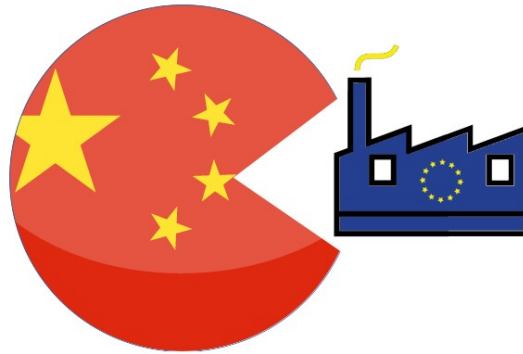


# The CREOGN Research Notes

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## CHINESE BARRIER<sup>1</sup> LAWS, WHAT ARE THE STAKES FOR EUROPEAN COMPANIES ?

Extraterritoriality of law is an ambiguous concept that questions the State sovereignty and thus, the basis of international law. It enables a State to act unilaterally on the basis of its internal laws, on the territory of another state.

The United States was the first to deploy this legal arsenal destined for extraterritorial use, enabling it to sentence foreign companies to a wide range of legal sanctions:

- corruption committed outside the national territory by broadly interpreting the Foreign Practices Corrupt Act (FPCA), a federal law passed in 1977 and revised for this purpose in 1998;
- unjust competition with the 1982 Foreign Trade Antitrust Improvements Act (FTAIA);
- violations of the ITAR regulations on exports of sensitive goods (*Traffic in Arms Regulations*)<sup>2</sup>, to which, the European regulation of dual-use technologies also condemns<sup>3</sup>;
- terrorist acts since the 2001 Patriot Act, or more recently:
- doping cases thanks to the 2022 Rodchenkov Act<sup>4</sup>.

The Trump Administration has even “increased the pressure by updating in June 2020, the guiding document of Countering America’s Adversaries Through Sanctions Act (CAATS)”<sup>5</sup>.

The use or misuse of digital tools, according to the American conception, makes the implementation of these laws even more intricate and restrictive. The interconnectedness of networks thus becomes a double-edged sword. The United States through the 2020 Cloud Act pertaining to communications data<sup>6</sup>, interprets the use of its data processing servers as representing its jurisdiction and allows itself to sanction foreign companies for acts committed on foreign soil. Even better! Through the ITAR, the United States compels companies to forward information on certain so-called sensitive material solely through American communication channels. All exchanges of information are thus drastically monitored. Within this globalised economic warfare context, the phenomenon of extraterritoriality of the law is becoming more widespread.

1 As in text, “Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures” (《阻断外国法律与措施不当域外适用办法》).

2 OFFICE OF THE VICE PRESIDENT FOR RESEARCH. *International Traffic in Arms Regulations – ITAR*. [online]. URL : <https://research.mit.edu/integrity-and-compliance/export-control/information-documents/export-control-regulations>

3 Direction générale des douanes et droits indirects. Biens et technologies à double usage (civil ou militaire) [online]. URL : <https://www.douane.gouv.fr/fiche/biens-et-technologies-double-usage-civil-ou-militaire>

4 Rodchenkov Anti-Doping, Act of 2019 [en ligne]. Disponible sur : <https://www.congress.gov/bill/116th-congress/house-bill/835/text>

5 HACKENBROICH, Jonathan, *et alii*. Défendre la souveraineté économique de l’Europe : de nouvelles voies pour résister à la coercition économique. Note d’orientation du Conseil européen des relations étrangères, octobre 2020, p. 6 [online]. URL : [https://ecfr.eu/paris/publication/defendre\\_la\\_souverainete\\_economique\\_de\\_leurope\\_lutter\\_contre\\_la\\_coercition/](https://ecfr.eu/paris/publication/defendre_la_souverainete_economique_de_leurope_lutter_contre_la_coercition/)

6 ROJSZCZAK, Marcin. CLOUD act agreements from an EU perspective. *Computer Law & Security Review*, vol. 38, 2020.

As many States were equipping themselves with comparable legal arsenals to tackle corruption ( 2010 *UK Bribery Act*, the 2016 *Sapin* law in France), so did the People's Republic of China (PRC). While it is currently engaged in an economic war with the US, it has just recently extended its legal jurisdiction to respond to what Beijing considers to be a belligerent and targeted use of the extraterritoriality of US law.

This note aims to present the intention of these Chinese barrier laws introduced by MOFCOM (Ministry of Commerce of the People's Republic of China) since 2021 and their possible ramifications for European companies.

## I) The setting of this Barrier Laws

At the beginning of 2021, the PRC adopted a legal framework to tackle the extraterritorial application of foreign legislation, when such legislation has not been the subject of an international agreement or treaty to which China is a party. A MOFCOM order followed by a bill passed by the Chinese People's Congress<sup>7</sup> established "prohibition orders", known as blocking laws, against measures considered unjustified or discriminatory by foreign states against Chinese interests, outside the scope of international law. The expressed goal of these laws is to safeguard Chinese sovereignty through measures that are part of a self-defence or even self-preservation mechanism.

Thus, the PRC allows itself to monitor and sanction, on its territory, any foreign individual or legal entity that uses its own internal laws to reprimand or discriminate Chinese companies or citizens. This includes several of the above-mentioned US laws and two recent European regulations<sup>8</sup> that have an extraterritorial scope, without naming them.

The PRC thus prohibits any form of political or economic interference and draws up a list of retaliatory measures against such practices. These "prohibition orders" include denying visas, expelling people, sealing, freezing movable or immovable property, and restricting activities and transactions within the Chinese territory<sup>9</sup>. The PRC also targets collaborators (States, organisations or individuals) that promote or enforce unwarranted or abusive extraterritorial provisions. The pressure exerted is direct or indirect, including administrative action that can be suspended, reduced or, on the contrary, accumulated, or even combined with judicial sanctions. These are countermeasures in the form of a gradual response, without any extraterritorial effect, *a priori*.

If it might appear that Chinese laws are in line with the principles of international law, their common basis of values is quite different:

- there is no recognition of the primacy of international law, but an acknowledgement of national sovereignty;
- It is not about building a Chinese State under the rule of law, based on democracy and human rights, but rather about establishing Chinese state law within the framework of international cooperation, necessary to pursue exclusively Chinese interests.

Chinese law is not extraterritorial, as it does not seek to export a model, unlike Western systems<sup>10</sup>. However, the law has now become a strategic tool for the PRC to achieve political and economic ends, just as it is used by its rivals. These barrier laws constitute a "new weapon of economic warfare"<sup>11</sup>.

## II) An offensive potential

If the legal and jurisdictional system set up by China is above all defensive, it nonetheless harbours the capacity for an offensive strategy against any state or international institution, private or public organisation, including their top executives, or even against individuals and their families.

With texts that fall under the sole discretion of the Chinese authorities, as well as by giving the Chinese people's court jurisdiction to judge violations of regulations affecting the legitimate interests of its nationals and organisations, the PRC places its domestic law above international law. Thus, the PRC deploys a strategy of " off-

7 Arrêté du 9 janvier 2021 du ministère du Commerce de la République populaire de Chine 2021 n° 1. Loi du 10 juin 2021 adoptée par l'Assemblée populaire nationale sur les sanctions anti-étrangères de la République populaire de Chine.

8 Le Règlement général sur la protection des données (RGPD) de 2018 et le règlement 2020/1998 du Conseil du 7 décembre 2020 concernant des mesures restrictives en réaction aux graves violations des droits de l'homme et aux graves atteintes à ces droits.

9 Article 6 de la loi du 10 juin 2021.

10 POISSON, Adeline. *Extraterritorialité et protection des données personnelles : aperçu comparatif en droit européen et droit chinois* [online]. (dir.) Fauvarque-Cosson B., Mémoire de Master 2 Recherche Droit européen comparé, Paris II Panthéon-Assas, 2018, p. 76. URL : [http://idc.u-paris2.fr/sites/default/files/memoires/memoire\\_adeline\\_poisson.pdf](http://idc.u-paris2.fr/sites/default/files/memoires/memoire_adeline_poisson.pdf)

11 LAÏDI, Ali. *Le droit, nouvelle arme de guerre économique. Comment les États-Unis déstabilisent les entreprises européennes*. Coll. Essai Babel, Ed. Actes Sud, 2019.

limits " economic warfare with the application of "a rule but not an established formula" and "supranational combinations"<sup>12</sup>.

The extraterritoriality of the Chinese penal laws had already been extended in 1997<sup>13</sup>. Back then, it was solely applied against Chinese nationals abroad. Nowadays, the Central Chinese government enables itself to take all necessary measures depending on factors that itself judges, specifically when it comes to foreign nationals or legal entities. The list is, of course, not exhaustive to enable itself some leeway to adapt its response. The latter is often composed of different economic coercion means that can reveal themselves to be very targeted to constrain further the target entity to cease all behaviour considered illegal.

Thus, these Chinese blockade laws do not extend beyond the borders, but there is nothing to prevent a broader jurisdiction. Furthermore, China's borders are variable, even in the definition of its territorial waters. Tibet and Taiwan thus represent for China the same community, the same country, although their systems may diverge.

Extraterritoriality, although considered as an exception, is developing and finding a foothold in economic law (anti-trust law, financial law, the fight against corruption, etc.). By a conceptual reversal, it is no longer the extraterritorial application of a law that may seem questionable but rather the connecting criteria used to justify the jurisdiction of a court or the application of a norm outside the territory where it was enacted. American case law considers two criteria: the effects test and the conduct test<sup>14</sup>. However, gradually, even a tenuous link with the territory, such as the use of the dollar, stock market quotation on American soil, or a transfer to a bank account in the United States, was enough to justify the jurisdiction of the American authorities, even if international reactions of protest were unanimous, given the exclusivity of extraterritoriality in its implementation. Under the guise of respect for territorial sovereignty, Chinese blocking laws are based on "normative mimicry"<sup>15</sup>, with criteria that are no longer technical but subjective, in this case the perception by the PRC of the injustice contained in measures taken by foreign legislation. They are thus based on potestative conditions, i.e. they depend only on the will of one party<sup>16</sup>.

Transnational European companies, faced with these legal dilemmas, are not ready to arbitrate between complying with US laws and Chinese countermeasures.

### III) What are the stakes for the European companies?

The Chinese text could be difficult to implement if the European Union (EU) and the United States agreed on a common and strong posture. In contrast, China could take advantage of Europe's vulnerability, which bases a large part of its GDP on trade (40% in 2019), whereas the United States draws only 26%<sup>17</sup>, coupled with a "dysfunctional"<sup>18</sup> blocking statute in the EU, which does not have a sufficiently dissuasive effect in the face of the economic coercion of the world's major economic powers. European companies, caught in a stranglehold between the American and Chinese legislations, with the resulting sanctions on both sides, are hampered in their strategic decision-making.

In addition to undermining the principles of international law, excessive regulation is not a sustainable solution, given the collateral economic damage. Restrictive laws lead to sometimes inextricable deadlock situations. Circumvention strategies have already been observed in the past<sup>19</sup>. Compliance management represents a real regulatory risk, which is taken very seriously by companies.

The first hurdle will be the increased complexity of export control. Indeed, the reexportation to third countries of goods composed, even if only partially, of parts produced in China, will be strongly impacted by extraterritorial export control.

Another challenge for companies is the wording of contracts, which often include "default sanctions" clauses.

12 LIANG, Qiao, XIANGSUI, Wang. La guerre hors limites. Coll Petite bibliothèque, Ed. Rivages poche, 2006.

13 CONSTANT, Frédéric, LOPEZ, Christophe. Le droit chinois. Coll. Connaissance du droit, Dalloz, 2013.

14 VAUPLANE (de) Hubert. « Une nouvelle géopolitique de la norme », in Garapon A. et Servan-Schreiber P., *Deals de justice. Le marché américain de l'obéissance mondialisée*. PUF, 2013.

15 MIRON, Alina, TAXIL, Béangère. (dir). Extraterritorialités et droit international. Société française pour le droit international, colloque d'Angers, Ed. A.Pedone, Paris, 2020.

16 GUINCHARD, Serge, DEBARD, Thierry. Lexiques des termes juridiques. Dalloz, 2020-2021, p. 239.

17 HACKENBROICH, Jonathan. Chinese sanctions: How to confront coercion and avoid a squeeze on Europe II. ecf.eu, 9 avril 2021. URL : <https://ecfr.eu/article/chinese-sanctions-how-to-confront-coercion-and-avoid-a-squeeze-on-europe-ii/>

18 HACKENBROICH, Jonathan, et alii. Défendre la souveraineté économique de l'Europe : de nouvelles voies pour résister à la coercition économique. Note d'orientation du Conseil européen des relations étrangères [online]. 7 janvier 2021, p. 23. URL : [https://ecfr.eu/paris/publication/defendre\\_la\\_souverainete\\_economique\\_de\\_leurope\\_lutter\\_contre\\_la\\_coercition](https://ecfr.eu/paris/publication/defendre_la_souverainete_economique_de_leurope_lutter_contre_la_coercition)

19 PITRON, Guillaume. La guerre des métaux rares. La face cachée de la transition énergétique et numérique. Ed. LLL Les liens qui libèrent, 2019.

If one of these clauses falls under a prohibition order under China's barrier laws, the balance of the contract will be disturbed. If not, the contract may simply be invalidated in its entirety or terminated abruptly. Accepting the clause could in itself expose the company to sanctions by Beijing.

Thus, a European company with a subsidiary in the United States and one in China may find itself in a highly uncomfortable situation. This is because it will have to comply with American, European and Chinese legal provisions simultaneously. If extraterritorial US sanctions are imposed on China, the French company will, in turn, face potential retaliation from China. Getting a ban lifted or an exemption in China will not be easy.

In particular, blockade laws linked to the digital renminbi<sup>20</sup> could eventually force companies to use this medium exclusively for trade with China. Suspicion, and therefore checks by the government in Washington, on companies likely to bypass the US financial sanctions system based on the conventional banking system are to be expected. Trade compliance is limitless.

Finally, the use of the digital renminbi could give China access to strategic information on company transactions, which would put European companies in an illegal situation with regard to the General Data Protection Regulation (GDPR), given the extraterritorial scope of this European regulation...

For firms, the extraterritoriality of the law is a real conundrum in terms of compliance, but also for strategy development. Unless they forego a colossal market for the sales or purchase of components necessary for the production of their finished products, they will have to equip themselves with the resources to ensure a very close watch on legislation blocking such sales and the drafting of commercial contracts by lawyers specialising in international business law. On a lesser scale of sanctions, the nationality of employees becomes a subject of consideration in employment contracts, in the light of texts prohibiting recruitment discrimination.

China is demonstrating a desire to safeguard its sovereignty, security and interests. By claiming to be unfairly condemned by foreign powers, it adopts a victim's posture that allows it to retaliate, "an eye for an eye, a tooth for a tooth"<sup>21</sup>, it puts itself on the ground of state security and, astutely, under the banner of international legality. However, it should be kept in perspective that these instruments are a tool to serve a strategy of economic warfare. Their effect is to modulate norms to the benefit of the PRC and to inscribe the law of the Chinese state in an international cooperation necessary for the pursuit of Chinese interests exclusively. This risk of non-reciprocity, which the EU has repeatedly denounced, should not be overlooked.

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<sup>20</sup> Official name of the Chinese currency. The yuan is the common name for the Chinese currency as a unit of account. (source : BSI Economics).

<sup>21</sup> HERVÉ, Alan. « Œil pour œil, dent pour dent » ou quand la Chine adopte une législation en réponse aux sanctions occidentales. [online] *Le Club des juristes*, 30 juin 2021. URL : <https://blog.leclubdesjuristes.com/quand-la-chine-adopte-une-legislation-en-reponse-aux-sanctions-occidentales/>