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Extraterritoriality of Chinese Law: Myths, Realities and the Future

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Abstract

While China strongly opposes the US practice of 'long-arm jurisdiction', it has decided to build its own legal system of extraterritoriality. This paradox reflects the crossroads at which China finds itself currently. Being a country weaker than the sole global superpower, it needs to stand firmly against the American 'legal bullyism' by invoking the shield of territorial sovereignty. Yet, as an emerging world power, it is in China's interest to establish a legal system of extraterritoriality to safeguard its own national interests that extend globally. This article has two aims. First, it provides a comprehensive overview of the current model of Chinese extraterritoriality. Second, it proposes four key planks that should support the emerging Chinese system of extraterritoriality such that it will be both distinct from the US system as well as being practically achievable in light of China's role in the global stage, national interests, and current capacity and conditions.

Introduction

The international system stemming from the 1648 Westphalian treaties establishes national sovereignty and territorial integrity as supreme principles of international law, thereby making territoriality a defining pillar of traditional international law.[1] However, since the 20th century, the principle of territoriality has come under sustained challenges.[2] The USA, notably, plays a leading role in overriding the principle. In the past century, the US legal doctrine has

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1 Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Edward Edgar 2017) 7.

2 See more generally Austen Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61 Vanderbilt L Rev 1455, 1462–70; see further FA Mann, 'The Extremism of American Extraterritorial Jurisdiction' (1990) 39 Intl & Comparative LQ 410.

bypassed traditional territorial limits in favour of extraterritorial jurisdiction under various doctrinal banners.[3] To illustrate the strategic thinking behind the extension of its domestic law beyond territorial borders by the US authorities, an American scholar explains bluntly: '[A] superpower no longer bent on conquering more territory stands to benefit when it instead can unilaterally project its law and corresponding enforcement resources to regulate what people do in other countries.'[4]

China seems to be caught in a dilemma. On the one hand, it is one of the targeted countries whose entities and citizens have been sanctioned by the US authorities based on the extraterritorial jurisdiction of American law. The situation has clearly deteriorated since 2017 when the Trump Administration labelled China as a major strategic competitor that challenges 'American power, influence, and interests, attempting to erode American security and prosperity'.[5] For example, in 2018, ZET, a major Chinese tech company, was ordered to pay the US government US $1.4 billion in penalty for violation of US sanctions on Iran. Shortly afterwards, Huawei, another Chinese tech titan, came under the investigation by the US authority for similar allegations.[6] More and more Chinese companies and individuals have been put on the list of American sanctions for doing business with Iran, Russia, or North Korea in the past two years.[7] On defending the interests of Chinese companies and the nation at large, the Chinese government repeatedly decries the US practice of imposing US domestic

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3 See 'Developments in Law: Extraterritoriality' (2011) 124 Harvard L Rev, 1226–1304.

4 Jeffrey A Meyer, 'Dual Illegality and Geoambiguous Law: New Rule for Extraterritorial Application of U.S. Law' (2010) 85 Minnesota L Rev 110, 111.

5 White House, 'National Security Strategy of the United States of America' (December 2017) 2 <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf> accessed 20 June 2020.

6 The United States Department of Justice, 'ZTE Corporation Agrees to Plead Guilty and Pay Over $430.4 Million for Violating U.S. Sanctions by Sending US-Origin Items to Iran' (7 March 2017) <https://www.justice.gov/opa/pr/zte-corporation-agrees-plead-guilty-and-pay-over-4304-million-violating-us-sanctions-sending> accessed 20 June 2020; The United States Department of Commerce, 'Secretary Ross Announces $1.4 Billion ZTE Settlement; ZTE Board, Management Changes and Strictest BIS Compliance Requirements Ever' (7 June 2018) <https://www.commerce.gov/news/press-releases/2018/06/secretary-ross-announces-14-billion-zte-settlement-zte-board-management> accessed 20 June 2020; United States Department of Justice, Indictment *USA v Hua Wei Techonologies Co Ltd* (23 January 2019) <https://www.justice.gov/opa/press-release/file/1125021/download> accessed 20 June 2020.

7 See eg Countering America's Adversaries through Sanctions Act: Russia-related Designations (20 September 2018) <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180920_33.aspx> accessed 20 June 2020; US Department of State, 'The United States Imposes Sanctions on Chinese Companies for Transporting Iranian Oil' (25 September 2019) <https://www.state.gov/the-united-states-imposes-sanctions-on-chinese-companies-for-transporting-iranian-oil/> accessed 20 June 2020.

law on Chinese entities and citizens and describes the USA's objectionable course of conduct as imposing unilateral sanctions of 'long-arm jurisdiction' under the yoke of 'American legal bullyism'.[8]

On the other hand, notwithstanding its vociferous protests against the USA, China is surreptitiously extending its domestic laws over territorial borders, tracing the steps of the USA. Since the entry into the 21st century, more and more Chinese laws incorporate provisions on extraterritoriality. The number of cases in which the Chinese authorities have imposed or threatened to impose sanctions on foreign entities and citizens, based on the extraterritoriality of domestic Chinese law, are also on the rise.[9] In this connection, what merits particular attention is the issuance of a news bulletin at the conclusion of the second session of the Commission for Overall Law-Based Governance of the Communist Party of China (CPC) Central Committee presided by Xi Jinping on 25 February 2019.[10] The news bulletin states, *inter alia*, that '[the Country] should take efforts to accelerate the construction of a legal system of extraterritorial application of our domestic law'.[11] This marked the first time that the CPC unequivocally expressed its ambition to establish a legal system of 'extraterritorial application' at a time when China was embroiled in an intense trade war with the USA.

China's messaging to the international community is thus somewhat confusing: it opposes the US practice of 'long-arm jurisdiction', yet it has decided to build its own legal system of extraterritoriality. In our view, this paradox reflects the crossroads at which China finds itself currently. Being a country weaker than the sole global superpower, it needs to stand firmly against the American 'legal bullyism' by invoking the shield of territorial sovereignty. Yet, as an emerging world power, it is in China's interest to establish a legal system of extraterritoriality to safeguard its own national interests that extend globally. However, it should be noted that, in sharp contrast to the US unilateralist style of foreign policy, China pledges to build 'a Community with Shared Future for Mankind' that advocates for multilateralism.[12] In this connection, the Chinese government has stressed that it has no intention to abuse the concept of 'long-arm jurisdiction', as the USA flagrantly does—a practice that China pejoratively

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8 Eg State Council Informatation Office, 'White Paper on China's Position on the China–US Economic and Trade Consultations' (1 June 2019) <http://www.scio.gov.cn/zfbps/ndhf/39911/Document/1655914/1655914.htm> accessed 20 June 2020.

9 See discussion in the text to notes 58–92 below.

10 In March 2018, the Commission for Overall Law-Based Governance of the Communist Party of China (CPC) Central Committee was established to strengthen the leadership of the CPC in promoting rule of law in China. See <http://www.moj.gov.cn/Department/content/2020-04/30/583_46423.html> accessed 20 June 2020.

11 The Second Meeting of Commission for Overall Law-Based Governance of the CPC Central Committee was held on 25 February 2019, presided by Xi Jinping <http://www.gov.cn/xinwen/2019-02/25/content_5368422.htm> accessed 20 June 2020.

12 Xiang Bo, 'China Keywords: Community with Shared Future for Mankind' *Xinhua* (Beijing, 24 January 2018) <http://www.xinhuanet.com/english/2018-01/24/c_136921370.htm> accessed 20 June 2020.

labels as 'an American patent'.[13] At first sight, this suggests that the system of legal extraterritoriality that China aims to establish is distinct from the US model.

This article seeks to go behind the shiny gloss of a seemingly justified and distinct brand of Chinese extraterritoriality by tackling a number of substantive questions head on: what is the precise meaning of 'extraterritorial application of our domestic law' that appears in the CPC news bulletin; what does the Chinese government mean by 'long-arm jurisdiction', an American practice that they have fiercely criticized; which Chinese laws have extraterritorial reach and on what legal foundation does the Chinese principle of extraterritoriality rest; are there any cases in which domestic Chinese laws have been applied extraterritorially and what do they reveal about the Chinese practice of extraterritoriality; and how should China strategically construct its own system of legal extraterritoriality based on its interests, capacity, and long-term goals?

The discussion comprises three main parts. The first part sets the background by defining key terminology, such as 'extraterritoriality', 'extra-territorial enforcement of law', and 'long-arm jurisdiction', with particular focus on how these terms are understood in the Chinese legal and political context. The second part goes on to provide a comprehensive review of current Chinese laws with extraterritorial jurisdiction and the Chinese legal practice/attitude towards applying or enforcing Chinese laws to extraterritorial conduct. In the final part, we propose four key planks that should support the Chinese system of extraterritoriality such that it will be both distinct from the US system as well as being practically achievable in light of China's role in the global stage, national interests, and current capacity and conditions.

Background: territoriality, extraterritoriality, and long-arm jurisdiction

Territoriality versus extraterritoriality

As this article focuses on the concept of extraterritoriality within the Chinese legal system, the key words relating to the topic—including 'territoriality', 'extraterritoriality', and 'long-arm jurisdiction', as understood within the Chinese legal and political context—must first be clarified. As mentioned above, the world is divided into individual nation-States enjoying sovereignty in the Westphalian system—hence, the organizing principle of modern government is 'territoriality', which refers to 'the organization and exercise of power over defined blocs of space' within a nation-State's borders.[14] The laws of a country are therefore territorial in principle.[15] Since the 20th century, international transactions have been taking

[13] Foreign Ministry of the PRC, 'Long Arm Jurisdiction Is an American Patent, and China Has No Interest in Misusing It' <http://cn.chinadaily.com.cn/a/201910/22/WS5daebdcda31099ab995e72a8.html> accessed 20 June 2020.

[14] Meyer (n 4) 123.

[15] It should be noted that in this article, when we discuss extraterritoriality of law of a country, we usually mean 'public' law; this is because 'private' law is not principally territorial, which may be applied extraterritorially under the rules of private international law. Indeed, one of the basic

place with increasing frequency, which in turn escalates the tension between territorial sovereignty and global mobility. Against such a backdrop, more and more countries have deemed it necessary to govern certain acts that occur outside their territorial borders, so as to protect their sovereignty. The act of extraterritorial governance raises the issue of extraterritoriality.

To be clear, the law of a country is territorial if it governs an act that occurs within its territorial borders; by contrast, a law is extraterritorial if it governs or claims to govern an act that occurs outside its borders. Whether a law is classified as territorial or extraterritorial depends on the *loci actus* that it regulates or claims to regulate, regardless of where the eventual consequences of such acts might be felt and regardless of any purpose, intent, or motive of the regulation to influence second-order conduct.[16] For example, an administrative order released by the State Council of China prohibits the purchase, sale, import, and export of African rhinoceros horns in China.[17] This order is 'territorial' in nature, even though it aims to prevent the killing of endangered rhinoceros in Africa. Consider another example: a document issued by the State Administration of Cultural Heritage of China that prohibits all public Chinese museums from participating in overseas commercial auctions of Chinese cultural objects that have been stolen or illegally exported.[18] This law is 'extraterritorial', notwithstanding that its purpose is to discourage the commitment of offences relating to Chinese cultural objects within the territory of China.

To be clear, the use of the term 'extraterritoriality' in this article does not refer to the extraterritorial enforcement of law. In its broad sense, 'extraterritoriality'—more precisely, 'extraterritorial jurisdiction' or 'enforcement jurisdiction'—describes an exercise by a State of prescriptive, adjudicative, or enforcement authority over conduct outside that State's physical territory.[19] Therefore, it covers the situation of enforcement of law abroad—that is, extraterritorially. By way of illustration, in the late 19th century, China entered into many unequal treaties with Western powers that were conferred extraterritoriality. Under the so-called 'foreign consular jurisdiction', nationals of these imperialist countries residing in China were not subject to the jurisdiction of Chinese law. When these foreign nationals committed crimes or became defendants in civil lawsuits, they could only be tried in their respective countries' consular courts in China and pursuant to the laws of their home

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premise of classic private international law is the equality between citizens and aliens as well as that between domestic law and foreign law. See Friedrich K Juenger, *Choice of Law and Multistate Justice* (Transnational Publishers 2000) 47.

16 Meyer (n 4) 112.

17 State Council of China, 'Guowuyuan Guanyu Yange Guanzhi Xiniu he Hu Jiqi Zhiping Jingying Liyong Huodong de Tongzhi' (A Notification of a Strict Restriction on the Commercial Activities of Rhino, Tiger and Their Products Issued by the State Council), Guofa No 36 (6 October 2018) <http://www.gov.cn/zhengce/content/2018-10/29/content_5335423.htm> accessed 20 June 2020.

18 *Guojiawenwuju Guanyu Beidao Huo Feifa Chukou wenwu Youguanwenti de Tongzhi* (A Notification on the Relevant Issues of the Cultural Object Stolen or Export Illegally issued by the State Administration of Cultural Heritage) (November 2008) 25.

19 Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Edward Elgar 2017) 2.

jurisdictions.[20] In this manner, the laws of these imperialist countries were enforced extraterritorially. Another example of extraterritorial enforcement of law is when an invader country enforces its law within the territories of the country that it has forcefully occupied. However, this article does not focus on extraterritorial enforcement of Chinese law. Instead, it focuses on the prescriptive jurisdiction of a State over extraterritorial acts—in other words, the narrow sense of 'extraterritoriality'. To be more specific, it refers to the situation of a country exercising prescriptive jurisdiction to enact laws over extraterritorial acts, and, as a consequence, by applying such laws under its adjudicative or enforcement authority within its borders, it achieves the 'extraterritoriality' of law.

Accordingly, as one scholar has observed, 'the concept of extraterritoriality can be misleading' because '[i]t does not (usually) mean that a nation enforces its law abroad' but, rather, that 'a nation uses the threat of force against local persons or property to punish, and thus regulate, extraterritorial acts that cause local harms'.[21] To avoid confusion, the use of the term 'extraterritoriality' in this article refers to its narrow meaning. As such, on our proposed understanding, 'extraterritoriality' and 'extraterritorial enforcement of law' are related, but distinct, concepts. Extraterritoriality in its narrow sense refers to the prescriptive jurisdiction of a State over extraterritorial acts. However, the jurisdiction of such a law is to be executed territorially, or, differently expressed, such a law is not enforced beyond its borders. Instead, the law is applied or enforced within that State's territorial borders. In contrast, 'extraterritorial enforcement of law' refers to the situation where a State enforces its law outside its territorial borders (that is, a State's enforcement jurisdiction). As extraterritoriality and extraterritorial enforcement of law are distinct concepts, it follows that their legitimacy under international law should be judged by different tests.

In the landmark case of *SS Lotus*, decided by the Permanent Court of International Justice in 1927,[22] the Court made the important distinction between prescriptive and enforcement jurisdiction. Whereas States would be precluded from enforcing their laws in another State's territory absent a permissive rule to the contrary (enforcement jurisdiction), international law generally imposes no limits on a State's jurisdiction to prescribe rules for persons and events occurring outside its borders absent a prohibitive rule to the contrary (prescriptive jurisdiction) as long as these rules are not enforced extraterritorially.[23] Since *Lotus*, it is generally believed that States are entitled to lay down rules for persons, property and acts outside their territory in the absence of a prohibitive rule of international law, provided that they enforce these rules territorially. Pursuant to the sacrosanct principle of sovereign equality of nations, a State cannot use coercive power to enforce its rules outside its territory, save where international law expressly permits.

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[20] Zhengxin Huo, *Private International Law* (UIBE Press China 2017) 75.

[21] Jack L Goldsmith, 'The Internet and the Abiding Significance of Territorial Sovereignty' (1998) 5 Indiana J Global Legal Studies 475, 479.

[22] *SS Lotus*, Permanent Court of International Justice (PCIJ), PCIJ Reports, Series A, No 10 (1927).

[23] Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2015) 31.

Long-arm jurisdiction

'Long-arm jurisdiction' has a defined meaning in US jurisprudence: it refers to the judicial jurisdiction of a court over a non-resident defendant who has had some contact with the jurisdiction in which the petition is filed.[24] Nevertheless, the US practice of 'long-arm jurisdiction' that the Chinese government condemns refers to a different concept, as is reflected in the White Paper on the Facts and China's Position on China-US Trade Friction, which was released by the Chinese government in September 2018.[25] In this document, a subsection entitled '"long-arm jurisdiction" and sanctions against other countries based on US domestic laws' under the main section entitled as 'the trade bullyism practices of the US administration', contains the following paragraph:

> Long-arm jurisdiction' refers to the practice of extending one's tentacles beyond one's borders and exercising jurisdiction over foreign entities based on one's domestic laws. In recent years, the US has been extending its "long-arm jurisdiction" to wider areas including civil torts, financial investment, anti-monopoly, export control and cybersecurity. In international affairs, the US has frequently requested entities or individuals of other countries to obey US domestic laws, otherwise they may face US civil, criminal or trade sanctions at any time.[26]

In another white paper released by the Chinese government, White Paper on China's Position on the China–US Economic and Trade Consultations, in June 2019, the reference to 'long-arm jurisdiction' therein bore the same meaning as

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[24] See Gary B Born, *International Civil Litigation in the United States* (Wolters Kluwer 2007) 76.

[25] State Council Information Office, 'Full Text: The Facts and China's Position on China–US Trade Friction' (24 September 2018) <http://www.scio.gov.cn/zfbps/ndhf/37884/Document/1638294/1638294.htm> accessed 20 June 2020.

[26] This section goes on to state as follows: 'Take export control as an example. To consolidate its technological advantages, the US has long established an all-round export control system. Through the Export Control Act, the Export Administration Regulations and the International Emergency Economic Powers Act, US exporters or exporting users must apply for export licenses. Foreign buyers are required not to violate restrictive regulations such as those on end-use and end-users, otherwise they will be subject to penalties, including being put in the Entity List which will place them under strict restrictions, or even prohibit them from importing from the US. Statistics show that by August 1, 2018, as many as 1,013 entities from around the world have been put on the Entity List of the US Department of Commerce. This action has undermined not only the interests of companies concerned—including those from the US—but also the development rights of developing countries.' The USA is also vigorously reviewing and revising its export control legislation to strengthen its 'long-arm jurisdiction'. On 13 August 2018, the US president signed the 2019 National Defense Authorization Law, an important part of which is the Export Control Reform Law (ECRA). The ECRA further tightened restrictions on foreign-holding companies, intensified controls on 'emerging and basic technologies', and mandated an inter-agency process to boost law enforcement capabilities. Recently, the Bureau of Industry and Security of the US Department of Commerce added 44 Chinese entities to its Entity List for 'acting contrary to the national security or foreign policy interests of the United States'. Such measures create obstacles for Chinese businesses to conduct normal trade and are in effect an extension and upgrading of 'long-arm jurisdiction'.

discussed above.[27] As such, the US practice of long-arm jurisdiction that the Chinese government vehemently condemns refers specifically to the US practice of unilaterally imposing sanctions on foreign entities and citizens based on the extraterritoriality of domestic US law without any reasonable basis or justification in international law.[28] Relevantly, trenchant criticisms and protests against the US practice of long-arm jurisdiction do not come from China alone. As one author describes, the USA, through its long-arm jurisdiction, has 'imposed huge fines and astronomical sums on foreign banks and companies, extracting from them confidential information, and thereby violating principles of sovereignty and non-intervention in the domestic jurisdiction of other States'.[29]

Even though the term 'long-arm jurisdiction', on a plain reading, vividly describes the American unreasonable or unjustified use of extraterritoriality of domestic law, applying a legal term that has its specific meaning in its originating country to describe a different scenario may breed misunderstanding and even mis-judgment. For this reason, and with the clarification provided by the foregoing discussion, it is hoped that the Chinese government would express its position with accurate legal terminology. The inaccurate use of legal terms by the Chinese authorities reflects China's present lack of capacity to ably engage in international legal affairs through the use of accurate and professional legal language.

We now to turn to examine extraterritorial Chinese laws and how they are interpreted, applied, and enforced in practice.

Chinese legislations and legal practice

Generally speaking, a weak and isolated State is inclined to resist the extraterritoriality of foreign law by invoking the shield of territorial sovereignty. A strong and open State, on the other hand, has both the practical need and the capacity to apply its domestic law to extraterritorial acts. Since the 1980s, China has been rapidly transforming itself from an isolated and backward agrarian society into a modern economic superpower with global interests and responsibilities. To adapt to evolving international and domestic conditions, China has substantially changed its attitude towards the extraterritoriality of domestic law. In a nutshell, China has changed from applying sovereignty-sensitive exclusion of extraterritoriality to adopting interests-served openness in respect of exercising prescriptive jurisdiction of domestic law over extraterritorial acts.

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[27] Eg State Council Information Office, 'White Paper on China's Position on the China–US Economic and Trade Consultations' (1 June 2019) <http://www.scio.gov.cn/zfbps/ndhf/39911/Document/166914/1655914.htm> accessed 20 June 2020.

[28] It thus differs from the conventional understanding of the phrase under US law.

[29] Mahir Al Banna, 'The Long Arm of US Jurisdiction and International Law: Extraterritoriality against Sovereignty' (2017) 60 JL, Policy & Globalization 59, 60–1.

Review of Chinese legislation with extraterritoriality provisions

The past four decades have witnessed a phenomenal acceleration in the rate of enactment of legislations in China as well as a significant improvement in the quality of Chinese legislation. Although China has yet to establish a comprehensive legal system that fully supports the prescriptive jurisdiction of Chinese laws over extraterritorial acts, there are numerous Chinese laws that prescribe rules of extraterritoriality. Presently, these rules are scattered among various separate laws. This section provides a systematic review of these rules. The discussion is structured based on the basis of jurisdiction that underlines the respective rules—namely, the personality principle, the protective principle, the principle of universal jurisdiction, and the effects doctrine.

The personality principle

The personality principle, a well-established basis of jurisdiction, comprises the active personality principle and the passive personality principle. Under the active personality principle, a State is entitled to exercise jurisdiction over its nationals, even when they are found outside its territory.[30] It is the principal basis upon which Chinese law asserts its prescriptive jurisdiction over extraterritorial acts. The Criminal Code of the People's Republic of China (PRC) serves as a good example.[31] Entitled 'territorial jurisdiction', Article 6 of the code affirms the principle of territoriality. Articles 7–9 go on to provide other bases of jurisdictions that may be extraterritorial in nature. Article 7 provides 'personal jurisdiction' under which the code shall govern Chinese nationals, even when they are located outside the territory of China. Article 7 states:

> This Code shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Code outside the territory and territorial waters and space of the People's Republic of China; however, if the maximum punishment to be imposed is fixed-term imprisonment of not more than three years as stipulated in this Code, he or she may be exempted from the investigation for his criminal responsibility.
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> This Code shall be applicable to any State functionary or serviceman who commits a crime prescribed in this Code outside the territory and territorial waters and space of the People's Republic of China.

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HK National Security Law), promulgated on 30 June 2020, is the latest example. Entitled 'Scope of Application', Part Six of the Law contains 4 articles, among which Article 37 incorporates personal jurisdiction. Article 37 states that the legislation shall apply to a Hong Kong permanent resident or an incorporated or unincorporated

[30] Ryngaert (n 23) 104.

[31] Zhonghua Renmin Gongheguo Xingfa (Criminal Code of the People's Republic of China) art 2, promulgated 1 July 1979, last amended on 4 November 2017.

body set up in Hong Kong if the person or the body commits an offence under the legislation outside Hong Kong.[32]

The active personality principle not only plays an important role in China's criminal law and national security law, but it also has great significance in Chinese tax law. Under Chinese tax law, instead of relying on nationality, personal jurisdiction is exercised on the bases of domicile, residence, actual management, or 'actual relationship'. Under the Individual Income Tax Law of the PRC, individual taxpayers are divided into resident individuals and non-resident individuals. The first category of taxpayers refers to those who are domiciled in China or non-China-domiciled individuals who have resided in China for more than 183 days accumulatively within a calendar year in China. For a resident individual taxpayer, according to Article 1 of the legislation, all his income within and outside China—that is, his worldwide income—is taxable in China. However, a non-resident taxpayer shall only pay tax in respect of his income in China.[33] As such, China's Individual Income Tax Law has jurisdiction over resident individuals who are abroad.

Under the Enterprises Income Tax Law of the PRC, enterprise taxpayers are divided into resident enterprises and non-resident enterprises. A 'resident enterprise' refers to an enterprise that is legally incorporated in China or that is incorporated under foreign law but has its 'actual management' in China. Actual management in this context refers to a department that exercises overall management and control over the manufacturing, operations, employees, finance, and property of the enterprise.[34] According to Article 3 of the Chinese Enterprises Income Tax Law, a resident enterprise shall pay enterprise income tax for its income derived from or accruing both in and outside of China. It bears mentioning that unlike a non-resident individual taxpayer who shall pay tax only in respect of his income derived in China, a non-resident enterprise is obliged to pay tax in respect of its income derived from both within and outside China if certain requirements are met. Article 3 provides that a non-resident enterprise with an institution or premises in China shall pay enterprise income tax in respect of the income derived from or accruing in China received by the institution or premises as well as the income derived from or accruing outside China by reason of that enterprise's 'actual relationship' with its Chinese institution or premises.[35] Thus, in addition to the extraterritorial jurisdiction over resident

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[32] Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquanfa (Geren Suodeshuifa) (Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region) art 37, promulgated 30 June 2020.

[33] Zhonghua Renmin Gongheguo Geren Suodeshuifa (Individual Income Tax Law of the People's Republic of China) art 1, promulgated 10 September 1980, last amended on 31 August 2018.

[34] Non-resident enterprise refers to an enterprise or other organization receiving income that is incorporated under foreign law without actual management in China but has an institution or premise in China or receives income derived from or accruing in China. Zhonghua Renmin Gongheguo Qiye Suodeshuifa (Enterprise Income Tax Law of the People's Republic of China) art 2, promulgated 16 March 2007, last amended on 29 December 2018.

[35] Under this article, a non-resident enterprise without an institution or premises in China and a non-resident enterprise with an institution or premises in China but receiving no income outside

enterprises, the application of personal jurisdiction under the Enterprises Income Tax Law is extended to non-resident enterprises on the basis of their 'actual relationship' with Chinese institutions or premises.

If jurisdiction based on nationality may be characterized as 'active personality', the flip side of the coin is 'passive personality'. According to the principle of passive personality, aliens may be punished for acts abroad that cause harm to the nationals of the forum.[36] The Criminal Code of the PRC reflects this principle in Article 8, notwithstanding that Article 8 is generically entitled 'protective jurisdiction'. Pursuant to Article 8, the Chinese Criminal Code is applicable to any foreigner who commits a crime outside the territory of China against the State of the PRC or against any of its citizens, if said crime is punishable with imprisonment for a term of at least three years under the code and it is also punishable according to the laws of the place where it is committed.[37] Hence, this legislative provision reflects both the passive personality principle and the protective principle in spite of its title, as it states that aliens may be punished for acts committed abroad that cause harm to Chinese nationals.[38]

Protective principle

The protective principle protects the State from acts perpetrated abroad that jeopardize its sovereignty or its right to political independence. Because these acts—for example, the offense of treason—may not be punishable in the State where they were committed, the targeted State's basis for exercising protective jurisdiction against these malicious acts appears justified.[39] Given that the CPC attaches paramount importance to the political security of its regime, it is unsurprising that extraterritorial jurisdiction based on the protective principle has been incorporated into various Chinese legislations.

In addition to incorporating the passive personality principle (discussed above), Article 8 of the Criminal Code of the PRC also encapsulates the protective principle, insofar as China may assume jurisdiction over aliens for acts committed abroad that impact the internal or external security or other key interests of the State of the PRC. More importantly, China has enacted a number of laws to safeguard its national security (political security of the regime in particular) in the last five years—for example, the Anti-Terrorism Law, the Anti-Espionage Law, and the Cybersecurity Law. Relevantly, these three legislations have

China with any actual relationship with such China institution or premises, shall only pay enterprise income tax for the income derived from or accruing in China.

36 James Crawford (ed), *Brownlie's Principles of Public International Law* (OUP 2003) 461.

37 Zhonghua Renmin Gongheguo Xingfa (Criminal Code of the People's Republic of China) art 8, promulgated 1 July 1979, last amended on 4 November 2017.

38 See Shiping Liao, 'Zhongguofa Yuwai Shiyong Falvtixi: Xianzhuang, Wenti Yu Wanshan (Extraterritorial Application of Chinese Law and Its Legal System: Current Situation, Problems and Improvements)' (2019) 6 Zhongguo Faxue (China Legal Science) 20, 24.

39 Ryngaert (n 23) 462.

incorporated rules of extraterritoriality based on protective jurisdiction. We turn to consider these legislations in greater detail.

The Anti-Terrorism Law of the PRC was passed on 27 December 2015. It contains 10 chapters and 97 articles and came into effect on 1 January 2016.[40] Article 11 of the law provides that the PRC shall exercise criminal jurisdiction over terrorist crimes committed against the State, its citizens, or its institutions outside the territory of China, or terrorist crimes constituted under international treaties that the PRC has concluded or acceded to.[41] Apparently, the protective principle and the principle of universal jurisdiction (to be discussed in detail momentarily) are the bases on which China assumes jurisdiction under Article 11.

Promulgated on 1 November 2014, the Anti-Espionage Law of the PRC plays an instrumental role in protecting the PRC's political security. Notably, Article 27 of the Anti-Espionage Law embodies prescriptive jurisdiction over extraterritorial acts based on the protective principle. It provides that espionage committed by an overseas institution, organization, or individual outside the territory of China is subject to criminal liability if said act amounts to a crime under Chinese law.[42]

Cybersecurity is also a priority item on the agenda of the Chinese government. The Cybersecurity Law was adopted by the Standing Committee of the National People's Congress (SCNPC) in November 2016, and it swiftly came into force on 1 June 2017.[43] The Cybersecurity Law is not a simple consolidation of the previously existing piecemeal cybersecurity rules and regulations.[44] It marked a significant legal revolution. A striking innovation of the Cybersecurity Law is the prescription of extraterritoriality, which is not found in the previous rules. Article 75 of the Cybersecurity Law provides as follows:

> Where any overseas institution, organization or individual attacks, intrudes into, disturbs, destroys or otherwise damages the critical information infrastructure of the People's Republic of China, causing any serious consequence, the violator shall be subject to legal liability in accordance with law; and the public security department of the State Council and relevant departments may decide to freeze the property of or take any other necessary sanction measure against the institution, organization or individual.

Compared with the rules of extraterritoriality contained in other Chinese legislations analysed above, Article 75 of the Cybersecurity Law is particularly significant. It not only incorporates prescriptive jurisdiction over the numerated

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[40] Zhonghua Renmin Gongheguo Fankongbuzhuyifa (Anti-Terrorism Law of the People's Republic of China), promulgated 27 December 2015.

[41] Ibid, art 11.

[42] Zhonghua Renmin Gongheguo Fanjiandiefa (Anti-Espionage Law of the People's Republic of China) art 27, promulgated 1 November 2014.

[43] Zhonghua Renmin Gongheguo Wangluoanquanfa (Cybersecurity Law of the People's Republic of China) art 27, promulgated 7 November 2016.

[44] Prior to the enactment of the Cybersecurity Act, China already had some legislative rules and administrative regulations relating to cybersecurity, such as the Decision of the Standing Committee of the National People's Congress (SCNPC) on Maintaining Internet Security, Regulations on Security Protection of Computer Information Systems, and Administrative Measures for Internet Information Services.

extraterritorial acts but also spells out the concrete legal penalties to ensure its extraterritoriality in practice. This marks a milestone in Chinese legislative history: this is the first rule on extraterritoriality that has been given 'teeth' to strengthen enforceability; it is not merely a paper tiger.

Article 38 of the newly promulgated Hong Kong National Security Law, which has drawn fierce criticism, is also founded on the principle of protective jurisdiction. It provides that the legislation 'shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region'.[45] For this reason, the Chinese government contends that the legislation is fundamentally different from the so-called 'long-arm jurisdiction'[46] that it denounces.[47]

The principle of universal jurisdiction

The principle of universal jurisdiction allows a state to assert criminal jurisdiction over offences committed abroad that constitute serious international crimes. The basis for universal jurisdiction is easy to comprehend: certain crimes are regarded as offensive to the international community as a whole.[48] The Anti-Terrorism Law and the Criminal Code of the PRC are two existing Chinese legislations that, in effect, encapsulate this principle. As Article 11 of the Anti-Terrorism Law has already been discussed above, we turn to consider the Criminal Code directly.

Entitled 'universal jurisdiction', Article 9 of the Criminal Code provides that the code is applicable to the crimes specified in international treaties concluded or acceded to by the PRC, and that China shall exercise criminal jurisdiction over such crimes in accordance with its treaty obligations.[49] Examining this Article together with Article 11 of the Anti-Terrorism Law, there are two key constraints on the exercise of universal jurisdiction under Article 9.

First, the application of universal jurisdiction under the Chinese Criminal Code is restricted to the crimes specified in international treaties concluded or acceded to by China. In other words, China cannot assume jurisdiction over the core crimes of customary international law—this is clearly different from the universal jurisdiction commonly understood by most international law scholars.[50]

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[45] *Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Weihu Guojia Anquanfa()Geren Suodeshuifa* (The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region) art 38, promulgated 30 June 2020.

[46] See 'Hong Kong National Security Law's Long-arm Jurisdiction "Extraordinary and Chilling"' *South China Morning Post* (2 July 2020) <https://www.scmp.com/news/china/politics/article/3091428/hong-kong-national-security-laws-long-arm-jurisdiction> accessed 9 September 2020.

[47] CGTN< China refutes calling HK national security law 'long-arm jurisdiction', acessible at< https://news.cgtn.com/news/2020-07-21/China-refutes-calling-HK-national-security-law-long-arm-jurisdiction--Sj7p5lwvCw/index.html> accessed 1 September 2020.

[48] Malcolm Shaw, *International Law*, (Cambridge University Press 2008), 668.

[49] *Zhonghua Renmin Gongheguo Xingfa* (Criminal Code of the People's Republic of China) art 9, promulgated 1 July 1979, last amended on 4 November 2017.

[50] See Crawford (n 36) 468.

Second, universal jurisdiction under the Chinese Criminal Code is residual, which means that China can only exercise universal jurisdiction if no other basis of jurisdiction under the Criminal Code is available. Specifically, China's exercise of universal jurisdiction pursuant to Article 9 of the Criminal Code presumes the existence of the following conditions: China is unable to rely on territorial jurisdiction (Article 6), personal jurisdiction (Article 7), or protective jurisdiction (Article 8).[51]

The effects doctrine

It has been suggested that there exists a further head of prescriptive jurisdiction: the so-called 'effects doctrine', which enables States to assert jurisdiction over acts committed abroad by foreign persons when these acts have effects in the territory of the regulating State.[52] Today, effects (or impact) jurisdiction is practised by the USA and by the European Union (EU) (with greater qualifications than the USA) largely in the field of competition law.[53] China, as a global economic power, following the USA and the EU, has incorporated the 'effects doctrine' in its domestic law, mainly in the area of economic law. Adopted by the SCNPC in 2007, the Chinese Anti-Monopoly Law is historically significant as it bears testament to Chinese economic reform and China's commitment to market mechanisms and competition.[54] Article 2 of the Anti-Monopoly Law demarcates the geographical scope of the application of the legislation to the monopolistic acts committed outside the territory of China that eliminate or have restrictive effect on competition in China's domestic market.[55] Obviously, the 'effects doctrine' is the justification for China to assume jurisdiction over monopolistic acts committed outside its borders, even though Article 2 does not prescribe the specific test. Since the implementation of the Anti-Monopoly Law, the Beijing competition authorities have become a key player, alongside Brussels and Washington, in regulating cross-border mergers and acquisitions.[56]

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[51] Ma Chenyuan, 'Lun Zhongguo Xingfa de Pubian Guanxiaquan' (Universal Jurisdiction in China's Criminal Law) (2013) 3 Zhengfaluntan (Forum on Political Science and Law) 88, 90.

[52] Laurent Cohen-Tanugi, 'The Extraterritorial Application of American Law: Myths and Realities', *Social Sciences Research Network* (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576678> accessed 20 June 2020.

[53] See Joseph P Griffin, 'Extraterritoriality in US and EU Antitrust Enforcement' (1999) 67 Antitrust LJ 159; Austen Parrish, 'Reclaiming International Law from Extraterritoriality' (2008) 93 Minnesota L Rev 852.

[54] See Zhengxin Huo, 'A Tiger without Teeth: The Antitrust Law of The People's Republic of China' (2008) 9 Asian Pacific L & Poly J 32, 41.

[55] Zhonghua Renmin Gongheguo Fanlongduanfa (Anti-Monopoly Law of the People's Republic of China) art. 2, promulgated 30 August 2007.

[56] Laurent Cohen-Tanugi, 'The Extraterritorial Application of American Law: Myths and Realities', *Social Sciences Research Network* (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576678> accessed 20 June 2020.

Another legislation that merits mention is the recently revised Chinese Securities Law.[57] Adopted in 1998 and amended for the first time in 2005, the Securities Law, for quite a long time, did not incorporate rules of extraterritoriality. However, when the Securities Law was amended for the second time at the end of 2019, rules of extraterritoriality were introduced into the legislation. The 2019 amendment introduced a new paragraph to Article 2 of the Securities Law, which provides as follows:

> Where the offering and trading of securities outside the People's Republic of China disrupt the order of the domestic market of the People's Republic of China and infringe upon the lawful rights and interests of domestic investors, the violator shall be punished in accordance with the relevant provisions of this Law and shall be subject to legal liability.

To implement the extraterritorial jurisdiction, the Amendment adds a new provision, Article 177, under Chapter 12 ('Securities Regulatory Authorities'), which provides as follows:

> The securities regulatory authority of the State Council may, in conjunction with the securities regulatory authorities of foreign countries or regions, establish a supervision and administration cooperation mechanism to conduct cross-border supervision and administration.
>
> Foreign securities regulatory authority shall not conduct investigation, evidence collection and other activities directly within the territory of the People's Republic of China. Without the consent of the securities regulatory authority of the State Council and the competent departments of the State Council, no entity or individual may provide documents or materials relating to securities business activities abroad without approval.

Examining Article 2 together with Article 177, two points are worthy of mention. First, against the background of highly globalized securities markets, the Chinese authorities deem it necessary to confer extraterritoriality on the Securities Law so as to enhance the protection of domestic investors' interests and the stability of China's securities market. Therefore, the 2019 amendment to the Securities Law replaced the principle of territoriality with the incorporation of the 'effects doctrine' as a basis for extraterritorial jurisdiction.

Second, and more importantly, an international cooperation mechanism is the principal means through which to effectively enforce the extraterritorial jurisdiction of the Securities Law. Reading Article 2 together with Article 177, the Chinese legislature sends a clear signal to the international community that multilateralism, rather than unilateralism, is the cardinal principle underlining the Chinese rules of extraterritoriality.

A review of relevant Chinese legal practice

The application of domestic law over extraterritorial acts may be effected by either the judiciary or the administrative organ. In this section, we will first review the judicial practice of the People's Courts of China and then we turn to analyse

[57] Zhonghua Renmin Gongheguo Zhengquanfa (Securities Law of the People's Republic of China), promulgated 30 August 2007.

the practice of China's administrative agencies in enforcing Chinese law over extraterritorial acts.

Judicial practice

In general, Chinese courts are reluctant to endorse the extraterritoriality of domestic law.[58] The judicial reluctance in this instance may be attributable to the indelible memory of the suffering of Chinese people placed under the 'foreign consular jurisdiction' that was in force between the 19th and early 20th centuries. As a consequence of the strongly patriotic and nationalist education in modern China, the majority of the Chinese population, including judges, believes in the supremacy of territorial sovereignty and, hence, the territoriality of law. Further, when compared with the Chinese administrative agencies, the Chinese judiciary is generally more passive and conservative. As such, it is unsurprising that the Chinese courts play a less active role in enforcing the extraterritoriality of domestic laws. Finally, under the influence of the Chinese political tenet 'foreign affairs is no small matter', the Chinese judiciary conventionally believes that foreign affairs should be dealt with by the executive branch of the government—specifically, the foreign affairs department.[59] The Chinese courts, therefore, are very hesitant to hear the cases that may have a bearing on foreign relations. For these reasons, a large number of disputes that may raise, or potentially raise, issues of extraterritoriality of domestic laws have been rejected by the Chinese courts.

Accordingly, the number of cases in which decisions were arrived at based on the extraterritorial jurisdiction of domestic Chinese law are, expectedly, very few. Indeed, searches on major online legal databases, including China Judgments Online,[60] Beida Fabao,[61] and China Academic Journals Database,[62] have produced only a small pool of cases for analysis. Two preliminary points have to be made before we proceed to analyse these cases in detail. First, in these cases, the jurisdiction of domestic Chinese law over extraterritorial acts was founded on the personality principle—the principle of universal jurisdiction—or the effects doctrine. We did not come across any case that concerns the application of the protective principle. Second, compared with the judges in many western countries (in particular, the common law judges), the Chinese judges are not known for articulating the reasoning of their decisions or laying out the underlying principles. Accordingly, deducing the actual tests applied in the Chinese cases is a

[58] It should be emphasized that private international law cases do not fall not within the scope of this section: as we mentioned earlier in note 15, this article analyses the extraterritoriality of public law.

[59] See Cai Congyan, 'Zhongguo Jueqi Duiwaiguanxifa yu Fafyuan Gongneng Zaizao' (The Rise of China, Foreign Relations Law and the Reform of the Functions of Courts) (2018) 5 Wuhan Daxue Xuebao (Wuhan University Journal) 130, 137.

[60] China Judgments Online <http://wenshu.court.gov.cn/> accessed 20 June 2020.

[61] Beida Fabao <http://en.pkulaw.cn/> accessed 20 June 2020.

[62] China Academic Journals Database <https://www.cnki.net/> accessed 20 June 2020.

complex and difficult task. Moreover, given the limited number of the Chinese cases endorsing the extraterritoriality of law as mentioned above, we believe that it is nearly impossible to extract a uniform approach employed by Chinese courts to the extraterritoriality of law at the current stage. What may be helpful to note is this: the Chinese courts have yet to develop/adopt any sophisticated doctrine/principle such as the 'presumption against extraterritoriality', or the 'charming betsy', as advocated by American judges.[63] Our analysis below focuses on three representative cases that have generated significant impact in China in the last decade to give a general sense of how extraterritoriality operates in Chinese judicial practice.

A case invoking the personality principle. The first case is *Kunming Municipal People's Procuratorate v Naw Kham et al.*[64] On the morning of 5 October 2011, two Chinese cargo ships were attacked on a stretch of the Mekong River in the Golden Triangle region that lies at the borders of Myanmar and Thailand. All 13 Chinese sailors on board the two ships were killed, and their bodies were dumped into the river. The Mekong massacre caused massive public outrage in China. The Chinese Public Security Ministry made the case a top priority, forming a 200-officer special investigation group to work with Thai, Lao, and Myanmar authorities. Naw Kham, the head of an armed drug gang from Myanmar, was found in the four-nation joint investigation to have been the mastermind behind the massacre. The law enforcement officers from all four countries launched a manhunt, pursuant to Chinese direction, to arrest Naw Kham and his gang members. Naw Kham was finally caught in Laos in late April 2012 and was extradited to China on 10 May 2012.[65]

The Intermediate People's Court of Kunming heard the case in open proceedings in September 2012. Naw Kham and five members of his gang were charged with murder, drug trafficking, kidnapping, and hijacking under the Chinese Criminal Code. Policemen and witnesses from Thailand and Laos also attended the trial. The trial court convicted the six accused persons of all charges. Notably, Naw Kan and three of his gang members were sentenced to death. The remaining two gang members were sentenced to death with reprieve and eight years in prison. The judgment suggested that Article 8 of the Chinese Criminal Code, which was underlined by the passive personality principle, was applied in

[63] See Zachary D Clopton, 'Bowman Lives: The Extraterritorial Application of US Criminal Law after *Morrison v National Australia Bank*' (2011) 67 New York U Annual Survey American L 137, 148; *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804).

[64] *Kunming People's Procuratorate v Naw Kham et al*, the Intermediate People's Court of Kunming, Kunming yichuzi No 162 (2012).

[65] See Jonathan Kaiman, 'China Executes Four Foreign Nationals Convicted of Mekong River Murders' *The Guardian* (1 March 2013) <https://www.theguardian.com/world/2013/mar/01/china-execute-mekong-river-murders> accessed 20 June 2020.

the case. Pursuant to an unsuccessful appeal, Naw Kham was executed together with his three gang members after the death penalty had been re-examined by the Supreme People's Court of the PRC.[66]

This case has generated significant interest and controversy both in China and abroad. Not only was it a representative example of the exercise of jurisdiction of Chinese criminal law over aliens based on the passive personality principle, but it also demonstrated in practice how the Chinese authorities applied domestic Chinese law over extraterritorial acts. Although some Western commentators argued that the execution of Naw Kham by the Chinese authorities was an example and the result of arm-twisting by the regional superpower,[67] or even a demonstration of China's own Monroe Doctrine in the region,[68] it is submitted that China's enforcement of its laws on this occasion was consistent with the principles of international law.

First, as mentioned earlier, all States, including China, are entitled to exercise jurisdiction by reliance on the passive personality principle as long as there are no prohibitory rules in international law. Second, and more importantly, the Chinese authorities relied on multilateral cooperation, rather than unilateral action, to enforce its domestic law abroad. Evidence showed that China accorded full respect to Thai, Lao, and Myanmar authorities in the whole process. Initiated by China, the four countries established a cooperation mechanism in investigating the case, capturing and extraditing the suspects. In fact, the four countries further concluded a security agreement to crack down on cross-border crimes and secure transportation along the Mekong River, which benefited the whole region. This case thus serves as a model of cross-border law enforcement for the rest of the world.[69]

A case invoking the principle of universal jurisdiction. The second case is *Shantou Municipal People's Prosecutor v Naim Atan et al.*[70] On 8 June 1999, Atan Naim and his nine gang members, all Indonesian citizens, boarded a Thai oil tanker in Malaysian waters. They seized the sailors on the tanker and changed the name and the colour of the chimney of the tanker. After releasing the sailors, Atan Naim and his gang members navigated the tanker along the Malaysia–Philippines–Taiwan route. On 16 June, they entered the Chinese territorial sea to negotiate the sale of the tanker's diesel oil with a Chinese vessel

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66 'Naw Kham of Mekong Murder Case Sentenced to Death' *Xinhua* (5 November 2012) <http://english.sina.com/china/2012/1105/523336.html> accessed 22 June 2020.

67 Jonathan Head, 'Mekong River Trial Murder Mystery' *BBC News* (21 September 2012) <https://www.bbc.com/news/world-asia-19671446> accessed 22 June 2020.

68 Jane Perlez and Bree Feng, 'Beijing Flaunts Cross-Border Clout in Search for Drug Lord' *New York Times* (4 April 2013) <https://www.nytimes.com/2013/04/05/world/asia/chinas-manhunt-shows-sway-in-southeast-asia.html> accessed 22 June 2020.

69 Xinhua, 'Mekong Murder Trial a Model of Judicial Co-cooperation' *China Daily* (20 September 2012) <http://www.chinadaily.com.cn/china/2012-09/20/content_15772037.htm> accessed 22 June 2020.

70 *Shantou Municipal People's Prosecutor v Naim Atan et al*, Intermediate People's Court of Shantou, Shanzhongfaxing yichuzi no 22 (2000).

when they were arrested by the Chinese coast guard. Naim and his gang members were prosecuted for robbery before the Intermediate People's Court of Shantou. In defence, the accused persons argued, *inter alia*, that the Chinese court did not have criminal jurisdiction over them and, further, that their alleged activities did not amount to robbery. [71]

The trial court ruled that the acts of the defendants met the requirements of criminal offences stipulated in Article 3(1)(a) of the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[72] (SUA) to which China was a contracting State. In accordance with Article 9 of the Criminal Code of the PRC, the trial judge concluded that the code would apply to the criminal acts and the offence of robbery was established on the evidence. Naim and his gang members were respectively sentenced to imprisonment for a term of between 10 and 15 years.[73]

This is a representative and the only reported case in which a Chinese court had exercised criminal jurisdiction over aliens committing offences outside the territory of China based on the principle of universal jurisdiction. Nor had the Chinese authorities contravened the principles of international law and domestic Chinese law on this occasion. The acts of the defendants constituted criminal offences under Article 3 of the SUA, which the NPC ratified on 29 June 1991.[74] Moreover, Article 6(4) of the SUA mandates its contracting States to exercise universal jurisdiction over the offences set forth in Article 3 in cases where the alleged offender was present in the territory of the relevant State. China's exercise of criminal jurisdiction over the offences discussed was thus in compliance with its treaty obligations under the SUA. Further, the Chinese court in the present case did not enjoy either territorial jurisdiction insofar as the crimes were committed in Malaysian waters; or personal jurisdiction as the defendants were all aliens or protective jurisdiction as the victims were not the state of the PRC. Accordingly, universal jurisdiction, the residual basis of jurisdiction under the PRC Criminal Code, constitutes a proper basis for the application of the code in these circumstances.

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71 Ma Chenyuan, 'Lun Zhongguo Xingfa de Pubian Guanxiaquan' (Universal Jurisdiction in China's Criminal Law) (2013) 3 Zhengfaluntan (Forum on Political Science & Law) 88, 92.

72 'Zhizhi Weiji Haishanghangxinganquan Feifaxingweigongyue' (the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation), signed by the PRC on 25 Novermber 1988, the Website of Ministry of Foreign Affairs, PRC (accessed 31 May 2021).

73 *Shantou Municipal People's Prosecutor v Naim Atan et al*, Intermediate People's Court of Shantou, Shanzhongfaxing yichuzi no 22 (2000), para 17.

74 'Guanyu Quanguorenmindaibiaodahui Changwuweiyuanhui Guanyu Pizhun Jinzhi Weiji Haishanghangxinganquan Feifaxingweigongyue de Jueding' (The Decision to Ratify the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation by the Standing Committee of the PRC) *China Net* (8 August 2006) <http://www.china.com.cn/law/flfg/txt/2006-08/08/content_7063894.htm> accessed 22 June 2020.

A case invoking the effects doctrine. Finally, we turn to consider *Huawei v InterDigital Inc (IDC)*, a very famous case in which the Chinese courts applied the Anti-Monopoly Law to acts committed overseas.[75] The plaintiff, Huawei, is a leading Chinese telecommunications equipment supplier and the defendant, IDC, is a US-based company holding a large number of essential patents and patent applications under 2G, 3G, and 4G standards in wireless communications. In December 2011, Huawei filed a complaint against IDC before the Shenzhen Intermediate People's Court of Guangdong Province. Huawei accused IDC of abusing its dominant market position by discriminatorily demanding higher royalty rates and tying the licensing of standards-essential patents with the licensing of non-standards-essential patents. In addition, Huawei asked the court to determine an appropriate royalty rate under fair, reasonable, and non-discriminatory (FRAND) terms and sought damages of 20 million renminbi from IDC.

In defence, IDC filed an opposition to jurisdiction when the case was initially accepted by the court. It contended that a Chinese court did not have jurisdiction over the case because the alleged abuse had occurred in the USA, and IDC was not domiciled in China. The Court rejected IDC's argument on the basis of Article 2 of China's Anti-Monopoly Law, which broadly interprets the 'place of the abuse' to include places where the effects of the alleged abuse are felt. The Court held that the royalty rate offered to Huawei was discriminatory because it was higher than that offered to other companies, such as Apple and Samsung, and that this constituted an abuse of IDC's dominant marketing position under the Chinese Anti-Monopoly Law. IDC was ordered to pay Huawei 20 million renminbi in damages. Huawei's other claim—that IDC had tied the licensing of standards-essential patents with the licensing of non-essential patents—was, however, rejected. Both parties appealed to the Guangdong Higher People's Court, which ultimately dismissed the appeals and upheld the trial court's judgment.[76]

This is a significant decision in the field of competition law, as it amply demonstrates the Chinese courts' willingness to assume jurisdiction on the basis of the 'effect doctrine' encapsulated in the Chinese Anti-Monopoly Law.

Practice of administrative agencies

Like the judiciary, China's administrative agencies were traditionally unwilling to claim jurisdiction of domestic Chinese law over the extraterritorial acts for fear of interfering with foreign affairs. This traditional mindset was changed by two significant events. The first was the implementation of the Anti-Monopoly Law of the PRC in 2008, which vested China's administrative authorities with

[75] Most of the cases that involved Chinese authorities applying its anti-monopoly laws to extraterritorial acts were handled by the Chinese antitrust agencies instead of the courts.

[76] *Huawei v IDC*, Shenzhen Intermediate People's Court Shenzhong Fazhi Minchuzi, No 858 (2011); *Huawei v IDC*, Guangdong Higher People's Court Yuegaofa Minsan Zhongzi, No 306 (2013).

extraterritorial jurisdiction. The second was the fundamental paradigm shift in Chinese foreign policy since Xi's ascent to power in 2012.[77]

As mentioned above, most anti-monopoly cases in which domestic Chinese law was applied over extraterritorial acts have been handled by the competition agencies instead of the courts. As the Anti-Monopoly Law fails to establish a single enforcement agency exercising authority uniformly, enforcement is implemented through three separate Chinese antitrust regulators: (i) the Ministry of Commerce (MOFCOM), which is responsible for reviewing merger control cases; (ii) the National Development and Reform Commission (NDRC), which is responsible for price-related conduct; and (iii) the State Administration for Market Regulation (formerly, the State Administration for Industry and Commerce), which is responsible for non-price related conduct.[78] Under the current structural arrangements, MOFCOM and NDRC are playing vital roles in the enforcement of the Anti-Monopoly Law over extraterritorial acts.

According to the statistics provided by an academic article, between August 2008 (when the Anti-Monopoly Law came into force) and the end of 2016, approximately 1,800 notifications of undertaking's concentration had been submitted to MOFCOM for review.[79] These submissions comprised a number of significant cross-border acquisitions between foreign enterprises, including Google's acquisition of Motorola Mobility, Microsoft's acquisition of Nokia, and Nokia's acquisition of Alcatel-Lucent.[80] Among these proposed cross-border mergers and acquisitions reviewed by MOFCOM, the case of the P3 Network is worthy of note.

In June 2013, A.P. Moller-Maersk (a Danish company), Mediterranean Shipping Company (a Swiss company), and CMA CGM (a French company), the three largest carriers in the world, agreed to establish a long-term operational alliance on East–West trade called the P3 Network. Although the network agreement had been approved by the US Federal Maritime Commission and the EU Commission, following a nine-month review, MOFCOM prohibited the transaction in June 2014.[81] MOFCOM was of the view that the P3 alliance would 'result in closely-coordinated joint operations, which is different in substance from traditional loosely-structured shipping alliances' approved in the past. Unlike previous alliances, MOFCOM noted that the shipping capacity of the three carriers would be integrated. According to MOFCOM, the P3 Network would have a combined capacity of nearly 47 per cent of the Asia–Europe routes. This increase in capacity concentration, MOFCOM reasoned, 'may restrict development of other

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77 See Zhengxin Huo and Man Yip, 'Comparing The International Commercial Courts of China with the Singapore International Commercial Court' (2019) 68 Intl & Comp LQ 903, 906.

78 See Huo (n 54) 41.

79 Wang Xiaoye and Wu Qianlan, 'Guoji Kateer yu Woguo Fanlongduanfa de Yuwaishiyong' (International Cartel and Extraterritorial Application of Chinese Antimonopoly Law) (2017) 3 Bijiaoffayanjiu (J Comp L) 132, 134.

80 All three of these acquisitions have been approved by the Ministry of Commerce. Ibid.

81 Shangwubu Gonggao (Notification of the Ministry of Commerce of the PRC), no 46 (17 June 2014) <http://www.mofcom.gov.cn/article/b/c/201406/20140600628730.shtml> accessed 22 June 2020.

competitors, which would further [place] such competitors in an inferior position in future competition'. MOFCOM also expressed the concern that this increased concentration could result in reducing the bargaining power of shippers and ports, a concern that presumably proceeded from safeguarding the interests of the Chinese players. Finally, MOFCOM revealed that the parties had put forth proposals to address the allegedly anti-competitive aspects of the proposed joint venture, but the remedies offered were considered insufficient to allay MOFCOM's concerns.[82] While there is some controversy surrounding MOFCOM's decision to reject the P3 Network transaction, this case is a textbook example of how Chinese competition agency applied the Anti-Monopoly Law over cross-border mergers and acquisitions between/among foreign enterprises, especially where the interests of the Chinese competitors or Chinese national economic policy goals are substantially affected.[83]

Under the Anti-Monopoly Law regime, the National Development and Reform Commission (NDRC) is in charge of dealing with price-related anti-competitive conduct. Since the implementation of the Anti-Monopoly Law, the NDRC has acquired a reputation of being 'aggressive', especially when dealing with foreign companies.[84] For example, in the landmark case of *NDRC v Qualcomm* in 2015[85], Qualcomm was slapped with a hefty fine of 6.088 billion renminbi (approximately US $975 million), the highest anti-monopoly fine ever imposed under Chinese law, for abusing its dominant position by adding unreasonable conditions to the sale of baseband chips.[86]

Further, the NDRC investigates price-related anti-competitive conduct that occurs outside the territory of China.[87] In 2014, the NDRC imposed fines of 1.235 billion renminbi (approximately US $201 million) on 12 Japanese automotive components suppliers and bearings makers for price fixing in contravention of the Anti-Monopoly Law. The investigation by the NDRC showed that these Japanese companies had colluded to reduce competition and establish

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[82] Some western commentators have expressed the view that MOFCOM may have been concerned that the more efficient P3 network would have disadvantaged Chinese shipping competitors. See Davis Polk and Wardwell LLP, 'MOFCOM Blocks "P3" Shipping Joint Venture' (19 June 2014) <http://www.davispolk.com/sites/default/files/06.19.14.MOFCOM.Blocks.P3.Shipping.Joint_.Venture.pdf> accessed 22 June 2020.

[83] Jay Modrall and Shan Hu, 'NDRC's Recent Cartel Decisions Shed Further Light on Chinese Leniency Policy' *Kluwer Competition Law Blog* (6 November 2014) <http://competitionlawblog.kluwercompetitionlaw.com/2014/11/06/ndrcs-recent-cartel-decisions-shed-further-light-on-chinese-leniency-policy/> accessed 22 June 2020.

[84] Amine Mansour, 'Understanding Competition Law Enforcement in China: *NDRC v Qualcomm*' *Developing World Antitrust* (16 February 2015) <https://developingworldantitrust.com/2015/02/16/understanding-competition-law-enforcement-in-china-ndrc-v-qualcomm/> accessed 22 June 2020.

[85] Guojiafazhanhegaige Weiyuanhui Dui Gaotonggongsi De Xingzhengchufa Juedingshu, Fagaibanjiajianchufa[2015]1hao' (the Administrative Penalty Decision on Qualcomm by NDRC, NDRC Price Supervision Penalty No. 1 [2015]).

[86] See the news bulletin of the Official website of the National Development and Reform Commission (NDRC) <https://www.ndrc.gov.cn/xwdt/xwfb/201502/t20150210_955999.html> accessed 22 June 2020.

[87] See the news bulletin of the Official website of the NDRC <https://www.ndrc.gov.cn/xwdt/xwfb/201408/t20140820_955897.html> accessed 22 June 2020.

favourable pricing on their products by conducting bilateral and multilateral negotiations, mostly in Japan. As the price fixing agreements improperly affected the pricing of auto parts, entire vehicles, and bearings in the Chinese market (that is, effects were felt in China), the NDRC enforced the Anti-Monopoly Law against these Japanese companies, even though the offending acts were committed in Japan.

Based on the foregoing discussion, it is clear that the NDRC has taken its place as a leading global antitrust authority in the area of cartel enforcement, much as MOFCOM has done in the area of merger control. Relevantly, both agencies are active in enforcing the Anti-Monopoly Law over extraterritorial acts by relying on the 'effects doctrine'. Apart from the competition authorities, Chinese administrative agencies in general had been reluctant to enforce Chinese law over extraterritorial acts for decades, in pursuance of Deng Xiaoping's strategy to keep a 'low profile' in international affairs. However, since the ascendance of Xi Jinping to Chinese presidency in 2012—especially after the 19th National Congress of the CPC in 2017, which had announced that socialism with Chinese characteristics entered 'a new era'[88]—China has adopted what many foreign observers interpret as a more 'aggressive' foreign policy.[89] Against this new political backdrop, Chinese administrative agencies have become increasingly active in imposing or threatening to impose sanctions on foreign entities by enforcing domestic Chinese law over extraterritorial acts. Ordering 44 foreign airline companies to purge their official websites of references to Taiwan, Hong Kong, and Macau as separate countries by China's Civil Aviation Administration (CAAC) is a case in point.

On 25 April 2018, the CAAC delivered a written notification to 44 foreign air carriers, pointing out that their websites' references to Taiwan, Hong Kong, and Macau as separate countries violated Chinese laws and the one-China policy. The CAAC requested that these companies revise their websites accordingly, stressing that sanctions would be imposed on non-complying companies.[90] Although the Trump administration criticized the CAAC's demand as 'Orwellian nonsense',[91] all 44 companies complied with the order.[92] From the perspective of academic research, this case provides an ideal vantage point to observe the

[88] See Yang Jiechi, 'The 19th CPC National Congress and China's Major Country Diplomacy in the New Era' (2018) 10(1) QiuShi Journal (English edition) <http://english.qstheory.cn/2018-02/11/c_1122395899.htm> accessed 22 June 2020.

[89] Tim Rühlig, 'A "New" Chinese Foreign Policy under Xi Jinping?' *Institute for Security and Development Policy* (2 March 2018) <https://isdp.eu/publication/new-chinese-foreign-policy-xi-jinping-implications-european-policy-making/> accessed 22 June 2020.

[90] See the news bulletin of the Official website of China's Civil Aviation Administration <http://www.caac.gov.cn/XWZX/MHYW/201805/t20180525_188212.html> accessed 22 June 2020.

[91] Danielle Paquette, 'Under Pressure from China, US Airlines Start Changing References to Taiwan' *Washington Post* (July 2018) <https://www.washingtonpost.com/world/under-pressure-from-china-american-airlines-changes-references-to-taiwan-on-its-website/2018/07/25/1b302984-8fc9-11e8-9b0d-749fb254bc3d_story.html> accessed 22 June 2020.

[92] Chris Buckley, '"Orwellian Nonsense"? China Says That's the Price of Doing Business' *New York Times* (6 May 2018) <https://www.nytimes.com/2018/05/06/world/asia/china-airlines-orwellian-nonsense.html> accessed 22 June 2020.

attitude of the Chinese administrative agencies towards the extraterritoriality of domestic law and their enforcement practice in the 'new era'. Two observations are pertinent.

First, notwithstanding the 'borderless' nature of the cyberspace, given that the websites of these foreign air carriers were hosted on servers located outside China and their official language is usually English instead of Chinese, it is argued that their references to Taiwan, Hong Kong, and Macau as separate countries constituted extraterritorial acts. Hence, the CAAC's order for these foreign airline companies to revise the references on their websites would constitute an exercise of jurisdiction of domestic Chinese law over extraterritorial acts.

Second, and more strikingly, unlike the competition authorities invoking Article 2 of Anti-Monopoly Law (which is expressly extraterritorial) in the cases discussed above, the law on which the CAAC relied does not expressly confer extraterritoriality. Although the CAAC did not specify on which Chinese laws it was relying, we submit that the Constitutional Law and the Anti-Secession Law of the PRC[93] are most relevant to the aforementioned case. Interestingly, both legislations are 'geo-ambiguous' laws—that is, laws that proscribe or regulate conduct but that remain silent as to whether they apply to acts that occur outside of the PRC.[94] As such, the CAAC's order for revision of website content was indicative of the Chinese administrative agencies' boldness in claiming jurisdiction of domestic Chinese law over extraterritorial acts, even in the absence of clear and express legislative intent as to the extraterritoriality of the relevant law. It marked a clear and profound change in the mindset of these agencies.

Constructing a Chinese system of legal extraterritoriality: four key planks

As Chinese Constitutional Law enshrines the leadership of the CPC and President Xi has been acknowledged as China's most powerful leader in decades,[95] it is beyond doubt that the legislature, the judiciary, and the executive departments of the PRC will place high priority on the construction of a Chinese system of legal extraterritoriality. Moreover, as the Chinese system does not follow the principles of separation of powers and checks and balances cherished by most liberal Western countries, one can thus expect expedience in the establishment of the system.

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[93] Zhonghua Renmin Gongheguo Xianfa (Constitutional Law of the People's Republic of China), promulgated 4 December 1982, last amended on 11 March 2018; Zhonghua Renmin Gongheguo Fanguojiafenliefa (Anti-Secession Law of the People's Republic of China) art 2, promulgated 14 March 2015.

[94] See Meyer (n 4) 114.

[95] Zhonghua Renmin Gongheguo Xianfa (Constitutional Law of the People's Republic of China), promulgated 4 December 1982, last amended on 11 March 2018; Andy Wong, 'Xi Jinping Becomes China's Most Powerful Leader in Decades' *NBC News* (24 October 2017) <https://www.nbcnews.com/news/china/xi-jinping-becomes-china-s-most-powerful-leader-decades-n813601> accessed 22 June 2020.

Political reasons aside, there is a genuine pressing need for China to construct its system of extraterritoriality expeditiously. Generally speaking, it is imperative for a strong and open economy to develop its legal system of extraterritoriality whose interests extend beyond the borders. A weak and isolated economy, in contrast, is usually hostile to extraterritoriality as it is typically on the receiving end of extraterritorial laws. Accordingly, such an economy would generally insist on the principle of territoriality of laws and shields itself from foreign extraterritorial laws by invoking the principle of sovereignty. Today, China is the world's largest trading country and the second largest economy, as well as one of the world's biggest investors, and is armed with an ambitious investment blueprint known as the Belt and Road Initiative (BRI).[96] Moreover, China's rise has brought forth the widely cited Thucydides Trap theory of conflict, which may explain why China is now viewed by the USA as the global, multi-channel, influencing, authoritarianism-exporting threat. In such circumstances, safeguarding political security and national security by constructing a legal system's extraterritoriality becomes a top priority for the CPC.

As the global presence of Chinese businesses continues to increase rapidly and China is now perceived to be the USA's major competitor, it should come as no surprise that the Chinese authorities are keen on establishing a legal system of extraterritoriality to protect the State's interests and those of its nationals in global operations. The pertinent question is how should China go about building its own system of extraterritoriality? To this end, after providing a systematic review of relevant Chinese legislation and practice, by way of conclusion, we propose below key planks that should support the emerging Chinese system of extraterritoriality with the aim of achieving two objectives. The first objective is that the Chinese system should be distinct from the US model of extraterritoriality. The second objective is to construct a Chinese system of legal extraterritoriality in the near future, without a political or legal system overhaul. Accordingly, our proposals are crafted with China's global role, national interests, and current capacity and conditions in mind.

We start by highlighting the current capacity and conditions of the Chinese concept and practice of extraterritoriality as these are likely to form the first shape of the Chinese system of extraterritoriality. Following this, we propose four key planks that should support the Chinese system.

China's current capacity and conditions

First, the rules of extraterritoriality have been scattered among various separate Chinese laws, most of which are of enormous significance to the political and economic security of the PRC. To be more specific, the Criminal Code, the Anti-Terrorism Law, the Anti-Espionage Law, and the Cybersecurity Law are legislations that safeguard the political security of the PRC; whereas, the Anti-Monopoly Law and the Securities Law are pieces of legislation that protect the economic security of the PRC. Political and economic security are therefore

[96] See Huo and Yip (n 76) 906.

priority areas in which one would expect a concentration of the Chinese extraterritorial laws in the future.

Second, compared with the US system of legal extraterritoriality,[97] the Chinese system appears to be more moderate. The US model is characterized by unilateralism.[98] Unilateralism herein means that when the US authorities exercise legislative, adjudicative, or enforcement jurisdiction extraterritorially, they usually do not seek foreign nation consent, nor do they depend on multilateral mechanism or international law. For example, since the second half of the 20th century, more and more US extraterritorial laws are imposing the 'secondary' sanctions that are meant to enhance the effect of primary, or designated, sanctions. They are, in essence, an extension of those primary sanctions, as they are deployed to penalize companies that are outside of the US jurisdiction for doing business with targets of primary sanctions by restricting their commercial access. Secondary sanctions cannot be justified by any of the principles of extraterritorial jurisdictions recognized in international law,[99] and they violate the international law principles of non-intervention and equality of sovereignty. It is not surprising that they have provoked strong protests.[100]

In contrast, Chinese law and practice suggest that China will not, in the ordinary course of things, assert or exercise extraterritorial jurisdiction unless there is a genuine connection between the subject matter of jurisdiction and the territorial base of the PRC. Thus far, the extraterritorial rules that are contained in existing Chinese legislations are based on the heads of prescriptive jurisdiction that are widely recognized under the principles of international law. Moreover, Article 177 of the newly revised Securities Law and the case of *Naw Kham*[101] suggest that China upholds multilateralism to exercise extraterritorial jurisdiction of domestic law, which is in line with its commitment to respect international law and to build 'a Community with Shared Future for Mankind'.

Third, the majority of the rules of extraterritoriality in the existing Chinese law are declaratory, lacking concrete rules to guarantee their enforcement in practice. However, the Cybersecurity Law and the 2019 amendment to the Securities Law portend that the Chinese legislature is prepared to give 'teeth' to extraterritorial Chinese rules going forward.

Finally, Chinese administrative agencies have been playing an active role in enforcing domestic Chinese law over extraterritorial acts. The role of the Chinese judiciary, in contrast, appears to be more restrained. As such, going forward, one can expect that the administrative agencies will play a more prominent role than the judiciary in the Chinese system of extraterritoriality.

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[97] As the article focuses on Chinese law, American law in this regard will not be discussed in detail within the space constraint of the article.

[98] See Cedric Ryngaert, 'Exterritorial Export Controls (Second Boycotts)' (2008) 7 Chinese J Intl L 625, 658.

[99] See Ryngaert (n 23) 101.

[100] Eg Delegation of the European Commission, 'European Union: Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act' (1996) 35(2) Intl Legal Materials 397.

[101] Discussed in the text accompanying notes 64–9 above.

The future: the key planks of the Chinese system of legal extraterritoriality

Based on the foregoing, there are four key planks that should support the emerging Chinese system of extraterritoriality so that it will be both distinct from the US system, which has been infamously labelled as 'long arm jurisdiction' as well as being practically achievable in light of China's role in the global stage, national interests, current capacity, and conditions. It is our hope that these suggestions will be helpful to the Chinese authorities in their construction of the Chinese system of legal extraterritoriality.

Multilateralism as the cornerstone

First, the Chinese system of legal extraterritoriality should be built on the basis of respect for international law and sovereignty of other States. Multilateralism should therefore be the cornerstone of the Chinese system. To be more specific, the model of multilateralism we propose comprises three core elements. First, when Chinese legislature exercises prescriptive jurisdiction over extraterritorial acts, it should, as far as possible, base the jurisdiction of Chinese law on grounds on which legitimacy has been recognized by international law, including, *inter alia*, the personality principle, the protective principle, and the principle of universal jurisdiction. In all circumstances, the jurisdiction of Chinese law should not violate the prohibitive rules established by international law or the international treaties to which China is a party. Second, the Chinese adjudicative or enforcement authorities, in any extraterritorial application of domestic law, should bear in mind international law principles and avoid infringing on the reasonable interests of other relevant countries. In the event of international differences arising from the extraterritorial application of Chinese law, the Chinese authorities should endeavour to amicably resolve the disputes through negotiations rather than imposing its unilateral interpretation on foreign countries. Finally, in essence, unilateralism that is underlined by the philosophy of absolute self-interest should be the antithesis of the Chinese system of legal extraterritoriality.

Indeed, multilateral approaches cohere with China's professed political ideology. Chinese leadership, under the strong influence of Confucius philosophy and the ideology of Marxism,[102] does not endorse unilateralism in general. Even today when China has become a world power, it strategically advances its own interests under the pretext of mutual respect and achieving win-win cooperation.[103] Indeed, President Xi has, on different occasions, reiterated that China firmly upholds multilateralism, the international system with the United Nations at its core, and the international order based on international law and promotes

[102] Yang Jiechi, 'Following the Guidance of Xi Jinping Thought on Diplomacy to Advance Diplomatic Work in the New Era' (2018) 10(4) QiuShi J (English edition) <http://english.qstheory.cn/2018-12/21/c_1123801028.htm> accessed 23 June 2020.

[103] Wang Yi, 'New Era of China's Foreign Policy' *China US Focus* (18 December 2017) <https://www.chinausfocus.com/foreign-policy/chinas-diplomacy-breaking-new-ground> accessed 23 June 2020.

the building of 'a community with a shared future for humanity'.[104] Accordingly, to demonstrate its full commitment to such lofty goals, China should endeavour to construct a system of legal extraterritoriality that is based on and promotes multilateralism. Its reputation would be at stake if it merely pays lip service to the commitments it made.

Political ideology aside, the more pressing reason for China to adopt multilateralism is that it currently (and in the foreseeable future) lacks the capacity to exercise extraterritorial jurisdiction of its domestic law by unilateral means or in ways that are inconsistent with international law. American 'legal bullyism', a term coined by China, is based on the 'hard power' of the USA as the world's dominant power that enjoys economic, technological, monetary, and military hegemony.[105] In contrast, China does not presently possess such extensive powers. As long as the USA remains the world's leading superpower and maintains a much larger economic, technological, and military lead over China, it is impracticable for China to abandon its long-standing position of multilateralism and to imitate the American approach.

There is a further strategic reason for China to adopt multilateralism. The US system of legal extraterritoriality, built based on hard unilateralism, has attracted sustained criticisms and controversies. Multilateralism, as the cornerstone of the Chinese system, would help strengthen its collaborative relations with other States and therefore bolster its position in the US–China race. Unlike unilateralism, multilateralism does not suffer from concerns of legitimacy, and through encouraging cooperation and championing shared values and norms, it would be less likely to provoke protests and retaliation by other States.[106]

In this light, we propose that China take active steps to ensure its system of legal extraterritoriality is imbued with multilateralism in practice. In the initial stages, China may consider implementing the project within the framework of the BRI. As China plays a driving role in the BRI, this is a logical, feasible, and strategic step to take. By resorting to the mechanisms for ongoing cooperation and engagement and identifying areas for cooperation under the BRI, China can host forums or dialogues for the representatives of national legislative, administrative, and judicial organs of the various countries along BRI corridors for the purpose of enhancing and advancing the understanding of legal extraterritoriality. Depending on the progress, 'soft law' (such as declarations and memorandum of understandings) may be made before 'hard law' (for example, international conventions or law enforcement mechanisms to support extraterritoriality of domestic law) gradually takes shape. For the countries that have not participated in the BRI, China may consider establishing bilateral cooperative

[104] Eg Xinhua, 'Xi Meets UN Chief' *China Plus* (26 April 2019) <http://chinaplus.cri.cn/news/politics/11/20190426/281431.html> accessed 23 June 2020.

[105] See Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) European J Intl L 369.

[106] Austen L Parrish, '*Kiobel*, Unilateralism, and the Retreat from Extraterritoriality' (2013) 28 Maryland J Intl L 208, 235–9. Parrish advances his views in the context of human rights but the benefits of multilateralism are clearly of general application beyond that context.

mechanisms, whether on an *ad hoc* or institutionalized basis, to enhance mutual understanding of the concept of legal extraterritoriality and to support extraterritoriality of domestic law under prescribed conditions. Under all circumstances, when Chinese authorities exercise legislative, adjudicative, or enforcement jurisdiction based on extraterritoriality of domestic law, they should justify the jurisdiction on the basis of international law and pay due respect to the sovereignty as well as reasonable concerns of the relevant foreign States. In no case should China bypass the prohibitory rules in international law to exercise extraterritorial jurisdiction.

Political and economic security as priority interests

In systematically reviewing existing legislations, the Chinese legislatures should prioritize reinforcing/prescribing extraterritoriality in laws that are closely connected with the political and economic security of the PRC. Specifically, in respect of laws that are territorial in nature (for example, the Anti-Session of the PRC), these rules should be revised in the future to clearly stipulate for extraterritorial jurisdiction and its proper basis. In respect of rules that are conferred extraterritorial jurisdiction but that do not presently entail concrete measures for enforcement (for example, the Criminal Code, the Anti-Terrorism Law, the Anti-Espionage Law, and the Anti-Monopoly Law), the Chinese legislature should introduce provisions on enforcement mechanisms into the legislations in future amendment exercises.

Moreover, it can be anticipated that new legislations and regulations that apply to extraterritorial conduct will be enacted to safeguard the national interests and foreign policy of the PRC. For example, the Standing Committee of the NPC has just finished the drafting of a new comprehensive Export Control Law to improve and enhance the PRC's existing export regime as well as to arm the Chinese authorities with the necessary legal armour to counter US export control measures that target China specifically.[107] Notably, the newly promulgated Export Control Law, which came into force on 1 December 2020, expressly confers extraterritorial jurisdiction. First, the label 'deemed export' in the legislation would include the provision of controlled items (including controlled services or technologies) to foreign persons within and without China's borders by Chinese citizens, legal entities, or organizations. Second, the term 're-export' under the legislation is ascribed a similar meaning to the same terminology under the US legislative regime.[108] This would likely expand China's extraterritorial reach and subject an overseas company to China's export control licensing requirement when it re-exports Chinese-origin controlled items or foreign-made items that contain Chinese-origin controlled items to a country or region outside China.

[107] Last legislative development can be found in the official website of the National People's Congress <http://www.npc.gov.cn/npc/c30834/202010/cf4e0455f6424a38b5aecf8001712c43.shtml> accessed 5 December 2020.

[108] Editors, 'Extraterritorial Application of United States Law: The Case of Export Controls' (1984) 132 U Pennsylvania L Rev 355, 381–2.

Third, the Export Control Law confers powers of enforcement and investigation on the Chinese export control authority over foreign entities in respect of the latter's extraterritorial acts.[109] Hence, the Export Control Law is not just a simple consolidation of the existing separate PRC export control regulations and rules. Needless to say, the law will substantially broaden the reach of the PRC export control regime.[110]

Administrative agencies to take the lead, with checks and balances in place

China's administrative agencies are predicted to play a more visible and increasingly active role in extending the application of Chinese law abroad. As analysed above, since the implementation of the Anti-Monopoly Law, China's competition authorities have become a major global antitrust regulator, alongside the USA and the EU. Remarkably, Chinese administrative agencies in the 'new era' are no longer hesitant in asserting the extraterritorial jurisdiction of Chinese laws. Indeed, one should not underestimate the role and powers of the Chinese administrative agencies because the overwhelming majority of Chinese statutes presently lack precise prescription of geographical application and relevant constraining principles—for example, 'presumption against extraterritoriality'—have not been established in Chinese law or judicial practice.[111] In this light, the administrative agencies are left with considerable discretion in exercising jurisdiction of 'geo-ambiguous' Chinese laws over extraterritorial acts. Consequently, the future stability, predictability, and principled operability of the Chinese system of extraterritoriality are at stake, unless the discretion is properly contained and guided by principle. For this reason, we propose that the Chinese courts should play an active role in providing a certain degree of check and balance on the administrative agencies' exercise of discretion.

Chinese courts as a check and balance on administrative agencies' exercise of discretion

Though the Constitution Law of the PRC does not recognize the modern Western idea of judicial independence, it does provide for the independent exercise of adjudicative power. Article 131 provides that 'the People's Courts exercise adjudicative power in accordance with law and without interference by administrative organs, social organizations and individuals'.[112] Therefore, one

[109] Zhonghua Renmin Gongheguo Chukouguanlinfa (Export Control Law of the PRC) art 44, promulgated 17 October 2020.

[110] Wilmer Hale, 'China Publishes Draft Export Control Law' (15 January 2020) <https://www.wilmerhale.com/en/insights/client-alerts/20200115-china-publishes-draft-export-control-law> accessed 23 June 2020.

[111] See Zachary D Clopton, 'Bowman Lives: The Extraterritorial Application of US Criminal Law after *Morrison v National Australia Bank*' (2011) 67 New York U Annual Survey American L 137, 141.

[112] Zhonghua Renmin Gongheguo Xianfa (Constitutional Law of the People's Republic of China) art 131, promulgated 4 December 1982, last amended on 11 March 2018.

should not neglect the role and participation of the People's Courts in the construction of the Chinese system of legal extraterritoriality.

First, as the overwhelming majority of the existing Chinese legislations are 'geo-ambiguous', the Supreme People's Court (SPC) is entitled to clarify the geographical scope of domestic Chinese law by 'judicial interpretation'. By way of background, in the Chinese legal system, judicial interpretation refers to a general interpretation document issued by the SPC on the implementation of legislation in judicial practice, which, in effect, results in the creation of new rules in a systematic and comprehensive manner.[113] Compared with the cumbersome legislative process undertaken by the NPC or its Standing Committee, the promulgation of a judicial interpretation by the SPC (composed primarily of legal professionals)[114] is far more efficient. Therefore, it is our hope that the SPC would spell out the geographical scope of domestic Chinese law by judicial interpretations. More importantly, if the SPC progressively develops constraining principles—for example, the principle of presumption against extraterritoriality of laws—it would help to contain excessive exercise of extraterritorial jurisdiction and thereby maintain the predictability and principled operability of the Chinese system of extraterritoriality.

Second, if a private party, like a company or an individual, believes that their lawful interests are violated by a specific administrative act undertaken by an administrative agency in exercising extraterritorial jurisdiction of domestic Chinese law, they are entitled to file an administrative suit before a People's Court,[115] pursuant to the Administrative Litigation Law.[116] Given that the independent exercise of adjudicative power is enshrined by the Chinese Constitutional Law as noted above, we submit that the role of People's Court in keeping the reach of Chinese extraterritorial laws within reasonable and justifiable bounds is crucial to the success and sustainability of the Chinese system of extraterritoriality.

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[113] See Huo and Yip (n 76) 909.

[114] Ibid.

[115] See Jianlong Liu, 'Administrative Litigation in China: Parties and Their Rights and Obligations' (2011) 4 National U Juridical Sciences L Rev 205, 207.

[116] Zhonghua Renmin Gongheguo Xingzhengsusongfa (Administrative Litigation Law of the People's Republic of China), arts 2, 12, promulgated 4 April 1989, last amended on 27 June 2017.