate interest of other parties.⁹⁴

The judicial opinion that the plaintiff's right not to sue should be deferred unless extremely compelling situations occur can now be revisited with the following two observations based on the reformulated judicial objectives and principles regarding the ASI. One is that, since the ASI interferes not only with the legitimate interest of the enjoined party but also judicial sovereignty of the enjoined jurisdiction, the courts may be empowered to conduct *ex officio* a mandatory, rather than discretionary, examination of the compatibility between the ASI involved and national or public interest. The first instance courts should thus be authorized to refuse an application for withdrawal based on the concerns currently examined at the second instance only—that is, the national or public interest.

With respect to the court's discretion in refusing the application for withdrawing proceedings to comply with a foreign-issued ASI, it warrants some attention to the following comments delivered by the Advocate-General of the CJEU in *Turner*:

⁹² See *supra* note 66 and its accompanying text.

⁹³ Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Judicial Interpretations on the Application of the Civil Procedural Law] (promulgated by Sup. People' Ct. Dec. 18, 2014, effective Feb. 4, 2015, amended Mar. 22, 2022, effective Apr. 10, 2022) art. 238 (1) (Chinalawinfo).

⁹⁴ *Id.* art. 336 (1).

“[I]t is undeniable that, as a result of a litigant being prohibited, under threat of a penalty, from pursuing an action before a given judicial authority, the latter is being deprived of jurisdiction to deal with the case, and the result is direct interference with its unfettered jurisdictional authority.”⁹⁵

Regarding the established opinion that interference with a foreign country’s jurisdictional sovereignty is the *prima facie* effect of the ASI, the court enjoined should be enlisted to rebut this *prima facie* connection between the ASI and interference if it decides not to intervene. In other words, only when the court is satisfied with the findings that the foreign-issued ASI has no, or only a negligible or minimal, impact or interference with its important public policy issues may it decide to grant the plaintiff’s application to withdraw the Chinese actions for the purposes of complying with that foreign-issued ASI.

The above comments from the Advocate-General of the CJEU also relate to the other observation regarding the “true intention” of the applicant for withdrawal of the actions. Even though an application for withdrawal is submitted by the plaintiff itself, the undisputable perception is that the application is submitted “under threat of penalty” or, at least, under stress from the enjoining court. Unlike in the general litigation, when examining the “true intention” of the plaintiff in the situation involving a foreign-issued ASI, the core issue is not whether the plaintiff intends to exercise its right to sue or not, but whether it intends to exercise its right to sue *in China* or not. The very fact that the plaintiff voluntarily institutes the proceedings before a Chinese court rather than a foreign court has demonstrated clearly enough its true intention in this regard—that is, to exercise its right to sue in China. Accordingly, in the absence of comprehensive protection offered by the current legal system to the enjoined party against the ASI, the submission of an application by the party for withdrawal under the stress from the ASI may not suffice to construe the true intention of the plaintiff. Only when the playing field is levelled—that is, alternative remedies are in place for the benefits of the enjoined party (i.e., the plaintiff in Chinese proceedings)—will the party be able to decide, genuinely out of its true intention, on whether it intends to comply with the foreign-issued ASI still. Consequently, a Chinese court may decide not to intervene in the enjoined party’s decision to withdraw from the Chinese proceedings where (i) the enjoined party’s decision is not made out of the stress from a foreign-issued ASI, in the context that protection to the party is available in Chinese legal system, and (ii) the withdrawal will not contravene national or public interest.

B. Defiance of ASI

In effect, the extant admiralty adjudications have already embraced some practices of defiance against the foreign-issued ASIs. The High People’s Court of Shandong Province reiterated in *SDXH v. Huiquan (No. 2)* the longstanding rule practised by the admiralty judiciary that an English ASI which is not

⁹⁵ Turner, [2004] EUECJ C-159/02 (CJEU), para. 34.

recognised and enforced in accordance with Chinese law does not bind in the Chinese proceedings the party against which it is issued; and no weight will be attached to such an ASI by the Chinese court seised in establishing its jurisdiction over the dispute.⁹⁶ It has also been clarified in adjudication that the presence of a foreign-issued ASI is deemed irrelevant to the court's reasoning on whether to exercise its jurisdiction based on the ground of *forum non conveniens*.⁹⁷ In addition, the court may ascertain its defiance of the foreign-issued ASI by rejecting to grant an application for withdrawing the Chinese actions based on a foreign-issued ASI—as is analysed in Part IV.A, *supra*—or by refusing to acknowledge any clout the injunction may have on the establishment or exercise of its jurisdiction.

Where the court's defiance against the foreign-issued ASI is formally ascertained in those situations, the party enjoined should be entitled, as a result of such defiance, to seek further protection from the court against possible penalties it may be exposed to by the ASI. A simple and effective remedy available to the party can be entitling it a maritime injunction refraining the respondent from seeking any remedy—either legal or equitable—from the enjoining court on the basis of the ASI noncompliance. Such a maritime injunction, though leaving the ASI as it is and not intervening the foreign trial and ASI proceedings, will be efficient to help protect the plaintiff from the execution of any damage award against it for commencing or continuing the Chinese proceedings.

C. Issue of Equivalent for AASI

An AASI refers to a relief seeking to refrain a party—which usually is the respondent in the proceedings at the issuing court—from taking or continuing any steps in the foreign court to obtain an ASI with the aim of restraining the proceedings at the issuing court.⁹⁸ The maritime injunctions granted by the Wuhan and Guangzhou Maritime Courts in the two cases of 2017 and 2021, which are elaborated in Part III.A, *supra*, are largely equivalents for an AASI. Nonetheless, the conditions to be employed by the Chinese judiciary for the issue of such a maritime injunction may be disparate from those adopted in common law jurisdictions regarding the issue of AASI.

⁹⁶ Shanghai Donghexin Shiye Jituan Youxian Gongsi, Qingdao Huiquan Chuanwu Gongsi Feifa Zhiliu Chuanbo, Chuanzai Huowu, Chuanyong Ranyou, Chuanyong Wuliao Sunhai Zeren Jiufen Ershen Mishi Caiding Shu (上海东和欣实业集团有限公司、青岛汇泉船务公司非法留置船舶、船载货物、船用燃油、船用物料损害责任纠纷二审民事裁定书) [Shanghai Donghexin Industrial Group Co., Ltd. v. Qingdao Huiquan Shipping Company], (2020)鲁民终2773号 (Shandong High People's Ct. 2020).

⁹⁷ Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Minshi Susong Fa de Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Judicial Interpretations on the Application of the Civil Procedural Law] (promulgated by Sup. People' Ct. Dec. 18, 2014, effective Feb. 4, 2015, amended Mar. 22, 2022, effective Apr. 10, 2022) art. 530 (Chinalawinfo).

⁹⁸ Danella A. Wilmschurst & Amy J. Lay, *The Anti-Anti Suit Injunction: The Fight by Australian Courts to Protect Rights Created under Australian Legislation Extra Territorially—A Case Summary: Pan Australia Shipping Pty Ltd v. the Ship Comandate* [2006] FCA 881 (Unreported, Rares J, 22 June 2006), 20 AUSTL. & N.Z. MAR. L.J. 61, 61 (2006).

In *Ecom v. Mosharaf* where an AASI was sought from the EWHC by the plaintiff in the English proceedings, Justice Hamblen underscored that “where the foreign proceedings are brought in breach of an exclusive jurisdiction or [an] arbitration clause, [AASIs] are frequently granted” where an ASI is issued under the foreign proceedings.⁹⁹ This rule is reiterated by Justice Calver in *Specialized Vessel Services Ltd v. MOP Marine Nigeria Ltd* (“*Specialized Vessel*”) in the following way:

“In contractual cases, where the parties have agreed an exclusive English forum clause, a foreign [ASI] to restrain substantive proceedings in England will be viewed as a breach of the clause and can be restrained by injunction on the basis that it is a breach of contract.”¹⁰⁰

Pan Australia Shipping Pty Ltd v. The Ship “Comandate” (“*The Comandate*”)¹⁰¹ is a typical example of the issue of AASI before the FAC in Australia. The dispute arose from a C/P and involved ship arrest. The C/P whose effect was in dispute contained a London arbitration clause. The plaintiff (“Pan”) perceived the respondent’s (“Comandate”) rejection to the FCA’s jurisdiction as well as the respondent’s intention to seek an ASI from the English court—i.e., a “threat of an ASI”. Therefore, Pan applied for an AASI against Comandate for a certain period on the ground that Pan needed some time, before the respondent could institute the ASI proceedings before the English court, to formulate whether it was entitled to sue *in personam* in Australia. Justice Rares reasoned that the injunction sought was not about jurisdiction, but about to preserve Pan’s right to bring an *in personam* proceedings in Australia, which is permitted by the Australian law.¹⁰² In other words, the consideration for the court to grant the injunction was to keep the *status quo*—that is, to allow some time for Pan to formulate its submissions as to whether it was entitled to sue before the FCA according to the Australian Law before it was banned by an English ASI to do so. Consequently, Comandate was prohibited by the Australian injunction to apply for an ASI at the English court.¹⁰³

Where the AASI equivalent is placed under Chinese law, it will constitute a countermeasure whose effect of intervention is escalated from that of the defiance measure as suggested in Part IV.B, *supra*. Nonetheless its effect will not be as severe as that of the ASI equivalent, in that it leaves the foreign trial proceedings as they are. The AASI equivalent can be employed, upon the application from the plaintiff against which the foreign-issued ASI is (or is to be) issued, to compel the ASI applicant not to commence or continue any ASI proceedings at a foreign court. On the one hand, the issue of an AASI equivalent can help protect the plaintiff from potential sanctions imposed by the ASI-

⁹⁹ *Ecom v. Mosharaf*, [2013] EWHC 1276 (Comm.), para. 21 (per Hamblen J.).

¹⁰⁰ *Specialized Vessel Services Ltd. v. MOP Marine Nigeria Ltd.*, [2021] EWHC 333 (Comm.), para. 24.

¹⁰¹ *The Comandate*, [2006] FCA 881.

¹⁰² *Id.*

¹⁰³ In an appeal before the FCA, the anti-anti-sui injunction was set aside because the FCA found that the court did not have jurisdiction on the dispute. *The Comandate*, [2006] FCAFC 192.

issuing court by reason of contempt of court on the ground of the ASI noncompliance. On the other hand, it does not interfere with the trial proceedings at the foreign court—which concurs with the traditional value upheld by the extant Chinese maritime adjudications. In addition, where an injunction is sought to combat a foreign ASI granted based on an arbitration agreement in advocate of the arbitral proceedings at the seat of the issuing court, the AASI equivalent, rather than the ASI equivalent, is the suitable recourse the Chinese court may invoke.

As indicated in *Comandate*, the AASI targets to sustain *status quo*—i.e., non-intervention in the possibility or existence of parallel proceedings—by preventing the occurrence of a stalemate between jurisdictions to be induced by the ASI. The past adjudications have shown that the opinion of the Maritime Courts may differ greatly from those of common law courts on the merits of the admiralty disputes—which are essential for the decisions as to whether the ASI should be granted at common law. Divergences therebetween have been perceived in the cases involving the effect of incorporation of the terms and conditions in the C/P into the bill of lading (“B/L”), the proximity of arbitration agreements contained by the B/L with respect to third parties such as cargo insurers and financial assurers, the exclusivity of choice-of-forum clauses, etc. For example, in *SDXH v. Huiquan (No. 1)*, where a dispute arose from possessory lien exercised against the cargo onboard, the Qingdao Maritime Court found that SDXH was not a party to the payment agreement at issue which contained an arbitration clause; whereas the EWHC granted the ASI upon the application from Huiquan on the basis of that arbitration clause.¹⁰⁴ Another example arises in *White Periwinkle Shipping SA v. Chongqing Hong Qing Ting*, where the Wuhan Maritime Court took the position that the C/P which contained an arbitration clause was not effectively incorporated into the B/L and thus the carrier—i.e., the B/L issuer—was not bound thereby. By contrast, the respondent successfully obtained an ASI against the carrier at the EWHC which acknowledged the incorporation and issued the ASI based thereon.¹⁰⁵

I also contend that, in respect of the threshold for the issue of AASI equivalent, differentiation between the situations involving EJC or arbitration agreements and other situations is unnecessary. Bearing in mind that the English courts and other common law jurisdictions have had a penchant for granting the ASI in parallel proceedings, the Chinese court seised should be empowered to counteract by means of the AASI equivalent so long as it takes justifiable,

¹⁰⁴ Shanghai Donghexin Shiye Jituan Youxian Gongsi, Qingdao Huiquan Chuanwu Gongsi Liuzhiquan Jiufen Minshi Yishen Minshi Caiding Shu (上海东和欣实业集团有限公司、青岛汇泉船务公司留置权纠纷民事一审民事裁定书) [Shanghai Donghexin Industrial Group Co., Ltd. v. Qingdao Huiquan Shipping Co.], (2019)鲁72民初187号 (Qingdao Maritime Ct. 2019).

¹⁰⁵ Bai Changchunhua Chuanwu Gongsi yu Chongqing Hong Qingting Youzhi Youxian Zeren Gongsi Haishang Huowu Yunshu Hetong Jiufen Shangsu An (白长春花船务公司与重庆红蜻蜓油脂有限责任公司海上货物运输合同纠纷上诉案) [White Periwinkle Shipping S.A. v. Chongqing Hong Qing Ting], (2015)鄂民四终字第00194号 (Hubei High People’s Ct., 2015).

no matter whether the grant of ASI by the enjoining court conforms to the law of the enjoining jurisdiction.

D. Issue of Equivalent for ASI

The threshold the Chinese judiciary takes to issue an equivalent for ASI should also deviate seriously from that under common law. In general, as is noted above, common law courts have been inclining towards issuing the ASI in parallel proceedings, whereas the Chinese judiciary may resort to an equivalent thereof only in the extremely compelling situations. Considering the longstanding comfort of the Chinese judiciary with parallel proceedings even in the situations where it takes itself having exclusive jurisdiction pursuant to the law, the AASI equivalent will, in most cases, suffice to temper the extraterritoriality of a foreign-issued ASI with a view to better protecting the legitimate interest of Chinese litigants and to sustaining jurisdiction of the Chinese courts. In the exceptional situations where the legal or ASI actions at the foreign court are instituted in a conspicuously belligerent manner, however, the Chinese courts may need to resort to the ASI equivalent, as in *The Xin Tai Hai*.¹⁰⁶

In *The Xin Tai Hai*, the Qingdao Maritime Court issued the maritime injunction not just on the ground that the respondent instituted the Australian proceedings after it had explicitly submitted to the jurisdiction of the Maritime Court, but also on the observation that the ship arrest associated with the *in rem* proceedings would severely impair the interest of the shipowner. It can be safely inferred that the belligerent actions in this regard—which can justify the issue of ASI as an countermeasure by the Maritime Courts—should include, at least, those taken by the enjoining party in the situations where (i) the refraining actions against the Chinese proceedings are commenced after the enjoining party has explicitly submitted to jurisdiction of the Chinese court seised; (ii) after the Chinese court seised has established its exclusive jurisdiction, the enjoining party not only commences the foreign proceedings but also applies for an ASI against the Chinese proceedings; and (iii) in addition to the established exclusive jurisdiction, the Chinese courts seised has also found that the dispute bears significant implications on national or public interest of the country and that the foreign proceedings as well as the prospective judgment to be delivered therein may severely impair such interests. Briefly, unlike at common law, the ASI equivalent will be issued under Chinese law only in the extremely compelling situations.

E. Interception of Stretched Extraterritoriality

The ASI is described as “extraterritorial” because its binding or interfering effect spills over from the enjoining jurisdiction into the enjoined one. In certain circumstances, however, that extraterritoriality of ASI has been detected in one or more third jurisdictions other than the enjoining and the enjoined, and thus

¹⁰⁶ See *supra* note 61 and its accompanying text.

infringes further the legitimate interests of the party against which the injunction is issued. A typical example of that “stretched extraterritoriality” of ASI can be found in *Compania Sud Americana de Vapores S.A. v. Hin-Pro International Logistics Ltd* (“CSAV”) before the Hong Kong courts.¹⁰⁷ The Appellant (“CSAV”) is a Chilean shipping corporation. The Respondent (“Hin-Pro”) is a company incorporated in Hong Kong that carries on business as a freight forwarder. Hin-Pro had brought proceedings against CSAV in various courts of the PRC (including the Wuhan Maritime Court) under several sets of B/L issued by CSAV that contained exclusive English jurisdiction clauses. CSAV applied for and obtained an ASI from the EWHC, restraining Hin-Pro from suing it in any jurisdiction other than the EWHC.¹⁰⁸ Hin-Pro ignored the ASI, continuing to pursue the Wuhan proceedings. CSAV, then, sought damages for Hin-Pro’s breaches of contract in disregarding the EJs.

In support of that claim for damages, CSAV instituted the Hong Kong proceedings, seeking a Mareva injunction over Hin-Pro’s assets in Hong Kong pursuant to Section 21M of the HCO (Cap 4). The HKCA, upholding the decision of the HKCFI, ruled in CSAV that this relief should not be granted as to grant it would be to intervene in a conflict between the English Court and the Courts of the PRC.¹⁰⁹ Thus, according to the HKCA, Section 21M does not empower it to grant the Mareva injunction sought by CSAV for the purpose of enforcing an English ASI.¹¹⁰

The Court of Final Appeal of Hong Kong (“HKCFA”), however, allowed the appeal from CSAV. Non-Permanent Judge Lord Phillips disagreed with the HKCA’s characterisation of the application, finding that the case was one in which “[i]t has been asked to assist in enforcing an award of damages by the English Court for breach of [an EJC],”¹¹¹ rather than in enforcing an ASI. Hence, “[t]here is no bar on the ground of public policy [in Hong Kong] to enforcing an award of damages made by the English Court nor to the grant of a Mareva injunction in support of the judgment of the English Court.”¹¹²

The reasoning and decision provided by the HKCFA in CSAV indicates that, where the extraterritoriality of ASI is stretched into a third jurisdiction, the party enjoined may face not only penalties imposed by the enjoining court in the case of noncompliance with the ASI, but also those exerted by other jurisdictions in which the ASI or an award for damages arising therefrom can be enforced. A measure to intercept such stretched extraterritoriality should also be available to the enjoined party, upon its request, from the Chinese judiciary. A maritime injunction refraining the enjoining party from seeking enforcement

¹⁰⁷ *Compania Sud Americana de Vapores S.A. v. Hin-Pro International Logistics Ltd*. (“CSAV”), [2016] H.K.C.F.A. 79.

¹⁰⁸ *Id.*, para. 5.

¹⁰⁹ *Id.*, para. 6.

¹¹⁰ *Id.*, para. 45.

¹¹¹ *Id.*, para. 59.

¹¹² *Id.*

of the ASI or a pertinent damage award seems to be expedient in such a situation, which may be used either independently or together with other counter-measures as the circumstance requires. In addition, it should also be advisable to bring this concern into the proximity of the prospective regional arrangements to avoid or manage it pursuant to mutual undertakings between the regional partners.

F. Regional Arrangements

Regional arrangements have been proved effective and amicable in taming the extraterritorial effect of ASI. As is revealed in Part III.F, *supra*, regional cooperation in this realm may follow two patterns which appear opposite to each other. One embraces at the regional level the recognition and enforcement of ASI as “interim measure” granted by the issuing court—as under the Arrangement concerning Interim Measures in Arbitral Proceedings 2019—which is referred to as “inclusion pattern” in the following text.¹¹³ The other precludes the use of ASI between the regional partners and relies completely upon regional jurisdictional rules in addressing the parallel-proceeding concerns within the region—as under the Brussels Regime in the EU—which is referred to as “preclusion pattern” below. In tackling the ASI concerns in parallel proceedings at the regional level in Chinese perspective, both patterns warrant reference.

It is noted that the ASI is currently excluded from the proximity of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (“Arrangement on Civil and Commercial Judgments 2019”).¹¹⁴ Nonetheless, the prospect of addressing the ASI predicament between the two places has not been dimmed. According to the arrangement, the recognition and enforcement of ASI as well as other court judgments and rulings that are currently excluded therefrom will be subject to further negotiations.¹¹⁵ It seems, nevertheless, that the Chinese judiciary has not been prepared to follow—in court proceedings—the “inclusion pattern” as has been adopted in the arbitral context.

Where the “preclusion pattern” is called upon, regional rules on allocating jurisdiction in the case of conflicts between the regional partners should be set forth ahead, as the EU experiences show. The jurisdictional rules under the Arrangement on Civil and Commercial Judgments 2019, though aiming to determine the recognisability and enforceability of the judgment concerned rather than to allocate jurisdiction between the two places, may help pave the way for

¹¹³ Arrangement concerning Interim Measures in Arbitral Proceedings 2019, *supra* note 70, art. 1.

¹¹⁴ Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (“Arrangement on Civil and Commercial Judgments 2019”), art. 3 (concluded Jan. 18, 2019, not entering into force as of the completion of this article).

¹¹⁵ *Id.*

settling the prospective regional rules on concurrent jurisdiction with the ASI relegated to a very meagre role.

V. CONCLUSIONS

The perception of both a shift in the judicial practices of Chinese Maritime Courts pertaining to the foreign-issued ASIs and the evolving backdrop against which that shift occurred necessitates both a revisit of the maritime judicial objectives and principles in this regard and a demand for a structured and inherently cohesive mechanism to modernise the relevant practices. Having regards to the national and international progresses with respect to the judicial stance on the use of ASI, the overarching judicial objective of tempering the extraterritoriality of foreign-issued ASIs in admiralty proceedings is crystallised and specified in the foregoing text.

In pursuit of the reformulated objectives, the conventional principles founding the extant practices of the Maritime Courts in relation to foreign-issued ASIs are re-examined to assimilate the progresses detected. The Chinese judiciary is suggested to make headway in its attitude towards, reaction to and employment of existent mechanisms with the aim of fortifying jurisdiction of the Chinese courts and safeguarding the legitimate interests of Chinese litigants overseas in the foreign-related admiralty proceedings.

The extraterritoriality of foreign-issued ASIs in Chinese admiralty proceedings will waste away if suitable and operative remedies (i.e., countermeasures)—as are devised and recommended in this article—can be sought from the Chinese proceedings by the litigants enjoined. Diverse courses of action are in truth available for the Maritime Courts to choose from to counteract the extraterritorial effect of those ASIs. Both domestic and regional legal instruments should be conscripted to serve that goal. Upon the application from the party enjoined, the court should be empowered, on the one hand, and conscripted, on the other, to react in a way it considers justifiable.