HOW FUNCTIONAL WILL THE NEW FOREIGN-RELATED CIVIL PROCEDURE RULES OF CHINA BE: A PERSPECTIVE BASED ON CONCERNS BY SEP STAKEHOLDERS

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Abstract

In the prevailing trend of parallel litigation regarding standard essential patents (SEPs), the amendment to the foreign-related provisions of the P.R.C. Civil Procedure Rules in 2023 aims to expand the jurisdiction of the People´s Courts over foreign-related cases to safeguard national sovereignty, security, and development interests. This study estimates the international impact of the new rules on foreign SEP stakeholders, based on a survey among them. Its findings suggest that China´s civil procedure system with the 2023 Amendment has enormous potential, even though it still cannot completely alleviate the concerns of international comity and procedural fairness of foreign SEP stakeholders. To effectively stimulate this potential, the next move in developing foreign-related civil procedure rules should continuously strengthen the transparency of judgments and external publicity. People´s Courts and judges should adopt a conservative and prudent attitude in implementing foreign-related jurisdiction on cases involved in parallel litigations, considering the long-term impact on the international community and public interests, and restricting the application frequency of foreign-related jurisdiction to hamper forum shopping activities.

Keywords: Foreign-Related Civil Procedure Rules, Implication Challenges and Suggestions, International Comity, Procedural Justice, Forum Shopping

I. INTRODUCTION: INTERNATIONAL DISPUTES ARISING FROM PARALLEL LITIGATION ON SEPS

In recent years, following some decisions made by the People's Courts on several standard essential patent (SEP) disputes concurrently subject to global parallel litigation, countries such as the E.U. and the U.S. have questioned the reasonableness of the Chinese courts' handling of these foreign-related cases. On February 22, 2022, the E.U. filed a request for consultations with China at the World Trade Organization (WTO), accusing China violated a series of international treaties, such as Articles 63.1 and 63.3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), based on the fact that the People's Courts had issued anti-suit injunctions in

SEP cases without making the judgments public.[1] Subsequently, the U.S., Japan, and Canada expressed support for the EU's request. On December 20, 2023, after the People's Courts determined global royalty rates for SEPs in a judgment, the EU sent another letter to China via the WTO, again requesting the publication of the court's decision based on Article 63.3 of the TRIPS Agreement.[2] Throughout these actions, China has repeatedly faced accusations and condemnations for allegedly violating multiple international agreements.

The Fifth Amendment to the Civil Procedure Rules in 2023, which has been effective in January 2024, marks the first large-scale adjustment to the foreign-related section, effectively responding to foreign concerns about the Chinese judicial system while more prominently reflecting the legislative motivation and spirit of "safeguarding national sovereignty, security, and development interests" through civil litigation.[3] The main revisions to the foreign-related section focus on special territorial jurisdiction, consensual jurisdiction, and exclusive jurisdiction. These changes are specifically embodied in the expansion of jurisdictional scope, clarification of the handling of parallel litigation, enhancement of service efficiency, strengthening of judicial assistance in evidence collection, and improvement in the recognition and enforcement of foreign court judgments.[4] The revisions to the foreign-related section are guided by principles of steady progress, optimization and improvement of civil litigation rules, and the integration of

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[1] *WTO Dispute DS611: China — Enforcement of Intellectual Property Rights*, European Commission, https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/wto-dispute-settlement/wto-disputes-cases-involving-eu/wtds611-china-enforcement-intellectual-property-rights_en (last visited Nov. 23, 2024).

[2] *See* Letter from the European Union to China (Oct. 20, 2023) (on file with World Trade Organization).

[3] Hongyu Shen (沈红雨) & Zaiyu Guo (郭载宇), <*Minshi Susong Fa*> *Shewai Bian Xiugai Tiaokuan Zhi Shuping Yu Jiedu* (《民事诉讼法》涉外编修改条款之述评与解读) [*A Review and Interpretation of the Amendments to the Foreign-Related Provisions in Civil Procedure*], 54 Zhongguo Falü Pinglun (中国法律评论) [China L. Rev.] 70, 70-80 (2023).

[4] *See* Wang Qiao (王俏), *Woguo Minshi Susong Fa Wancheng Xiugai, Jiang Genghao Baozhang Dangshiren De Susong Quanli He Hefa Quanyi: Jiedu Xinxiugai De Minsufa* (我国民事诉讼法完成修改将更好保障当事人的诉讼权利和合法权益——解读新修改的民诉法) [*Civil Procedure of China Has Been Amended to Better Protect the Litigation Rights and Legal Interests of the Parties: Interpretation of the Amendments to the Foreign-Related Provisions in Civil Procedure*], Renmin Fayuan Bao (人民法院报) [People's Court Daily], Sept. 2, 2023, at A3, *available at* https://www.chinacourt.org/article/detail/2023/09/id/7509752.shtml.

advanced and beneficial international litigation rules into the socialist litigation system with Chinese characteristics. The goal is to enhance the quality and efficiency of foreign-related civil trials, balance the values of litigation efficiency and substantive justice through procedural disputes, and promote the development of China's judicial system to support transnational commercial activities.[5] Alongside these revisions, the Supreme People's Court has introduced an International Commercial Expert Committee and a diversified dispute resolution mechanism for international commercial disputes, enriching the pathways for resolving international disputes in China and improving the country's actual capacity to resolve such disputes.[6]

The 2023 Amendment was driven by practical circumstances and national needs. More importantly, it has effective implementation and ability to achieve the intended goals, especially in addressing the current consultation crisis that China faces at the WTO and the anticipated increase in cross-border litigation arising from SEPs, which depend on how well the judiciary can navigate the boundaries of these provisions and respond to the complexities of international situations. First, the foreign-related civil procedure rules have yet to be widely applied and authoritatively interpreted. Judicial practice relies solely on legislative principles and spirit; otherwise, it will be difficult to delineate the boundaries of these legal provisions. Second, the importance and complexity of technical standards are continuing to grow and expand beyond the communication sector, with the artificial intelligence field now also developing its technical standards. However, the global ecosystem for maintaining the effective operation and development of these technical standards is deteriorating. The phenomenon of de-globalization is emerging in global trade

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[5] *See* Shen & Guo, *supra* note 3.

[6] *Zuigao Renmin Fayuan Min Sitng Fuzeren Jiu Fabbu Disi Pi She "Yidaiying" Jianshe Dianxing Anli Xiangguan Wenti Da Jizhe Wen* (最高人民法院民四庭负责人就发布第四批涉“一带一路”建设典型案例相关问题答记者问) [*Head of the Civil Division IV of the Supreme People's Court Answers Questions from the Press on the Release of the Fourth Batch of Typical Cases Related to the Belt and Road Initiative*], Supreme People's Court (Sept. 27, 2023, 2:45 PM), https://www.chinacourt.org/article/detail/2023/09/id/7555211.shtml.

and technological cooperation, hindering the goal of promoting global technological compatibility and economic development through the implementation of technical standards.[7]

This Article, from the perspective of the developmental needs of the litigation system with Chinese characteristics, systematically examines the concerns of foreign SEP stakeholders regarding China's judicial system by reorganizing existing policy research. Based on the results of this qualitative analysis, it provides a normative analysis of the key points in the foreign-related civil procedure rules, offering insights and focus areas for its application and future judicial interpretations. Part II explains the amendment to the foreign-related civil procedure rules. Part III empirically reviews the concerns of SEP stakeholders regarding China's judicial system. Part IV recalls the various fundamental duties and values of a judicial system. Based on them, this part examines whether or not the amended civil procedure rules align with them and predicts how SEP stakeholders would be affected by the amended rules. Based on the results of the examination and prediction, Part V delivers implications and Part 6 provides the conclusion.

II. THE AMENDMENT TO THE FOREIGN-RELATED CIVIL PROCEDURE RULES

There are a few primary changes addressed by the 2023 Amendment. Some are about the jurisdiction over foreign-related cases, which expand jurisdiction categories that only addressed special territorial jurisdiction and exclusive jurisdiction in statutory language.[8] First, the amended Art. 272 expands the scope of special territorial jurisdiction.[9] Under the amended special territorial jurisdiction, courts can hear not only contractual disputes or

[7] *See* Tim W Dornis, *Standard-Essential Patents and FRAND Licensing—At the Crossroads of Economic Theory and Legal Practice*, 11(10) J. Eur. Competition L. & Prac. 575 (2020).

[8] Minshi Susong Fa (民事诉讼法) [Law on Civil Procedures] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991; rev'd by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007; rev'd by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012; rev'd by the Standing Comm. Nat'l People's Cong., June 27, 2017; rev'd by the Standing Comm. Nat'l People's Cong., Dec. 24, 2021; rev'd by the Standing Comm. Nat'l People's Cong., Sept. 1, 2023) (hereinafter Law on Civil Procedures) art. 157 (Chinalawinfo).

[9] *Id*. art. 272.

other disputes over property interests but also any foreign-related civil disputes except for identity relationships. Moreover, the amended Art. 272 explicitly adds the connection of adequate relation, which is meant to refer to jurisdiction by necessity adopted by European countries and be distinguished from the U.S. long-arm jurisdiction.

Second, the new Art. 277 releases the restrictions of practical connection and allows foreigners to be plaintiffs in Chinese courts based on a written agreement.[10] This connection was only and effectively applied in maritime law cases.[11] By the amendment, the subject jurisdiction is expanded to all foreign-related civil cases and a written agreement between any foreign parties regarding personal jurisdiction enables them to be heard by People's Courts. Moreover, the new Art. 278 is related to Art. 277 to release the restrictions of practical connection.[12] It is aligned with personal jurisdiction and confirms the authority of People's Courts when a defendant fails to object to jurisdiction, answers the suit, or raises a counterclaim.

Third, the new Art. 279 declares two types of exclusive jurisdiction.[13] One refers to the activities of corporations or other organizations established within China, including establishment, dissolution, liquidation, and validity of resolution. The other refers to validity issues of the intellectual property rights examined and granted within China.

Fourth, the new Arts. 280, 281, 302 clarify the scope of jurisdiction in parallel litigations with the intention of both international comity and safeguarding national sovereignty. Art. 280 confirms the authority of People's Courts to hear a case involved in a parallel litigation.[14] Under Art. 280, parties are free to choose a foreign court exclusively if the dispute between them does not involve the sovereignty, security, or public interest of China. Art. 281 and

[10] *Id*. art. 277.
[11] Haishi Susong Tebie Chengxu Fa (海事诉讼特别程序法) [Special Maritime Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 25, 1999, effective July. 1, 2000) art. 8 (Chinalawinfo).
[12] Law on Civil Procedures, art. 278.
[13] *Id*. art. 279.
[14] *Id*. art. 280.

Art. 302 specifically provide that courts may suspend, decline, or dismiss a case if a foreign court has already accepted or decided on the case before a People's Court exercises its jurisdiction. [15] Moreover, Art. 281 stipulates three circumstances where a People's Court can exercise jurisdiction after a foreign court has accepted to hear the case: 1) the parties agree to be heard by the Court or it has exclusive jurisdiction; 2) it is more convenient to be heard by the Court than the foreign court; or 3) the foreign court fails to take necessary measures to hear the case or fails to render a judgment within a reasonable period.[16]

Fifth, Art. 282 clearly states the rule of inconvenience, which was addressed in judicial interpretations. It allows People's Courts, after exercising jurisdiction, to dismiss a case if a more convenient foreign court is identified following an application by the defendant.[17] The rule of inconvenience in Art. 282 includes five elements: 1) the basic facts of the dispute occurred outside China; 2) the parties have no agreement that selects a People's Court to hear the dispute; 3) the Court has no exclusive jurisdiction; 4) the dispute does not involve the sovereignty, security, or public interest of China; 5) it is more convenient for a foreign court to hear the dispute.

In addition to the above changes regarding jurisdiction, there are other changes: one change is about service to foreign parties, which is addressed in the amended Art. 283;[18] one change relates to discovery across the globe, which is addressed in the amended Art. 284;[19] and one change is about recognizing and enforcing judgements by foreign courts or arbitration institutes, which is addressed in the amended Art. 297 and the newly added Arts. 300 and 301.[20] It is going to be tested whether or not all those amended articles can be effectively enforced, especially against foreign parties.

[15] *Id*. arts. 281 & 302.
[16] *Id*. art. 281.
[17] *See id*. art. 282.
[18] *Id*. art. 283.
[19] *Id*. art. 284.
[20] *Id*. arts. 279, 300–01.

Therefore, the next Part reviews concerns of foreign SEP stakeholders regarding China's judicial system, suggesting problems to be solved by the Amendment.

III. CHALLENGES TO CHINA′S JUDICIAL SYSTEM

Through research, foreign SEP stakeholders, as well as scholars and policymakers dedicated to promoting their innovation, have expressed concerns about judicial independence and transparency, international comity, and due process. These concerns not only highlight the potential of the amended foreign-related civil procedure rules to increase the preference of foreign SEP stakeholders for the Chinese judicial system but also indicate that the recent revisions still fall short of fully addressing their needs, leaving room for further improvement.

A. Research Methodology and Study Samples

This study utilizes feedback from a survey conducted by the U.S. government in 2021, which aimed to gather public opinion on whether the judicial system should impose substantial restrictions on the application of injunctions related to SEPs as part of judicial policy reform. The survey results were used to identify the concerns of foreign SEP stakeholders regarding the Chinese judicial system. Most standard-setting organizations require companies to sign a FRAND (Fair, Reasonable, and Non-Discriminatory) declaration when adopting technical standards. This declaration is essentially an altruistic contract, where SEP holders commit to granting licenses to implementers under fair, reasonable, and non-discriminatory terms.[21] The FRAND commitment is a fundamental safeguard for the dissemination of knowledge through technical standards and for enhancing consumer benefits.[22]

[21] Xianlin Wang (王先林), *Sheji Zhuanli De Biaozhun Zhiding He Shishi Zhong De Fan Longduan Wenti* (涉及专利的标准制定和实施中的反垄断问题) [*Anti-Monopoly Issues in the Setting and Enforcement of Standard Related to Patents*], 4 Fa Xue Jia (法学家) [The Jurist] 62, 66 (2015).

[22] See Catharina Maracke, *Free and Open Source Software and FRAND-based patent licenses*, 22 J. World Intell. Prop.

However, when negotiations between patent holders and implementers reach an impasse, patent holders may seek injunctions from the courts, requesting that the implementers cease infringement based on patent law.[23] While injunctions are commonly used by patent holders as a negotiation tool during licensing, their improper use can lead to the extortion of implementers.[24] Therefore, researching policies in this context can reveal pain points and challenges in the foreign-related litigation system, multi-party dispute resolution mechanisms, patent law, antitrust law, and contract law, as well as the expectations of policymakers and legal practitioners in the fields of cutting-edge technological innovation and global trade cooperation.

The research sample of this study consists of 49 responses, including 42 that specifically mention China's litigation system or the use of litigation to counter Chinese companies and seven that, while not directly involving China, discuss issues related to parallel litigation or competition between litigation systems.[25] Among these, 33 responses reflect individual opinions,[26] six are from companies involved in the development or implementation of SEPs, one is from a consulting firm, seven are from non-profit organizations related to

78 (2019).

[23] Zhuanli Fa (专利法) [Patent Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985; rev'd by the Standing Comm. Nat'l People's Cong., Sep. 4, 1992; rev'd by the Standing Comm. Nat'l People's Cong., Aug. 25., 2000; rev'd by the Standing Comm. Nat'l People's Cong., Dec. 27, 2008; rev'd by the Standing Comm. Nat'l People's Cong.,Oct. 17, 2020) art. 65 (Chinalawinfo).

[24] *E.g.*, Li Xingwen Li Xingwu Qiaozha Lesuo An (李兴文、李兴武敲诈勒索案) [In re Li Xingwen Li Xingwu Extortion] (Shanghai First Interm. People's Ct. 2019) (Chinalawinfo).

[25] *Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject To Voluntary F/RAND Commitments,* Regulation.gov (2021), https://www.regulations.gov/docket/ATR-2021-0001/comment. Out of a total of 168 documents, documents numbered ATR-2021-0001-0001 and ATR-2021-0001-0054 are excluded. The former is the policy draft itself, and the latter is completely unrelated to the research content. A total of 166 valid questionnaires were collected, and 141 of the questionnaires contained non-redundant responses. Among these 141 non-redundant responses, 99.29% (N=140) originated from individuals and entities outside China, including Europe, the U.S., other Asian countries, and South America. The respondents included individual inventors, corporate inventors, patent pools or intellectual property transfer and commercialization service institutions, companies implementing SEPs, innovation and intellectual property policy research institutions or scholars, and innovation policymakers or legislators. Of the responses, 29.78% (N=42) expressed concerns about whether Chinese companies, policies, or the patent litigation system could effectively safeguard innovation or whether China's patent system poses a threat to U.S. national security; 11.35% (N=16) mentioned that parallel litigation and forum shopping are common strategies or issues in SEP licensing negotiations; and 10.64% (N=15) expressed concerns about anti-suit injunctions.

[26] Among them, 8 documents are from inventors, 9 are from scholars in the fields of innovation policy, economics, or law, 1 is from a judge, 4 are from current or former national policymakers (U.S. Senators, senior federal government officials), 2 are from lawyers, and 4 are from intellectual property, technology, or policy consultants.

innovation, patents, or SEPs, one is from the U.S. Department of Commerce, and one is from a funding institution. The respondents include both potential users of the foreign-related civil procedure rules and those capable of providing commentary on it in international settings. Their concerns are not only fundamental issues that the foreign-related section must address but also have a direct impact on its international applicability.[27] Effectively addressing these concerns could enhance the international competitiveness and attractiveness of the Chinese judicial system.

B. Survey Results: Concerns of Foreign SEP Stakeholders

1. Concern One: Insufficient Judicial Independence or Transparency

In the feedback, 14.29% (N=7) of the sample expressed concerns that improper application of China's judicial system has led to outcomes that interfere with competition and hinder the effective implementation of patents. The feedback includes responses from a government entity (the U.S. Department of Commerce), an industrial enterprise (InterDigital), a non-profit organization representing inventors and patent holders (The Alliance of U.S. Startups and Inventors for Jobs), three individuals, and a consulting firm (GTW). Of these, four opinions criticized the lack of judicial independence for its negative impact on competitive markets, while three opinions criticized the lack of transparency in the judicial system, which they believe results in excessive legal risks. However, the underlying issue in these criticisms is the perceived inadequacy of China's judicial system in effectively fulfilling its role.

[27] European and American countries, along with the U.S., have the highest relevance to intellectual property cases in the judicial system of China, followed by Japan and South Korea. From 2019 to 2023, 36% of the foreign-related appeal cases accepted by the Intellectual Property Court of the Supreme People's Court came from EU countries, 31% from the U.S., 15% from Japan, and 3% from South Korea. *Zuigao Renmin Fayuan Zhishi Chanquan Fating Niandu Baogao* (最高人民法院知识产权法庭年度报告(2023)) [*Annual Report of the Intellectual Property Court of the Supreme People's Court (2023)*], Supreme People's Court (Feb. 23, 2024, 2:12 PM) 11, https://www.court.gov.cn/zixun/xiangqing/425872.html.

The criticisms of judicial independence mainly stem from the National Development and Reform Commission's (NDRC) antitrust investigations and the view that China's litigation system does not adequately ensure the effective and full utilization of technical standards to promote market competition. The perception of insufficient transparency in the judicial system is linked to two factors: the close association with the lack of judicial independence and the use of anti-suit injunctions by the People's Courts.[28]

These concerns about judicial independence and transparency have limited applicability in enhancing foreign-related civil procedure rules. On the one hand, courts, not only in China but also in the U.S., may defer to administrative departments based on national policies, public interests, or judicial preferences.[29] The U.S. Department of Commerce's feedback, while seemingly focused on the openness of court judgments and reasoning, is rooted in broader issues of national interest competition and national security. The recent amendment to the foreign-related civil procedure rules, which adheres to the principle of "safeguarding national sovereignty, security, and development interests," is uncompromising in these areas, clearly defining China's stance on the governance of foreign-related civil litigation, which is non-negotiable. On the other hand, not all foreign SEP stakeholders view China's judicial system as lacking transparency, particularly in civil litigation. For example, in feedback on global parallel litigation, Panasonic cited Chinese court decisions to illustrate the importance of understanding SEP negotiations through publicly available judgments. Despite this, the perception of insufficient judicial independence or transparency among the seven foreign SEP stakeholders in the survey does highlight the need for China's judicial system to further improve the publication of judgments and its international

[28] For example, data cited by Cohen shows that between 2010 and 2019, only 14.5% of the judgments in standard essential patent cases adjudicated by the People's Courts were made public.

[29] *See e.g.*, Runhua Wang, *Decoding Judicial Reasoning in China: A Comparative Empirical Analysis of Guiding Cases*, 68 Clev. St. L. Rev. 521, 569 (2020); Tianrui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322 (Fed. Cir. 2011) (showing that a court may tolerate errors in citing a wrong law when supporting the decision made by the International Trade Commission).

communication efforts.[30]

2. Concern Two: Need for Enhanced International Comity

A significant 26.53% (N=13) of the feedback expressed concerns about the rising trend of applying and enforcing anti-suit injunctions internationally in recent years. This concern was shared by 30.77% (N=4) of the corporate respondents (including Qualcomm, Cisco, InterDigital, and Ericsson), 15.38% (N=2) from non-profit organizations, and 53.85% (N=7) from individual respondents. The focus on anti-suit injunctions varied across different types of respondents, with some attributing the improper application of such injunctions to a lack of international comity. Among the feedback on anti-suit injunctions, only three responses specifically mentioned the terms "international comity" or "judicial comity."

International comity is not only a fundamental principle and bottom line of private international law but also a crucial guarantee of the stability and predictability of civil conduct. Based on the feedback, while foreign SEP stakeholders are in the process of building trust or preference for China's judicial system, the use of anti-suit injunctions raises concerns that the People's Courts may restrict the enforcement of their foreign patents or interfere with ongoing international cooperation negotiations. Additionally, there is a statistically significant correlation between concerns over anti-suit injunctions and the perception of insufficient judicial independence or transparency (Pearson $chi^2 = 8.4459$, $p < 0.01$), indicating that the innovation community's attitudes toward these two issues are related. Comparatively, the feedback suggests that the perceived inadequacies in the design and application of the Chinese judicial system in foreign-related cases contribute to the lack of confidence among foreign SEP stakeholders. This indicates that while the foreign-related civil procedure rules aim to build trust among foreign courts

[30] *Supra* Part III Sec. B.1.

and parties by addressing these concerns, there remain significant challenges in achieving the anticipated goals. The following chapter will delve into a discussion of these challenges.

3. Concern Three: Lack of Due Process

A small but significant 6.12% (N=3) of the feedback expressed dissatisfaction with the lack of notice to foreign parties during the pre-litigation preservation process in China. These respondents also raised concerns about international comity and the use of anti-suit injunctions, with one response from Professor Herbert H. Koh also addressing issues related to judicial independence and transparency.

In response to this issue, the recent amendments to the foreign-related civil procedure rules have not introduced specific measures, and legal literature has yet to provide a positive response. This reflects a gap in accurately capturing the concerns of foreign parties by Chinese legislators and scholars. Zhang has recognized the institutional shortcomings in the civil procedure rules regarding the correction of ex parte provisional remedies, particularly the lack of an appeal mechanism, which distinguishes it from judicial systems in the UK and Germany.[31] Similarly, the U.S. courts commonly grant ex parte temporary injunctions,[32] which can be appealed—a feature that aligns with the UK and Germany but differs from China.[33] However, foreign parties, especially U.S. companies, are more concerned about the improper application requirements for ex parte provisional remedies rather than the inadequacies in correcting them.[34] In the U.S., there is no pre-litigation preservation system, and the most common form of interim relief (preliminary injunction) requires

[31] Wenliang Zhang (张文亮), *Guoji Minshi Susong Zhong de Danfang Linshi Jiujii Yanjiu* (国际民事诉讼中的单方临时救济研究) [*A Study on Unilateral Interim Relief in International Civil Litigation]*, 6 FA XUE JIA (法学家) [The Jurist] 117, 127-28 (2023).
[32] *See e.g.*, Am Can Co. v. Mansukhani, 742 F.2d 314 (1984).
[33] *See* Law on Civil Procedures, art. 157.
[34] Respondents from the U.K. and the U.S. did not mention any procedural shortcomings in pre-litigation preservation remedies.

service on the respondent.[35] This is a fundamental right under the U.S. Constitution and a basic guarantee of due process in the U.S. judicial system. Although temporary restraining orders (TROs) in the U.S. federal system and some states do not require service of process,[36] they usually last no more than 14 days,[37] are prohibited in certain types of cases,[38] and their scope is generally limited to within the U.S.[39] In contrast, China's pre-litigation injunctions have a longer duration and broader effect than TROs,[40] indirectly leading to differences in the understanding of due process between China and the U.S. This divergence may hinder China's ability to achieve international comity when applying pre-litigation provisional remedies in foreign-related cases.

C. Challenges of Balancing Judicial Fundamental Duties

Based on the concerns identified by foreign SEP stakeholders regarding the Chinese judicial system, courts face challenges in implementing the 2023 Amendment effectively. The key difficulty lies in balancing and adapting multiple fundamental judicial duties, including but not limited to 1) international comity, 2) judicial fairness, 3) national sovereignty, security, and development, and 4) litigation efficiency. Properly fulfilling the obligation of international comity and maintaining judicial fairness while maintaining the latter two national interests is crucial to avoid turning Chinese courts into a source of deteriorating international judicial relations.

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[35] Fed. R. Civ. P. 65(a).
[36] Ohio has service requirements for TROs. Ohio R. Civ. P. 65(A)(2).
[37] Under the Federal Rules of Civil Procedure, a TRO is valid for a maximum of 14 days. *See* Fed. R. Civ. P. 65(b). Under Illinois Rules of Civil Procedure, a TRO is valid for a maximum of 10 days. *See* 735 ILCS 5/11-101.
[38] Ohio has restricted the application of TROs in cases involving non-compete agreements with former employees through case law. State ex rel. Pizza v. Rayford, 62 Ohio St. 3d 382, 582 N.E.2d (1992).
[39] *See e.g.*, Texas v. United States., No. 6:21-cv-00003, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).
[40] *See* King F. Tsang & Jyh-An Lee, *The Ping-Pong Olympics of Antisuit Injunction in FRAND Litigation*, 28 Mich. Tech. L. Rev. 305, 346 (2022).

D. International Comity vs. National Sovereignty, Security, and Development

Properly fulfilling the obligation of international comity is critical to prevent courts or judges from exacerbating international judicial relations, while also presenting challenges in coordinating relationships between different judicial systems. The term "comity" originally derives from Sanskrit and later Latin, meaning "smile" or "courtesy."[41] From a social and cultural perspective, it implies integration and balance to promote relationships, contrasting with protecting specific interests.[42] In modern legal contexts, it refers specifically to international comity and state comity, which are fundamental principles for balancing international relations and resolving "conflicts of laws."[43] However, the content and scope of judicial comity are often vague and diverse. When addressing conflicts between states, it generally involves the most basic principles of mutual recognition, such as the recognition and enforcement of foreign court judgments. Other principles of comity deal with conflicts between states and international dispute resolution mechanisms.[44] Whether these principles and techniques promote conciliation or litigation in practice largely depends on the attitudes, political expressions, and legal principles applied by the courts and judges.[45] Therefore, judicial comity is often seen as dependent on the court's attitude, political expressions, and the application of legal principles.[46] Balancing international comity with national interests requires a nuanced approach, ensuring that international

[41] *See* Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and "Breard" Scenarios*, 50 Cath. U. L. Rev. 591 (2001).
[42] Elisa D'Alterio, *From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?*, 9 Int. J. Const. L. 394, 398.
[43] *See* Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments.
[44] D'Alterio, *supra* note 42, at 309–401.
[45] For example, the margin-of-appreciation doctrine is applied in handling the relationship between the European Court of Human Rights and national courts. *See* Handyside v. The United Kingdom, 7 December 1976, ECHREuropean Court of Human Rights and national courts, n. 5493/1972; For the same type of issue, the Italian Constitutional Court also created the doctrine of "peacekeeping judgments," affirming its authority as the final court of adjudication. Italian Constitutional Court, No. 348 and 349 of 2007.
[46] D'Alterio, *supra* note 42, at 407.

obligations are met without compromising domestic sovereignty and legal integrity.

In addressing parallel litigation and the addition of the inconvenient forum principle, the 2023 Amendment has enhanced the consideration of international comity from a legal perspective.[47] First, regarding situations involving parallel litigation, Art. 280 adds restrictions to the applicability of jurisdictional rules based on existing judicial interpretations.[48] Second, to avoid parallel litigation, Art. 282 limits requests for an inconvenient forum to the period of jurisdictional objections and removes the requirement for Chinese parties' involvement based on judicial interpretations.[49] Finally, during the legislative draft discussions, legislators rejected including "the existence of a valid arbitration agreement between the parties" as a ground for considering foreign courts as having no jurisdiction in Art. 301, due to concerns about not easily denying foreign court jurisdiction.[50]

However, the primary legal interest of the 2023 Amendment is to protect national sovereignty, security, and development interests, which superficially conflicts with the principle of international comity. When resolving foreign-related civil disputes, courts should adhere to the fundamental principle of maintaining national sovereignty, security, and development interests. This principle is particularly reflected in the new law's provisions on negative conditions for exercising jurisdiction, [51] the inconvenient forum

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[47] *See* She & Guo, *supra* note 3, at 75–77.

[48] 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) [Interpretation on Application of <Civil Procedure Rules of People's Republic of China>] (promulgated by the Judicial Comm. Sup. People's Ct., March 22, 2022, effective April 10, 2022) art. 531 (Chinalawinfo).

[49] *See id.* art. 530.

[50] *See* Constitutional and Legal Affairs Committee of the National People's Congress, *Quanguo Renmin Daibiao Dahui Xianfa He Falu Weiyuanhui Guanyu <Zhonghua Renmin Gongheguo Minshi Susong Fa* (*Xiuzheng Caoan*)*> Shenyi Jieguo De Baogao* (全国人民代表大会宪法和法律委员会关于《中华人民共和国民事诉讼法（修正草案）》审议结果的报告) [*Report on the Review Results of the Draft Amendment to the Civil Procedure Rules of the People's Republic of China*], *National People's Congress* (Sept. 1, 2023), http://www.npc.gov.cn/npc//c2/c30834/202309/t20230901_431421.html.

[51] *See* Law on Civil Procedures, art. 280.

principle,[52] jurisdiction in necessity based on "other adequate relations,"[53] and the review grounds for recognizing and enforcing foreign court judgments.[54] This means that considerations of national sovereignty, security, and development interests should take precedence over international comity when dealing with parallel litigation issues, and form the basis for expanding protective jurisdiction and limiting the recognition and enforcement of foreign court judgments. Under such legal reasoning, balancing the maintenance of international comity with national sovereignty, security, and development presents a significant challenge for courts exercising jurisdiction in foreign-related civil litigation.

Drawing on the development of the principle of international comity in Western countries can be beneficial for balancing these two types of principles. First, limiting the exercise of jurisdiction and not recognizing foreign judgments can achieve the objective of maintaining national sovereignty, security, and development. The value of the judicial system lies in protecting fundamental rights[55] and national sovereignty[56]. By the end of the 19th century, international comity had formally become a legal principle in modern legal systems, with its essence and basis for promotion rooted in the protection of national sovereignty.[57] However, the means of protection is one of deference, as the goal of implementing the principle of reciprocity is to balance political and trade relations between countries while safeguarding national sovereignty.[58]

Second, the "sovereignty, security, or public interest" principle under the inconvenient forum principle should not be expansively interpreted.[59] The

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[52] *See id.* art. 282
[53] *See id.* art. 276.
[54] *See id.* art. 300.
[55] *See e.g.*, The Sunday Times v. United Kingdom, 2 Eur. Ct. H.R. (ser. A) (1979).
[56] *See e.g.*, Handyside v. United Kingdom, App No 5493/72, Eur. Ct. H.R. 737 (1976).
[57] *See* Hilton v. Guyot, 159 U.S. 113, 165 (1895).
[58] Medellín v. Texas, 552 U.S. 491, 128 S.Ct. 1346 (2008); Margaret E. McGuiness, *International Decisions: Medellin v. Texas*, 102 Am. J. Int'l L. 622 (2008).
[59] *See* Law on Civil Procedures, art. 282.

inconvenient forum principle originates from Anglo-Saxon law and is primarily used by courts in the U.S., Canada, and the United Kingdom.[60] U.S. courts typically decide whether to apply this principle after balancing public and private interests.[61] Private interests generally include the relative ease of obtaining evidence, the feasibility of compelling unwilling witnesses to testify, and the costs of securing willing witnesses' testimony.[62] Public interests usually encompass concerns such as unnecessary case backlogs, additional burdens on jurors, unnecessary legal conflicts, or local interests in resolving domestic disputes by foreign courts.[63] The consideration of the latter public interest is also viewed as judicial comity.[64] If there is insufficient evidence that the case will significantly affect the public interest of the jurisdiction, it is recommended that parties sue in a more convenient forum.[65] By comparing and drawing from these experiences, the "public interest" addressed in the civil procedure rules can be considered as limited to judicial interests and compared with the private interests of the parties, avoiding the burden of expansive jurisdiction on the judicial system.

However, the jurisdiction in necessity based on "other adequate relations" introduces uncertainties in the implementation of the principle of international comity. Jurisdiction in necessity is a type of protective jurisdiction, a negative form of the inconvenient forum principle. During the revision, legislators considered its modesty, emphasizing the necessity, appropriateness, and reasonableness of exercising jurisdiction.[66] However, the premise of modesty still involves expanding jurisdiction, with the primary goal being to protect China's sovereignty, security, and development interests.[67] These

[60] *See* Peter J. Carney, *International Forum Non Conveniens: Section 1404.5—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 Am. U. L. Rev. 415 (1995–1996).
[61] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 235 (1981).
[62] Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
[63] *Id*. at 508–09.
[64] *See* Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674, 687 & 694 (Tex. 1990).
[65] *See* Daniel S. Sternberg, *Res Judicata and Forum Non Conveniens in International Litigation*, 46 Cornell Int'l L.J. 191, 207 (2013).
[66] *See* She & Guo, *supra* note 3, at 73.
[67] *Id*.

characteristics align with the concerns from the survey feedback, where foreign SEP stakeholders predict that China intends to lead the handling of SEP disputes and rate-setting. Although judges from the Supreme People's Court and Chinese scholars stress that the "adequate relation" standards differ from "minimum contacts" in the U.S.,[68] the "adequate relation" standards lack clear guiding interpretations compared to the more defined and restricted "minimum contacts."[69] The specific differences between the two principles depend on how courts and judges apply the doctrine of necessity jurisdiction.

Therefore, if courts and judges pursue necessity jurisdiction in an aggressive or contentious manner,[70] aiming to quickly strengthen China's international influence in civil litigation,[71] it may be challenging to achieve. For example, using an injunction to restrict foreign jurisdiction while exercising jurisdiction can be difficult to reconcile with the obligations of international comity.[72] While it is urgent to enhance China's influence in international civil cases,[73] when adopting necessity jurisdiction to achieve this goal, it is crucial to consider the current international impact of China's judicial system. Specifically, foreign SEP stakeholders, who are important for China's technological and economic development, still have concerns about China's judicial independence, transparency, international comity, and due process.

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[68] *Id*; Zhihui Huang (黄志慧), *Shewai Fazhi Shiyu Xia "Shidang Lianxi" Guoji Minshi Guanxiaqian Yanjiu* (涉外法治视域下"适当联系"国际民事管辖权研究) [*A Study on "Adequate Relation" in International Civil Jurisdiction from the Perspective of Foreign-Related Rule of Law*], 505 FAXUE (法学) [Law] 176, 178 (2023).

[69] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[70] See Zhihui Huang (黄志慧), *Wo Guo Shewai Minshi Susong Biyao Guanxiaqian Zhidu De Tixi Dingwei Yu Guifan Chanshi* (我国涉外民事诉讼必要管辖权制度的体系定位与规范阐释) [*Systematic Positioning and Normative Interpretation of the Necessary Jurisdiction System in China's Foreign-Related Civil Procedure*], 39 fashang yanjiu (法商研究) [Stud. in L. & Buss.] 48, 55 (2022).

[71] *See* Huang, *supra* note 68, at 178.

[72] Tsang & Lee, *supra* note 38, at 318.

[73] *See* Zhizhou Zhang (黄志慧), *Guoji Huayuquan Jianshe Zhong Jida Jichuxing Lilun Wenti* (国际话语权建设中几大基础性理论问题) [*Several Fundamental Theoretical Issues in the Construction of International Discourse Power*], Xuexi Shibao (学习时报) [Study Times], Feb. 27, 2017, at 2.

E. Efficiency and International Comity

High judicial efficiency is both an advantage of the Chinese judicial system and a potential risk to its stable and orderly operation. Although there is no time limit for handling foreign-related cases by Chinese courts[74] or concerns from foreign parties regarding China's judicial efficiency, its efficiency far exceeds that of other countries based on institutional demands.[75] The recent revision of the foreign-related rules in civil procedure continues this advantage. First, it allows jurisdiction over cases where foreign courts, despite being more convenient, have not taken necessary measures or failed to resolve the case within a reasonable timeframe.[76] Second, it shortens the period for public notices.[77] However, these two changes that continue to enhance efficiency may differ from international comity obligations from the perspective of foreign parties, and may not effectively coordinate parallel litigation.

There are three main considerations regarding the limitation of the inconvenient forum principle based on whether foreign courts have failed to take necessary measures or resolve cases within a reasonable time. First, the core value of applying the inconvenient forum principle is procedural justice rather than procedural efficiency. In civil law countries in Europe, the approach of considering the reasonable timeframe of foreign court judgments is based on the lis alibi pendens principle,[78] which aims to avoid wasting judicial resources by waiting for the outcome of the earlier case in parallel litigation.[79]

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[74] *See* Law on Civil Procedures, art. 287.

[75] China's judicial efficiency not only surpasses that of Germany, which is widely recognized for its high judicial efficiency, but also exceeds the average level of European countries by 23.4% in terms of trial duration. *See* Tao Zheng (郑涛), *Minshi Shenxian Zhi "Shuang Gao" Beilun Ji Qi Sifahua Goujian* (民事审限之"双高"悖论及其司法化构建) [*The "Double High" Paradox in Civil Litigation Time Limits and Its Judicial Construction*], 5 fazhi yu shehui fazhan (法制与社会发展) [L. & Soc. Dev.] 156, 158–59 (2021).

[76] *See* Law on Civil Procedures, arts. 281 &282.

[77] *Id*. art. 283.

[78] *See* Fabrizio Marongiu Buonaiuti, *Lis Alibi Pendens and Related Actions Before Third Country Courts Under he Brussels Ibis Regulation*, *in* Research Handbook on the Brussels Ibis Regulation 250, 250 (Peter Mankowski ed., 2020).

[79] *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 451 (2017).

However, the common law system, where this principle originated, does not emphasize efficiency in the same way.[80] Courts in the UK and Australia, when balancing the inconvenient forum principle, categorize litigation efficiency as a private interest consideration.[81] In the U.S., even though scholars have suggested considering national interests for international trade development,[82] courts typically choose not to prioritize such private interests in their balancing,[83] rejecting the limitation of the inconvenient forum principle.[84] U.S. courts have repeatedly stated that this is based on judicial comity, and the principle is only excluded when foreign courts lack procedural safeguards.[85] Efficiency is seen as a substantive element, excluded from procedural safeguards. Furthermore, U.S. courts place the value of justice above efficiency when applying the inconvenient forum principle.[86] However, this does not mean that courts in the U.S., UK, and Canada disregard efficiency in applying the inconvenient forum principle; rather, they consider litigation speed and costs for economic and jurisdictional purposes.[87] Therefore, when parallel litigation involves different foreign courts, considerations of reasonable timeframes for judgments may trigger varying international comity effects. Civil law countries in Europe might be more accepting of this approach, whereas common law countries like the U.S. might not. Thus, when excluding the inconvenient forum principle, it is important to carefully consider the judgment and management efficiency of foreign courts.[88]

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[80] *See* Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45 N.Y.U. J Int'l L. & Pol. 1003, 1010 (2013).
[81] Markus Petsche, *A Critique of the Doctrine of Forum Non Conveniens*, 24 Fla. J. Int'l L. 545, 554 (2012).
[82] *See* Donna Solen, *Forum Non Conveniens and the International Plaintiff*, 9 Fla. J. Int'l L. 343, 353 (1994).
[83] *See* Gardner, *supra* note 79, at 446.
[84] For example, U.S. courts have rejected plaintiffs' claims that the judicial process in Philippine courts would exceed 30 years, making U.S. courts a more convenient forum for litigation. *See* Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1178–79 (9th Cir. 2006).
[85] Base Metal Trading Ltd. v. Russian Aluminum, 98 F. App'x 47, 50 (2d Cir. 2004); PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998).
[86] Ronald A. Brand & Scott R. Jablonski, Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements 74 (2007).
[87] *See* J. Stanton Hill, *Towards Global Convenience, Fairness, and Judicial Economy*, 41 Vand. L. Rev. 1177, 1195 (2008). *See also* Spiliada Maritime Corp. v. Cansulex Ltd. [1987] 1 AC 460 (UKHL) (appeal taken from Eng.); Amchem Prods., Inc. v. British Columbia (Workers' Comp. Bd.), [1993] S.C.R. 8897 (Can.); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
[88] Alexander R. Moss, *Bridging the Gap: Addressing the Doctrinal Disparity Between Forum Non Conveniens and*

Second, the requirement to set a higher standard for reasonable time limits for judgments, rather than for the filing of cases, exceeds international consensus. The most influential perspective on the consideration of reasonable time limits for judgments comes from the 2005 Hague Conference on Private International Law's Convention on Choice of Court Agreements.[89] However, this convention addresses the convenience of the court in concluding the case within a reasonable time, rather than considering the efficiency of other courts. Moreover, the latest discussion at the Hague Conference in 2023 on handling parallel litigation limited the time consideration to the filing period, i.e., the reasonable time for initiating the lawsuit, rather than the judgment period.[90] In contrast, the new Arts. 281 and 282 are more stringent, specifying not only that the judgment must be made within a reasonable time but also failing to provide leniency for the filing period. Given the efficiency advantage of the Chinese judicial system internationally, this approach might attract parties who prefer litigation efficiency or are inclined towards Chinese judicial policies to choose Chinese courts, thus deviating from the legislative intent of effectively coordinating parallel litigations. On the other hand, it might result in international dissatisfaction if Chinese courts exercise jurisdiction based on evaluations of foreign litigation efficiency.

Third, the standard for what constitutes a reasonable time limit is unclear—whether it is based on Chinese court standards, foreign court standards, or the standards of the parties involved. Based on the balancing tests which is applied to the inconvenient forum principle in common law countries, this standard may adopt the party's standard.[91] However, referring to legal

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Judgment Recognition and Enforcement in Transnational Litigation, 106 Geo. L. J. 209, 231 (2019).

[89] Jianli Song (宋建立), *Cong Zhonghua Guoji An Kan Bu Fangbian Fayuan Yuanze de Zuixin Fazhan—Jianlun Woguo Quji Minshangshi Susong Guanxiaquan Chongtu de Ruogan Sikao* (从中化国际案看不方便法院原则的最新发展——兼论我国区际民商事诉讼管辖权冲突的若干思考) [*The latest developments of the forum non conveniens doctrine in light of the Sinochem case—with some thoughts on jurisdictional conflicts in interregional civil and commercial litigation in China*], 6 Faxue Pinglun (法学评论) [Law Review] 73, 79 (2007).

[90] Working Group on Jurisdiction: Report, HCCH ch.2 art.3 (Feb. 2023), https://assets.hcch.net/docs/fd997e67-381e-47f1-9ff8-74c28e2faf68.pdf.

[91] Litigation efficiency is considered a private interest in the balancing test.

transplantation sources, this standard may not apply to the interpretation of the civil procedure rules. In contrast, some Continental law countries' international private law provisions provide references, but both the civil procedure rules and the laws of these reference countries interpret the specific standards for a reasonable time.[92] Determining a reasonable time for litigation milestones has always been a challenge in the civil procedure rules applied in an international view. [93] Its uncertainty can lead to inconsistencies in the application of the inconvenient forum principle, thus reducing the efficiency of dispute resolution in parallel litigation and promoting forum shopping.[94] Therefore, cautiously exercising jurisdiction based on foreign courts' failure to conclude within a reasonable time is a more realistic and less contentious approach than further judicial interpretations to clearly define reasonable time limits.

F. Inadequacies in Service of Process Regulations

The inefficiency in the serving process in foreign-related cases has long been a problem for the Chinese judicial system, but it is not the only issue from the perspective of foreign parties regarding the service for the defendants of civil disputes in China. Despite ongoing developments and optimizations in the judicial system of China when solving foreign-related civil disputes, issues related to the difficulties in service have been increasingly identified and addressed.[95] However, the judicial practice still shows that the success rate of service has considerable room for improvement: from the early 2000s, when

[92] For example, the Swiss Federal Act on Private International Law, the Bulgarian Private International Law Code, and the Italian Statute on Private International Law. *See* Qisheng He (何其生) et al., *Zhongguo Guoji Minshi Susong Yuanze (Jianyi Gao)* (中国国际民事诉讼原则(建议稿)) [*Draft principles on Chinese international civil procedure*], 2 Wuda Guojifa Pinglun (武大国际法评论) [Wuhan University International Law Review] 1, 29–30 (2015).

[93] The Fifth Hague Conference on Private International Law in 2023 stated that the reasonable time limit for foreign litigation should be clarified, but challenges exist and further discussion is needed. Working Group on Jurisdiction: Report, *supra* note 90, at 10.

[94] Moss, *supra* note 88, at 246–47.

[95] Compared to the general summaries in earlier literature, recent scholars have identified seven key causes of difficulties in service of process, primarily covering incomplete legal frameworks, inherent institutional flaws, deficiencies in the capabilities of case handlers, and insufficient use of information technology. See Minghua Xiang (向明华), *Yuwai "Songda Nan" Kunju Zhi Pojie* (域外"送达难"困局之破解) [*Resolving the Dilemma of "Difficulty in Service Abroad"*], 6 The Jurist 137, 138–39 (2012).

incomplete statistics showed about 20% of cases used public notice service[96] with a success rate of less than 30%,[97] to the late 2010s, where some courts had a non-service rate exceeding 50%.[98] Thus, the new Art. 283 aims to address the efficiency issue of service, with the goal of further improving the success rate of service. [99] Nevertheless, this study reveals that foreign SEP stakeholders are more concerned not with the timeliness of service but with the lack of specific provisions and remedies for foreign-related service situations under the civil procedure rules, especially the absence of requirements for service of unilateral interim relief. The fundamental obstacle to foreign SEP stakeholders' trust in the Chinese civil litigation process due to inadequate requirements on service of process and remedies has not been fully addressed in the 2023 Amendment.

Procedural fairness is the foundation of public trust in the judicial system. Even if the outcome of a judgment is unsatisfactory, participants are more likely to accept the result if they believe the process was fair.[100] A common understanding of procedural fairness includes four key elements: first, the parties under jurisdiction should have the opportunity to express their views; second, the system should be neutral, meaning that legal principles are applied

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[96] *See* Fagui Cao (曹发贵), *Xiamen Shi Zhongji Renmin Fayuan Shewai Minshangshi Anjian De Shenli He Yanjiu* (厦门市中级人民法院涉外民商事案件的审理和研究) [*The Adjudication and Study of Foreign-Related Civil and Commercial Cases by Xiamen Intermediate People's Court*], 5 Renmin Sifa (人民司法) [People Judicatory] 46, 47 (2007).

[97] *See* Qisheng He (何其生), *Woguo Yuwai Songda Jizhi De Kunjing Yu Xuanze* (我国域外送达机制的困境与选择) [*The Dilemmas and Choices of China's Mechanism for Service Abroad*], 2 Chinese J. L.(法学研究) 126, 126–29 (2005).

[98] Taking the Shanghai Pudong District People's Court as an example, from May 1, 2016, to December 31, 2019, the failure rate of service in foreign-related civil and commercial cases was as high as 57.92%. Specifically, the proportion of cases for which no service feedback was received was as high as 32.5%, and among the cases with feedback, the proportion of unsuccessful service reached 41.4%. *See* Wen Zou (邹雯) & Jiayue Zhang (张嘉玥), *Zhongguo Fayuan De Yuwai Songda Zhidu Fenxi* (中国法院的域外送达制度分析) [*Analysis of China's Mechanism for Service Abroad by Courts*], IP Lead (Apr. 2, 2022), https://www.zhichanli.com/p/519300541.

[99] Tianxuan Luo (罗恬漩), *Shewai Minshangshi Anjian Susong Wenshu Songda De Kunjing Yu Chulu—Cong Minshi Susongfa Di 283 Tiao Xiugai Zhankai* (涉外民商事案件诉讼文书送达的困境与出路——从《民事诉讼法》第 283 条修改展开) [*The Dilemmas and Solutions of Serving Litigation Documents in Foreign-Related Civil and Commercial Cases—An Analysis Based on the Amendment of Article 283 of the Civil Procedure Rules*], 1 Jingmao Falü Pinglun (经贸法律评论) [U. of Int'l Buss. & Econ. L. Rev.] 57, 61 (2024).

[100] Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction,* 44 Court Rev. 4, 6 (2007).

consistently, adjudicators are unbiased, and the results are transparent; third, respect for individuals; and fourth, the reliability of the exercising authority, which comes from providing parties under jurisdiction with sufficient explanation or adjusting the judgment based on their needs.[101]

However, from the perspective of the American innovation community, there is room for improvement in their trust in the procedural fairness of the Chinese judicial system, beyond just the third element. Among these, the substantive deficiencies in China's service of process system are concentrated in the first element, which pertains to the right to express one's position in the judicial process.

First, while unilateral interim relief does not necessarily grant the defendant the right to express their views, it should ensure that they are informed about the litigation process. The right to be informed is the foundation of the right to express oneself and is a fundamental value and mission of the service of process system.[102] In the U.S., procedural due process based on service of process is a litigation right under the Fourteenth Amendment and has become a fundamental principle in the American litigation system.[103] Based on the fulfilment of this basic court service obligation and the parties' right to be informed, the U.S. judicial system allows for remedies related to the right to express oneself.[104] Although temporary injunctions, which do not require service of process, are limited in practice and have available remedies, they remain widely criticized.[105] In contrast, China's pre-litigation preservation and other unilateral interim remedies are fast,

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[101] *See* Tom R. Tyler, Why People Obey the Law 22–23 (2006).
[102] Zhang, *supra* note 31, at 153.
[103] *See* David Resnick, *Due Process and Procedural Justice*, 18 Nomos 206, 209–10 (1977).
[104] Whether it meets the conditions for a default judgment or unilateral interim relief is a common appeal request for U.S. parties after a behavior injunction is issued. *See* Runhua Wang (王润华), Disi Zhishi Chanquan Zhi Lu, Meiguo Shangye Mimi Susong Anli Jingxuan (第四知识产权之路：美国商业秘密诉讼案例精选) [The Fourth Path of Intellectual Property: Selected Cases of Trade Secret Litigation in the U.S.] 261 (Intellectual Property Publishing House, 2024).
[105] *See* Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. Colo. L. Rev. 887, 996 (2020).

cost-effective, and impactful.[106] However, the absence of requirements and remedies for the right to be informed about such procedures in China undoubtedly distances foreign parties from trusting the judicial system of China even further.

Second, the lack of provisions for challenging service of process in the legal text leads to deficiencies in remedies related to service of process, resulting in a certain degree of procedural unfairness for parties passively involved in the Chinese judicial system when solving foreign-related civil disputes. First, the absence of service requirements for pre-litigation preservation in the civil procedure rules means that the respondent does not have a statutory basis to challenge service of process in such procedures. Although this does not mean that the respondent is deprived of remedies,[107] it weakens their ability to obtain relief. Second, the legal text also lacks appropriate provisions for challenging service of process in the application for recognition and enforcement of foreign default judgments or rulings.[108] Although judicial interpretations require proof of legal summons by foreign courts when applying for the recognition and enforcement of foreign default judgments or rulings,[109] it is not equivalent to the conditions and circumstances for issuing an anti-suit injunction[110] and does not explicitly grant the respondent the right to challenge service of process. This results in a lack of procedural fairness for the respondent. Therefore, in situations where

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[106] *See Tianjin Er Zhong Yuan Jianchi "Sankuai Liangzhun Liangtongbu" Shishi Baoquan* (天津二中院坚持"三快两准两同步"实施保全) [*Tianjin No. 2 Intermediate Court Adheres to "Three Fast, Two Precise, Two Synchronous" Preservation Measures*], China Ct. (Apr. 6, 2017), https://www.chinacourt.org/article/detail/2017/04/id/2686217.shtml.

[107] Zuigao Renmin Fayuan Guanyu Shiyong <Zhongua 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) [Interpretation on Application of <Civil Procedure Rules of People's Republic of China>] (promulgated by the Judicial Comm. Sup. People's Ct., March 22, 2022, effective April 10, 2022) art. 111 (Chinalawinfo).

[108] *See* Wenliang Zhang (张文亮), *Waiguo Panjue Chengren Yu Zhixing Yujing Xia "Songda Kangbian" Yanjiu* (外国判决承认与执行语境下"送达抗辩"研究) [*A Study on "Service Defenses" in the Context of Recognition and Enforcement of Foreign Judgments*], 2 Dangdai Faxue (当代法学) [Contemporary L. Rev.] 150, 157 (2019).

[109] Zuigao Renmin Fayuan Guanyu Shiyong <Zhongua 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) [Interpretation on Application of <Civil Procedure Rules of People's Republic of China>] (promulgated by the Judicial Comm. Sup. People's Ct., March 22, 2022, effective April 10, 2022) art. 541 (Chinalawinfo).

[110] Zhang, *supra* note 31, at 118.

statutory remedies for service of process are limited,[111] it is essential to exercise caution when issuing unilateral interim relief to foreign parties and when enforcing unilateral interim relief judgments or rulings from foreign courts.

IV. IMPROVING THE FEASIBILITY OF CHINA'S JUDICIAL SYSTEM IN FOREIGN-RELATED DISPUTES

In the context of frequent global trade frictions and the gradual weakening of international innovation cooperation, the judicial system should function as a strong support for China's role in international trade. The prerequisite is to enhance the international competitiveness of the Chinese judicial system, based on the parties' autonomous choice, by improving the control of people's courts over international governance authority procedurally, and strengthening their adjudicatory power over significant cross-border disputes substantively.[112] The continued growth of foreign-related cases, especially foreign-related intellectual property cases, in China has become a reality.[113] Therefore, to effectively leverage the role of people's courts in China's judicial system within international governance and to achieve the goal of "maintaining national sovereignty, security, and development interests," People's Courts and judges must consider the acceptance of relevant foreign-related civil rules and their application by foreign parties, their compatibility with international

[111] In judicial practice, the People's Courts may be able to find remedies for objections to service of process. Zhang, *supra* note 108, at 160.

[112] *See* Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 Tul. L. Rev. 67, 71–72 (2009).

[113] The number of foreign-related civil and commercial cases accepted by courts at all levels increased from 14,800 in 2013 to 2.73 million in 2021, and this number continued to grow in 2023. From January to September 2023, the number of cases received by courts at all levels increased by 42.49% year-on-year. In the field of intellectual property, the Intellectual Property Court of the Supreme People's Court accepted 421 new foreign-related appeal cases in 2023, accounting for 8.3% of the total new cases. Zhou Qiang (周强), *Zuigao Renmin Fayuan Guanyu Renmin Fayuan Shewai Shenpan Gongzuo Qingkuang De Baogao* (最高人民法院关于人民法院涉外审判工作情况的报告) [*Report on the Foreign-Related Adjudication Work of the People's Courts*], Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao (中华人民共和国最高人民法院公报) [Gazette of the Supreme People's Court of the P.R.C.], Oct. 28, 2022; *Zuigao Fa Gongbu 2023 Nian 1–9 Yue Sifa Shenpan Gongzuo Zhuyao Shuju* (最高法公布 2023 年 1 至 9 月司法审判工作主要数据) [*Major Data on Judicial Adjudication Work from January to September 2023—Supreme People's Court of the P.R.C.*], Zuigao Renmin Fayuan Xinwenju (最高人民法院新闻局) [Information Department of Supreme People's Court] (2023), *available at* https://www.court.gov.cn/zixun/xiangqing/415692.html; Supreme People's Court of the P.R.C., *supra* note 27, at 10.

standards, and their exemplary and leading role in future international legislation.[114] At the same time, it is essential to wisely use the inconvenient forum principle to prevent the development of People's Courts into a preferred jurisdiction for foreign parties seeking litigation.

A. Enhancing the Receptivity of Foreign Parties

Feedback from foreign SEP stakeholders indicates that there has long been a trust crisis in the Chinese judicial system, with unilateral temporary injunctions such as anti-suit injunctions being one of the triggers for international disputes involving China due to international comity. Some scholars predict that after improving the anti-suit injunction mechanism, People's Courts will use it based on the principle of reciprocity to counter foreign judicial outcomes they disagree with, thereby strengthening China's international discourse power.[115] The principle of reciprocity can theoretically justify the establishment of the anti-suit injunction system under international law, and institutionally prevent China from being passively constrained by international comity obligations. However, while anti-suit injunctions are part of the preservation system,[116] as a substantive injunction, they have significant impacts on actual rights.[117] Therefore, given that the revised foreign-related civil procedure rules further expand foreign-related jurisdiction but do not provide special regulations on the service of pre-litigation preservation procedures, courts and judges must exercise caution when considering the implementation of unilateral temporary injunctions such as anti-suit

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[114] *See* Qisheng He (何其生), *Daguo Sifa Linian Yu Zhongguo Guoji Minshi Susong Zhidu De Fazhan* (大国司法理念与中国国际民事诉讼制度的发展) [*Great Power Judicial Philosophy and the Development of China's International Civil Procedure System*], 5 Zhongguo Shehui Kexue (中国社会科学) [China Social Science] 123, 123 (2017).

[115] *See* Peter K. Yu et al., *Transplanting Anti-Suit Injunctions*, 71 Am. U. L. Rev. 1537, 1602–04 (2022).

[116] *See* Jianjun Zhu (祝建军), *Woguo Ying Jianli Chuli Biaozhun Biyao Zhuanli Zhengyi De Jinsuling Zhidu* (我国应建立处理标准必要专利争议的禁诉令制度) [*China Should Establish an Anti-Suit Injunction System for Standard-Essential Patent Disputes*], 6 Zhishi Chanquan (知识产权) [Intellectual Property] 25, 25 (2020).

[117] *See* Weiping Zhang (张卫平), *Minfa Dian De Shishi Yu Minshi Susongfa De Xietiao He Duijie* (民法典的实施与民事诉讼法的协调和对接) [*The Implementation of the Civil Code and the Coordination and Integration with the Civil Procedure Rules*], 32 Zhongwai Faxue (中外法学) [Peking University Law Journal] 933, 943 (2020).

injunctions in cases involving international parallel litigation. It is crucial to carefully weigh the public and private interests involved.[118]

Despite some foreign SEP stakeholders expressing concerns about the independence or transparency of the Chinese judiciary, they still show a preference for applying the judicial system over administrative governance. This preference is indicative of the potential contribution of the amended foreign-related civil procedure rules to improving the international perception of the Chinese judicial system. The revisions expand the channels for handling foreign-related disputes to maintain healthy competition and address antitrust issues, providing an effective and fair judicial channel for remedying foreign enterprises' interests in China, which are advancements that China needs to advertise. Foreign enterprises can fully utilize this channel to protect their legitimate interests in China while avoiding scenarios where cooperative negotiations deteriorate into administrative intervention. Although the 2023 Amendment specifies in Art. 279 that People's Courts will not interfere with administrative jurisdiction, this provision is limited to disputes over the validity of intellectual property rights and does not extend to antitrust matters. This leaves ample space for addressing civil issues and antitrust matters in the future, avoiding unnecessary interference from national administrative bodies and mitigating disputes between countries as innovation and cooperation face de-globalization trends.

B. Preventing Forum Shopping

When there is an imbalance in litigation procedures, especially showing a clear preference for one side, forum shopping is inevitable. Empirical studies have shown that the U.S., known for its plaintiff-friendly litigation system,

[118] *E.g.*, Lianxiang Su Biaozhun Biyao Zhuanli Xuke Jiufen An (联想诉标准必要专利许可纠纷案) [Lenovo, A Dispute Over Standard-Essential Patent Licensing Disputes], (2020)粤 03 民初 5105 号 (Guangdong Shenzhen Interm. People's Ct. 2020).

continually experiences forum shopping.[119] The foreign-related civil procedure rules limit the period for raising jurisdictional objections in foreign-related cases,[120] which should prevent parties from choosing to litigate in People's Courts to delay dispute resolution. However, the 2023 Amendment further enhances judicial efficiency in foreign-related cases, which may lower the litigation costs for parties and thus lead to an increase in cases due to the advantage given to plaintiffs.

Therefore, it is essential to improve the vigilance of People's Courts and judges regarding forum shopping and to avoid encouraging parties to prefer litigation in China. Given the ongoing uncertainties and unresolved issues with the application of the inconvenient forum principle and service difficulties, an increase in case volume will not necessarily highlight the superiority of the Chinese judicial system.[121] Instead, it may simply add unnecessary burdens to the courts and risk pushing them into new international disputes.

To address this, courts and judges should enhance the certainty of applying the inconvenient forum principle. The experience of the U.S. judicial system shows that while the inconvenient forum principle plays a crucial role in correcting forum shopping, even active application of this principle does not completely alleviate the additional workload created by forum shopping.[122] This is a situation that People's Courts need to be mindful of. During the revision process of the foreign-related provisions, legislators incorporated social feedback and attempted to expand the application scope of the inconvenient forum principle.[123] Following this legislative approach, People's Courts should proactively identify and exclude forum shopping cases using the

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[119] *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 483 (2011).
[120] Law on Civil Procedures, art. 278.
[121] Service of process is an official act of the People's Courts and is both their duty and responsibility. *See* Luo, *supra* note 97, at 62.
[122] *See* Whytock, *supra* note 119, at 484.
[123] *See* Ningning Zhu (朱宁宁), *Minshi Susongfa Xiuzheng Caoan Zai Ci Tiqing Shenyi: Jinyibu Xiugai Wanshan Shewai Minshi Susong Chengxu Zhidu* (民事诉讼法修正草案再次提请审议：进一步修改完善涉外民事诉讼程序制度) [*Draft Amendment to the Civil Procedure Rules Submitted for Review Again: Further Revisions to Improve the Foreign-Related Civil Procedure System*], Fazhi Ribao (法治日报) [Legal Daily] (2023), *available at* http://epaper.legaldaily.com.cn/fzrb/content/20230829/Articel02003GN.htm.

inconvenient forum principle in practice, rather than waiting until the Chinese judicial system becomes a preferred venue for forum shopping, which would lead to high-cost and low-efficiency corrective measures. For parties involved, even if People's Courts are not proactive in exercising jurisdiction, they can still fully utilize international commercial arbitration committees and international multi-dispute resolution organizations to effectively resolve international disputes.

V. CONCLUSIONS

The 2023 Amendment to the civil procedure rules has expanded China's jurisdiction over foreign-related civil cases, providing legitimacy for using the judicial system to uphold national sovereignty, security, and development interests. However, it has also introduced uncertainties in the proper fulfilment of international comity obligations. These uncertainties are reflected in the unclear boundaries of the inconvenient forum principle's application and the differences in procedural justice between Chinese and foreign perspectives. While the Chinese judicial system has a notable efficiency advantage and significant potential for foreign-related cases, these uncertainties may exacerbate concerns among foreign SEP stakeholders potentially worsening the deglobalization trend in global collaborative innovation. Conversely, they may attract parties seeking to engage in forum shopping, thus failing to achieve the legislative goal of effectively resolving parallel litigations.

Therefore, alongside emphasizing efficiency in China's judicial system solving foreign-related civil disputes, it is crucial to enhance procedural justice, increase case transparency and international outreach, and narrow the scope of non-application of the inconvenient forum principle. People's Courts and judges should carefully balance public and private interests when applying the inconvenient forum principle, exercise caution in issuing unilateral interim injunctions, and focus on leveraging China's litigation system to exert a long-term impact on global commercial and civil dispute resolution.