DOI 10.3868/s050-012-023-0033-5

Creating an Extraterritorial Application System of Chinese Law: From the Perspective of Advancing the Rule of Law in Domestic and Foreign-Related Affairs in a Coordinated Manner*

> **HUO Zhengxin**[a]

Abstract The rule of law in foreign-related affairs breaks down the distinction between domestic law and international law, as well as between the rule of law in domestic affairs and that in international affairs, providing a bridge for China to build law-based governance and to reform the global governance system for the new era. The extraterritorial application of domestic law can lead to legal conflicts between nations and conflicts between domestic law and international law. The principle of extraterritorially applying domestic law should be based on not violating the prohibitive provisions of international law and resolving legal conflicts through the conclusion of international treaties or negotiations. In the systematic undertaking of taking a coordinated approach to the rule of law in Chinese domestic and foreign-related affairs, the building of China's system of extraterritorial application of domestic law should be accelerated under the unified leadership by the Communist Party of China, with legislative, executive, and judicial authorities performing their respective duties. This building should be based on multilateralism, taking into account the legitimate concerns of other countries, and with the bottom line of not violating the prohibitive provisions of international law, and should be promoted with a balanced approach considering both "offense" and "defense."

Keywords rule of law in foreign-related affairs, advancing the rule of law in domestic and foreign-related affairs in a coordinated manner, extraterritorial effect, extraterritorial application of domestic law

I Introduction

The world is undergoing major developments, transformation, and adjustment. On the one hand, peace and development remain the order of the day. China's international standing has risen significantly, and China remains in an important period of strategic

* This paper is translated from 中国法律评论 (*China Law Review*), 2022 (1): 41–51.

a School of International Law, China University of Political Science and Law, Beijing 100091, China

opportunities for its development. On the other hand, economic globalization is facing headwinds, with the rise of unilateralism and protectionism, and the world has entered a period of turbulence and transformation. China is confronted with an increasingly complex external environment, with accumulated risks and challenges. The COVID-19 pandemic has further magnified the differences between national systems and exacerbated the divergence and conflicts of interests among countries, profoundly impacting China's peaceful development and global governance system reform. In this context, the Communist Party of China (CPC) Central Committee with Comrade XI Jinping at its core has strategically planned from the perspective of balancing the domestic and international situations, and has established the strategic goal of "advancing the rule of law in domestic and foreign-related affairs in a coordinated manner." Indeed, this approach is one of the "eleven commitments" that must be adhered to for the comprehensive rule of law in the new era. It has provided guidance by which China can apply the principle of rule of law to respond to unprecedented changes, to steadily promote peaceful development, and to handle its relationship with the external world appropriately.

In the systematic undertaking of advancing the rule of law in domestic and foreign-related affairs in a coordinated manner, accelerating the building of an extraterritorial application system of Chinese law holds a particularly important position,[1] and is vital for achieving mutual support and organic integration between the rule of law in domestic affairs and that in foreign-related affairs. Currently, in the field of extraterritorial application of Chinese law, legal research in China primarily focuses on comparative studies of the extraterritorial application systems and practices of domestic laws of Western countries, as well as on the current situation and legal improvements of the extraterritorial application of Chinese law.[2] However, there is relatively little exploration of the legal conflicts, and their coordination, arising from the extraterritorial application of Chinese law. There is still a lack of

1 See WANG Chen, 习近平法治思想是马克思主义法治理论中国化的新发展新飞跃 (XI Jinping Thought on the Rule of Law Is a New Breakthrough in Adapting Marxism to the Chinese Context), 2 中国法学 (*China Legal Science*), (2021).

2 LIAO Shiping, 国内法域外适用及其应对——以美国法域外适用措施为例 (The Extraterritorial Application of Domestic Law and Countermeasures Thereof: Taking the Exterritorial Application of the US Law As an Example), 3 环球法律评论 (*Global Law Review*), (2019); LI Qingming, 论美国域外管辖：概念、实践及中国因应 (The Extraterritorial Jurisdiction of the United States: Concept, Practice and China's Response), 3 国际法研究 (*Chinese Review of International Law*), (2019); XIAO Yongping, "长臂管辖权"的法理分析与对策研究 (Jurisprudential Analysis and Countermeasure Research on "Long-Arm Jurisdiction"), 6 中国法学 (*China Legal Science*), (2019); HUO Zhengxin, 国内法的域外效力：美国机制、学理解构与中国路径 (Extraterritoriality of Domestic Law: American Model, Jurisprudential Deconstruction and Chinese Approach), 2 政法论坛 (*Tribune of Political Science and Law*), (2020); LI Xiuna, 制衡与对抗：美国法律域外适用的中国应对 (Balancing and Confrontation: China's Response to the Extraterritorial Application of the US Law), 5 国际法研究 (*Chinese Review of International Law*), (2020); SUN Nanxiang, 美国法律域外适用的历史源流与现代发展——兼论中国法域外适用法律体系建设 (The Origin and Modernization of Extraterritoriality in the American Judiciary: With Reflections on the Extraterritorial Application of Chinese Laws), 3 比较法研究 (*Study of Comparative Law*), (2021); SONG Xiao, 域外管辖的体系构造：立法管辖与司法管辖之界分 (The System Construction of Extraterritorial Jurisdiction: Differentiating Legislative Jurisdiction and Judicial Jurisdiction), 3 法学研究 (*Chinese Journal of Law*), (2021).

research on the creation of an extraterritorial application system of Chinese law from the perspective of taking a coordinated approach to the rule of law at home and in matters involving foreign parties.

In light of this need to advance the rule of law in domestic and foreign-related affairs in a coordinated manner, this article firstly conducts a theoretical analysis of the core concepts of "the rule of law in foreign-related affairs" and "extraterritorial application of domestic law." The article then provides a systematic explanation of the legal conflicts between nations arising from the extraterritorial applications of domestic law, as well as of the conflicts between domestic law and international law, and explores principles and methods for coordination and resolution. Based on this, advancing the rule of law in domestic and foreign-related affairs in a coordinated manner in the new-era China as the historical context, the article analyzes the significance and principles of speeding up the creation of an extraterritorial application system of Chinese law, and proposes a path for its realization.

II Definition of Core Concepts

Georg Wilhelm Friedrich Hegel, German philosopher, believed that the unfolding of a core concept constitutes the entirety of a theory.[3] To define the study object and determine the scope of study, this article first conducts a theoretical analysis of the core concepts of "rule of law in foreign-related affairs" and "extraterritorial application of domestic law."

A | The Rule of Law in Foreign-Related Affairs

Based on the distinction between domestic law and international law, the academic community in China traditionally divides the rule of law into two basic levels: national-level rule of law (rule of law in domestic affairs) and international-level rule of law (rule of law in international affairs).[4] The rule of law in domestic affairs is primarily manifested as a governance system where a national legislative body formulates legal norms through statutory procedures, and their administrative and judicial bodies then apply these legal norms to administer internal affairs of the country. The rule of law in international affairs mainly manifests itself in the operation of the international community based on the principles of the rule of law, while the international landscape is constructed in the form of the rule of law, with legal norms as its foundation. In addition, legal norms serve to adjust international order and guide to restore international order.[5] Due to significant differences in their foundations, paths of formation, pursuit of values, and forms of manifestation, it is generally believed that the rule of law in domestic

3 WANG Dingding, 新政治经济学讲义：在中国思索正义、效率与公共选择 (*Lecture on New Political Economics: Reflections on Justice, Efficiency, and Public Choice in China*), 上海人民出版社 (Shanghai People's Publishing House), at 537 (2013).

4 ZENG Lingliang, 国际法治与中国法治建设 (Advancing the Rule of Law in International and Chinese Affairs), 10 中国社会科学 (*Social Sciences in China*), (2015).

5 See HE Zhipeng, 国际法治：一个概念的界定 (The Rule of Law in International Affairs: Defining a Concept), 4 政法论坛 (*Tribune of Political Science and Law*), (2009).

affairs and the rule of law in international affairs are two relatively independent governance systems.[6]

In the 21st century, the rule of law has been globally accepted as a common concept, principle, and strategy for national governance and global governance. Moreover, there has been a shift in the balance of power in the world, with the "rise of the East and the decline of the West," and globalization is suffering setbacks while the international order is being reconstructed amidst shocks, revealing increasing flaws in the existing world order. A consensus among various parties is gradually forming to construct a more progressive and just international order through more effective national governance and global governance.[7] Against this backdrop, under the leadership of XI Jinping, the CPC Central Committee has proposed the strategic goal of "advancing the rule of law in domestic and foreign-related affairs in a coordinated manner" from the perspective of the great rejuvenation of the Chinese nation and the building of a human community with a shared future. It emphasizes the need for acceleration of creation of a strategic framework for the rule of law in matters involving foreign parties, for pursuit of coordinated progress in both domestic and international governance, and for better safeguarding national sovereignty, security, and development interests. This then offers a Chinese approach and contribution to the reform and building of the global governance system.[8]

It can be seen that the foreign-related rule of law is a new concept proposed from a new perspective under the historical conditions of China's overall national strength entering the forefront of the world and its unprecedentedly enhanced international status, as it is increasingly approaching the center of the world stage. This concept reflects China's wisdom and propositions on safeguarding national interests, reforming the global governance system, and improving the international order through the means of the rule of law.[9]

Specifically, in terms of starting point and perspective, the concept and the theoretical construction of the rule of law in foreign-related affairs find their foundation and focus in the new era of China. In terms of essence and system, the rule of law in foreign-related affairs includes not only the aspects within the rule of law system in China's domestic affairs that involve foreign parties and international matters but also the aspects where China participates in international legislation, law enforcement, and judicial cooperation. Thus, the rule of law system can be integrated with and applied to international

6 See ZHAO Jun, 全球治理视野下的国际法治与国内法治 (The Rule of Law in International and Domestic Affairs from the Perspective of Global Governance), 10 中国社会科学 (*Social Sciences in China*), (2014).

7 See CHEN Zhimin, 国家治理、全球治理与世界秩序重构 (State Governance, Global Governance, and Reconstruction of World Order), 6 中国社会科学 (*Social Sciences in China*), (2016).

8 See Research Team of China Society of International Private Law, 习近平法治思想中的国际法治观 (The International Perspective of XI Jinping Thought on the Rule of Law), 1 武大国际法评论 (*International Law Review of Wuhan University*), (2021).

9 XI Jinping, 决胜全面建成小康社会,夺取新时代中国特色社会主义伟大胜利——在中国共产党第十九次全国代表大会上的报告 (*Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era: Report to the 19th CPC National Congress*), 人民出版社 (People's Publishing House), at 10–11 (2017).

affairs. This is a major means for China, as a responsible major country, to influence the international governance system through the rule of law. In terms of function and purpose, the rule of law in foreign-related affairs aims to effectively exercise national governance within the global context. This is not only an organic component of China's comprehensive promotion of the rule of law, the modernization of the national governance system and capacity. It is also an essential element in China's participation in the building of rule of law in international affairs, in promoting the rule of law in international relations, and in building a more progressive and just international order.

Essentially, the concept of rule of law in foreign-related affairs breaks the long-standing distinction between domestic law and international law, as well as between rule of law in domestic affairs and rule of law in international affairs. It establishes a bridge between theory and practice across which China can, in the new era, coordinate the overall domestic and international situations, comprehensively promote the rule of law, and reform the global governance system. It provides strong theoretical and institutional guarantees for the great rejuvenation of the Chinese nation and the building of a human community with a shared future.

B | Extraterritorial Application of Domestic Law

The Peace of Westphalia established the basic principle of national sovereignty and equality, marking the origin of modern international law. The international system composed of independent sovereign states is thus referred to as the "Westphalian system."[10] After the end of World War II, particularly since the beginning of the 21st century, the trend of globalization has strengthened. In order to safeguard international peace and security and promote international cooperation, states voluntarily transfer some sovereign powers, such that intergovernmental organizations as well as other non-state actors have become subjects of international law. As a result, national sovereignty has been somewhat weakened.[11] In spite of this, as long as the "horizontal" parallel power structure of the international system remains fundamentally unchanged, states are always the basic subjects of international law, and the principle of equal sovereignty among states is always the core principle of the international order. Therefore, territorialism remains the organizing principle of contemporary governments. Each government exercises its powers within its specific territorial jurisdiction, including legislative, enforcement, and judicial powers. This constitutes the fundamental principle that maintains the international order.[12] Thus, under the principle of equal sovereignty among states in the international system, domestic law is essentially "territorial" and can regulate actions that occur within its own territory. This is known as the domestic effect of

10 LI Minqian,《威斯特伐利亚和约》与近代国际法 (*The Peace of Westphalia and the Modern International Law*), 商务印书馆 (The Commercial Press), at 5 (2018).

11 William W. Burke-White, International Legal Pluralism, 25 *Michigan Journal of International Law*, 963–979 (2004).

12 Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law*, Oxford University Press, at 5, 224 (2009).

domestic law and constitutes a general principle of domestic law effect.

However, since the beginning of the 20th century, due to the increasingly frequent cross-border flows of people, goods, and behaviors, the trend has been for states, especially strong ones, to continuously expand the scope of the effect of their domestic laws beyond their territories. As a result, domestic law has gradually acquired the extraterritorial effect.[13] Therefore, when a national authority regulates behavior that occurs outside its territory, based on domestic law with the extraterritorial effect, the issue of the extraterritorial application of domestic law arises. It can be seen that the extraterritorial effect of domestic law is the prerequisite and foundation for its extraterritorial application, while the extraterritorial application of domestic law is the actual manifestation of its extraterritorial effect.

In a broad sense, the extraterritorial application of domestic law includes two scenarios. First is the application or enforcement of domestic laws with the extraterritorial effect within its own territory by the national authority of a country, based on behaviors occurring outside its territory, using those domestic laws as a basis. Second is the exercise of its power outside its territory, and application of its domestic laws, by a country, based on the occupation of another country or in similar circumstances. In the second scenario, the extraterritorial application of domestic law is achieved through the exercise of public authority by the national authority in the overseas territory, which violates the sovereignty of the overseas country and is therefore prohibited by contemporary principles of international law. Therefore, the extraterritorial application of domestic law in this case does not comply with the principle of rule of law and is not within the scope of this discussion, nor is it related to the extraterritorial application system adopted by China.

III Legal Conflicts and Coordination Arising from the Extraterritorial Application of Domestic Law

Due to the contemporary international order being built upon the Westphalian system, the extraterritorial application of domestic law inevitably sparks legal conflicts between states and conflicts between domestic law and international law. Coordination and resolution of these conflicts becomes an essential issue that a country must consider when constructing an extraterritorial application system of domestic law.

A | Legal Conflicts Between States

The extraterritorial application of domestic law is based on the enacted laws with the extraterritorial effect by the legislative body, which is then exercised through law enforcement by administrative agencies or application by judicial bodies. Therefore, analyzing the legal conflicts between states arising from the extraterritorial application of domestic law requires an examination from three dimensions: legislation,

13 See HUO, fn. 2.

enforcement, and judicature.

1. Legislative Conflicts. Based on the principle of national sovereignty, a country's legislative body enjoys an independent legislative power that is not subject to external interference. Therefore, within the scope authorized by its own constitution, a country's legislative body has the right to enact laws with extraterritorial effect. For example, according to Article 1 (1) and Article 8 of the United States Constitution, Congress has the power to "regulate commerce with foreign nations" and "define and punish piracies and felonies committed on the high seas and offenses against the Law of Nations." Therefore, the United States Congress has the authority to enact federal laws with extraterritorial effect,[14] especially in the areas of trade administration and punishment of specific international crimes.[15] Similarly, in China, the National People's Congress and its Standing Committee are granted legislative power by the Constitution according to Articles 62 and 64 of the Constitution of the People's Republic of China, and there is no explicit or implicit prohibition on their enactment of laws with extraterritorial effect. Therefore, China's legislative body also has the authority to enact laws with extraterritorial effect.

In the era of globalization, national interests are no longer confined within the boundaries of a country's territory. As a result, legislative bodies of different countries are competing to enact laws with extraterritorial effect. Consequently, it is inevitable that the legislative boundaries of different countries overlap, leading to an increase in legislative conflicts. For example, the United States Foreign Account Tax Compliance Act (FATCA) requires foreign financial institutions to provide the U.S. Internal Revenue Service with the bank account and financial assets information of all American account owners. Inevitably, this requirement conflicts with legislation in China, as the Commercial Banking Law of the People's Republic of China stipulates that commercial banks have an obligation to maintain the confidentiality of depositors. Regarding customer deposits, unless otherwise provided by Chinese law, commercial banks have the right to refuse any entity or individual's inquiries.[16]

However, the legislative conflicts mentioned above are only formal or "virtual" legal conflicts. If administrative and judicial authorities do not actually enforce or apply such laws, or if they engage in consultations and coordination with relevant countries through multilateral or bilateral mechanisms during the process of enforcement and application of laws, there will be no "real" legal conflicts and no international disputes will arise.

Article 12 (1) of the Anti-Foreign Sanctions Law of the People's Republic of China (China Anti-Foreign Sanctions Law) stipulates that "no organization or individual shall implement or assist in the implementation of discriminatory restrictive measures imposed on Chinese citizens and organizations by foreign

14 Anthony J. Colangelo, A Unified Approach to Extraterritoriality, 97 *Virginia Law Review*, 1019–1031 (2011).

15 Gary B. Born & Peter B. Rutledge, *International Civil Litigation in the United States* (4th edition), Wolters Kluwer, at 578 (2007).

16 中华人民共和国商业银行法 (Commercial Banks Law of the People's Republic of China), Art. 3, 29.

countries." Therefore, in theory, there are no geographical restrictions on the effect of this provision. However, this provision does not necessarily lead to actual legal conflicts; China Anti-Foreign Sanctions Law does not specify the legal responsibilities for violating this provision. Its legal effect lies only in providing a legal basis for Chinese citizens or organizations to seek judicial remedies against individuals or organizations that violate this provision. Whether Chinese courts exercise jurisdiction and how they apply the law will depend on other laws such as Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships. Therefore, whether Article 12(1) of China Anti-Foreign Sanctions Law will result in actual legal conflicts depends on the judicial policies and practices of Chinese courts.[17]

For another example, Article 8 of the Criminal Law of People's Republic of China (China Criminal Law) stipulates that if any foreigner commits crimes against Chinese citizens outside the territory of China, the law can be applied to them. Due to territorial jurisdiction being the primary basis of criminal law jurisdiction, this provision theoretically may result in legal conflicts with other countries. However, in the "Naw Kham" case,[18] when Naw Kham and five other foreign nationals involved in the Mekong River case were arrested abroad and extradited to China, Chinese judicial authorities penalized them based on China Criminal Law, which did not trigger actual legal conflicts between relevant countries, nor did it lead to international disputes. This is because during this case, Chinese national authorities did not unilaterally enforce and apply China Criminal Law, but instead negotiated with Thailand, Laos, and Myanmar to formulate a joint law enforcement and security cooperation mechanism, under which the law enforcement and judicial processes were completed.[19]

It is clear that, as the number of domestic laws with extraterritorial effects increases, the occurrence of countries' overlapping legislative boundaries will become more common. However, such legislative conflicts only result in hypothetical legal conflicts and may not necessarily lead to actual legal conflicts in practice. Whether the extraterritorial application of domestic laws will cause rigid collisions between national laws and trigger international disputes depends on how law enforcement and judicial authorities in each country enforce and apply the laws.

2. Enforcement Conflicts. When a country's legislative body formulates laws with extraterritorial effect, it provides a legal basis on which the executive authorities

17 See HUO Zhenxin,《反外国制裁法》的国际法意涵 (An Interpretation of the Anti-Foreign Sanctions Law of China Under International Law), 4 比较法研究 (*Journal of Comparative Law*), (2021).

18 On October 5, 2011, the Chinese vessel "Hua Ping" and the Burmese vessel "Yu Xing 8" were hijacked by an armed gang in the Mekong River. Thirteen Chinese crew members were brutally killed. On November 6, 2012 this gang head Naw Kham (Burma) and five foreign followers, were publicly tried at the Intermediate People's Court of Kunming, Yunnan Province, China. Among them, four defendants were sentenced to death in the first instance, in addition that the six defendants jointly compensate the plaintiffs in the civil action with a total of 6 million RMB. On March 1, 2013, Naw Kham and the other three defendants were executed in accordance with the law.

19 "Four Criminals, Including Naw Kham, in the Mekong River Case Executed on March 1, 2013, in Accordance with the Law."

can enforce such laws and implement foreign-related policies. However, practice has shown that the executive authorities of a country have significant discretion in determining whether to actually enforce such laws and the degree of enforcement. In the case of the United States' practice of imposing sanctions on other countries, its executive departments have adopted a strategically ambiguous approach in how they enforce these sanctions, intentionally creating uncertainty in the boundaries between permissible and prohibited actions to enhance the deterrent effect of the sanctions. This has led to entities of various countries, especially banks, often adopting excessive compliance policies to ensure they stay away from the known boundaries set by the United States, thereby further strengthening the practical impact of United States sanctions laws. Furthermore, the United States executive departments apply varying enforcement measures to entities and individuals from different countries based on their foreign-related policies. For example, since the United States classified China as "the principal strategic competitor challenging United States. interests in multiple areas, including national security and economic matters,"[20] Chinese entities and individuals have become marked targets of enforcement by United States executive departments.

It needs to be noted that unilaterally enforcing domestic laws with extraterritorial effect by a country's executive authorities without consultation and coordination with relevant foreign countries can create real legal conflicts and trigger international disputes, thereby affecting international order. In recent years, the United States has increasingly intensified its suppression of China's interests through "legal sanctions," seriously impacting China-United States relations and threatening the security of the global industrial chain and supply chain. In response to the suppression, the Chinese government has not only lodged diplomatic protests but also taken legislative and enforcement measures to block and counteract such suppression. China's Ministry of Commerce issued the Provisions on the Unreliable Entity List[21] in September 2020 and the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures[22] in January 2021. The Standing Committee of the National People's Congress passed China Anti-Foreign Sanctions Law on June 10, 2021, and China's Ministry of Foreign Affairs has imposed reciprocal sanctions on relevant individuals and entities in the United States on multiple occasions.[23]

It can be seen that when a country's executive authorities unilaterally enforce domestic laws with extraterritorial effect in practice, it can create real legal conflicts

20 White House, "National Security Strategy of the United States of America" (Dec. 2017), p. 2.

21 Order No. 4 of the Ministry of Commerce of the People's Republic of China in 2020.

22 Order No. 1 of the Ministry of Commerce of the People's Republic of China in 2021.

23 Refer to 外交部发言人就中方决定对美有关人员和实体实施制裁答记者问 (Spokesperson's Remark of the Ministry of Foreign Affairs on China's Decision to Impose Sanctions on Relevant the United States Individuals and Entities).

between relevant countries. Affected countries often respond through the diplomatic protests, the enactment of countermeasures or blocking laws, and the implementation of reciprocal sanctions. These real enforcement conflicts can trigger a "legal war" between countries on the matter of sanctions and countermeasures. The tensions and disputes between countries continue to escalate, thereby constituting a major factor that affects the stability of international relations.[24]

3. Judicial Conflicts. Regarding the extraterritorial application of domestic laws, the role of domestic courts should not be overlooked. Firstly, domestic courts play a vital role in applying domestic laws with extraterritorial effect during the adjudication process, and thus they provide an important means of implementing the extraterritorial application of domestic laws. Secondly, since most laws do not explicitly clarify whether they have extraterritorial effects,[25] the determination of whether these "territorially ambiguous" laws have extraterritorial effects, and the conditions under which they are applied extraterritorially, often rely on gradual clarification by the courts. Finally, in international judicial assistance, domestic courts are usually responsible for reviewing requests, thereby possessing enormous discretion in the development of international judicial assistance.

In judicial practice, domestic courts apply domestic laws with extraterritorial effect by exercising "legislative power" or the power of legal interpretation relating to expansion of the extraterritorial effect of domestic laws.[26] Additionally, engaging in unilateral judicial activities beyond their jurisdiction can potentially trigger real legal conflicts between relevant countries. Firstly, in the context of globalization, it is common to have more than one country's court exercising jurisdiction over the same case, a scenario known as "parallel litigation." Secondly, in countries that pursue judicial unilateralism, their domestic courts often disregard the judicial sovereignty of other countries and forcefully apply their domestic laws extraterritorially or engage in unilateral transnational judicial activities. For example, in the case of "GucciAm v. Li,"[27] the Southern District of New York court in the United States requested the Bank of China to provide all relevant information regarding the defendant held in the bank. The Bank of China argued that the United States court had no authority to make such a request and that disclosing customer information would violate Chinese law. Furthermore, the United States court's implementation of the request for evidence disclosure should be based on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, to which both China and the United States

24 See Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in Larissa van den Herik, ed., *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, at 19, 33 (2017).

25 Jeffrey A. Meyer, Extraterritorial Common Law: Does the Common Law Apply Abroad?, 102 *Georgetown Law Journal*, 301–305 (2014).

26 See Jeffrey A. Meyer, Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of United States Law, 95 *Minnesota Law Review*, 110–186 (2010); see LIU Fei, 德国"法官造法"的功能解构 (The Functional Deconstruction of Germany's "Judge-Made Law"), 1 华东政法大学学报 (*East China University of Political Sciences and Law Journal*), (2009).

27 See LI, fn. 2.

are signatories, rather than unilaterally applying its domestic law. The legal dispute surrounding this case lasted for five years. During this period, Chinese regulatory authorities issued two letters regarding the case. However, the United States court still ruled that the Bank of China was in contempt of court and ordered it to pay a fine of $50,000 per day.[28]

In response to judicial conflicts arising from the unilateral application of domestic laws by foreign judicial authorities, a country's measures usually include conducting diplomatic representations, submitting amicus curiae briefs to the court, encouraging parallel litigation, and enacting countermeasures through legislation. For example, to address the expanding jurisdiction of the United States courts in the field of data and their forced application of the United States law, the European Parliament passed the General Data Protection Regulation (GDPR) in April 2016. The GDPR extends jurisdiction based on "the principle of effectiveness." This means that regardless of whether a data controller or a processor has a physical presence within the European Union, if they provide goods or services to EU residents, they are subject to this regulation.[29] As a result, the European Union has transformed from a passive to an active role and has established a set of judicial policies in the field of data to counterbalance those of the United States.

B | Conflict Between Domestic Law and International Law

Since the beginning of the 21st century, the scope of the extraterritorial application of domestic laws in various countries has become increasingly wide-ranging, extending the boundaries they administer. As a result, there has been an increasing number of "contacts" and "collisions" between these laws and international law, which primarily regulates relations between states.

To define the boundaries of state sovereignty in international law, it is necessary to proceed from re-discussing the SS Lotus case,[30] in which the French steamship "SS Lotus" collided with the Turkish vessel "Boz-Kourt" in the international waters of the Mediterranean Sea on August 2, 1926, causing "Boz-Kourt" to sink and loss of 8 Turkish crew members. When "SS Lotus" called into Istanbul, Turkish authorities arrested and sued "SS Lotus" captain and other senior crew members on charges of manslaughter in Istanbul. In 1927, the Permanent Court of International Justice stated in its judgment that "limitations upon the independence of States cannot be presumed... States have full discretion, except insofar as prohibited by peremptory norms."[31] In other words, a state has the right to exercise any sovereign power as long as it is not prohibited by international treaties and customary international law. The principle established

28 Gucci America Inc. et al. v. Weixing Li et al., 768 F.3d 122 (2d Cir. 2014).

29 Sahar Bhaimia, The General Data Protection Regulation: The Next Generation of EU Data Protection, 18 *Legal Information Management*, 21–28 (2018).

30 See Rebecca Barber, An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions, 70 *International & Comparative Law Quarterly*, 343–378 (2021).

31 The Case of the SS Lotus (France v. Turkey), 1927 PCIJ (Series A), No. 10.

by this judgment, known as the "Lotus principle," states that "what is not prohibited by international law is allowed," and it has had a profound impact on the evolution of international law.[32] Accordingly, a state has the right in principle to establish a system of extraterritorial application of its domestic laws, but it must not violate the prohibitive provisions of international law.

Furthermore, due to the extraterritorial application of domestic laws breaking the principle of territoriality, the following two principles of international law are most likely to constitute its prohibitive boundaries. First is the principle of sovereign equality of states. This principle is not only an important principle defined by the Westphalian system, but is also recognized by modern international legal documents such as the United Nations Charter.[33] It is the core of the basic principles of modern international law. State sovereignty has two aspects: the highest authority internally and independent authority externally. Second is the principle of non-intervention in internal affairs.[34] Accompanying the principle of national sovereignty, this principle is enshrined in various international documents such as the United Nations Charter as a norm of international relations.[35] These two principles of international law are both based on territoriality, and the extraterritorial application of domestic law may be a departure from and deviation from territoriality. Therefore, when a country establishes its system of extraterritorial application of domestic law, it needs to ensure that it does not contradict these principles. Otherwise, it would exceed the prohibitive boundaries of international law.

The application of "secondary sanctions" by the United States government agencies to punish foreign entities and individuals is a typical example. Secondary sanctions aim to prohibit or restrict trade activities between third countries and the primary sanctioned countries in order to advance the United States foreign policy objectives. It places the United States foreign policy above that of third countries and uses sanctions as a means to force them to change their foreign policies. This violates the principles of sovereign equality of states and non-intervention in internal affairs, and thus it is considered unlawful under international law.[36]

It should be pointed out that in contemporary international law, there are multiple foundations on which countries can exercise jurisdiction. In the era of globalization and of the internet, one country may claim jurisdiction based on territoriality to apply its domestic law to a specific person and their actions, while another country may assert the same claim based on nationality. The result is that the coexistence of jurisdictional claims is quite common.

32 See HUO, fn. 17.

33 Jennings R. & Watts A., eds., 奥本海国际法 (*Oppenheim's International Law*) (Vol. 1, Part 1), translated by WANG Tieya, CHEN Gongchuo et al., 中国大百科全书出版社 (Encyclopedia of China Publishing House), at 276 (1998).

34 Edited by LIANG Xi, 国际法（修订第2版）(*International Law*) (Revised 2nd edition), 武汉大学出版社 (Wuhan University Press), at 64 (2000).

35 Id. at 67.

36 See HUO, fn. 13; YANG Yonghong, 次级制裁及其反制——由美国次级制裁的立法与实践展开 (Secondary Sanctions and the Counter Measure: Unrolling from the United States Secondary Sanctions Legislation and Practice), 3 法商研究 (*Studies in Law and Business*), (2019).

Therefore, the extraterritorial application of domestic laws, even if it does not violate the prohibitive provisions of international law, can still potentially lead to conflicts between the laws of different countries and result in international disputes. In such cases, the ideal approach for resolution would be for the relevant countries to make adjustments through the conclusion of treaties or for countries to coordinate and resolve the issue in a wise and rational manner.[37] Starting from a "position of strength," unilaterally and forcibly applying a country's domestic law not only violates the principle of sovereign equality of states but also leads to tense international relations and affects the international order.

IV Accelerating the Construction of China's Extraterritorial Application System: Significance, Principles and Pathway

After sorting out the legal conflicts caused by the extraterritorial application of domestic laws and the conflicts between domestic law and international law, and proposing principles and methods for their resolution, this section proceeds from taking a coordinated approach to the rule of law at home and in matters involving foreign parties in the new era of China. It explains the significance and basic principles of accelerating the construction of China's extraterritorial application system of domestic law, and provides suggestions for its implementation pathway.

A | Major Significance

Taking a coordinated approach to the rule of law at home and in matters involving foreign parties is an important aspect of XI Jinping Thought on the Rule of Law. It is an important strategic judgment that China should actively participate in global governance on the basis of safeguarding national sovereignty, security and development interests, and should contribute its wisdom to human civilization, thus promoting the building of a human community with a shared future.[38] Within the systematic undertaking of advancing the rule of law in domestic and foreign-related affairs in a coordinated manner, the acceleration of the construction of China's extraterritorial application system is particularly important.

From a national perspective, laws serve as tools for a country to materialize its power and interests.[39] Only a strong and outward-looking country has the need, willingness, and capability to promote the extraterritorial application of its domestic laws. Through long-term efforts, China's comprehensive national strength has massively increased, and the reform and opening-up have been deepened, resulting

37 See Jennings & Watts, fn. 33 at 331.

38 WANG Yi, 坚持统筹推进国内法治和涉外法治 (Advancing the Rule of Law in Domestic and Foreign-Related Affairs in a Coordinated Manner), 人民日报 (*People's Daily*), p. 11, Mar. 19, 2021; HUANG Huikang, 习近平关于国际法治系列重要论述的核心要义 (The Core Essence of XI Jinping Thought on the Rule of Law Regarding the Series of Important Propositions on the Rule of Law in International Affairs), 1 武大国际法评论 (*International Law Review of Wuhan University*), (2021).

39 Laurent Cohen-Tanugi, *The Extraterritorial Application of American Law: Myths and Realities*, SSRN (Mar. 12, 2015).

in the continuous outflow of national interests. In this context, accelerating the construction of China's extraterritorial application system is not only needed to accompany reform and opening up and safeguard national rights and interests, but is also a realistic guarantee of national strength.

Moreover, in the face of certain hegemonic countries disregarding international law and indiscriminately and improperly applying their domestic laws extraterritorially, and imposing sanctions on Chinese entities and individuals, acceleration of the construction of China's extraterritorial application system is also a must-do for blocking and counteracting such extraterritorial application and for defending China's dignity and interests. In other words, the logical structure of China's extraterritorial application system should not only include the reasonable expansion of the extraterritorial effect of Chinese laws but should also encompass measures to block and counteract the expansion of foreign laws into China in violation of international law.

From an international perspective, the extraterritorial application of domestic laws is an extension and expansion of a country's sovereign power beyond its territorial scope, which inevitably comes into direct "contact" and even "collision" with the laws of other countries and international law. Therefore, there is a question of how to construct an extraterritorial application system for domestic laws based on principles and methods that will have an impact on international legal rules and governance mechanisms.

As mentioned above, the unilateral and forced promotion of the extraterritorial application of domestic laws by the United States, especially the implementation of "secondary sanctions," not only triggers legal conflicts between countries but also crosses the prohibited boundaries of international law, causing international disputes and threatening international peace, security, and prosperity. As a responsible major country, China has always upheld the international system centered on the United Nations and the international order based on international law. XI Jinping emphasizes, "As China gets closer to the center stage of the world and participates in international affairs as a responsible major country, China must be proficient in the use of the rule of law. In our external struggles, we must wield the weapon of law, occupy the high ground of the rule of law, and dare to say no to those who undermine and disrupt. The global governance system is undergoing a critical period of adjustment and transformation. We must actively participate in the formulation of international rules and be participants, promoters, and leaders in the process of global governance transformation."[40] Therefore, by constructing an extraterritorial application system for domestic laws based on respecting the rule of law in international affairs, China will promote the improvement of international legal rules and the transformation of the global governance system in a constructive and progressive manner, and contribute to the

40 XI Jinping, 论坚持全面依法治国 (*Advancing Law-Based Governance on All Fronts*), 中央文献出版社 (Central Party Literature Press), at 225 (2020).

construction of a more progressive and just international order.

B | Basic Principles

As mentioned above, the legislative body's formulation of laws with extraterritorial effect serves as the foundation for the extraterritorial application of domestic laws. Meanwhile, the enforcement or application of such laws by executive and judicial authorities serves as the means of implementing the extraterritorial application of domestic laws. Therefore, the structure of China's extraterritorial application system integrates legislative, enforcement, and judicial governance mechanisms.

Firstly, as a socialist country under the leadership by the CPC, China is accelerating the construction of an extraterritorial application system for domestic laws. The primary principle is that, under the unified leadership of the CPC, each of legislative, executive, and judicial authorities should fulfill their respective duties and coordinate their efforts. This not only serves the purpose of improving China's socialist rule of law system and advancing the modernization of the national governance system and capacity, but also meets the inevitable requirements of actively participating in the reform of the global governance system and promoting the construction of a human community with a shared future.

Secondly, in contrast to the United States' pursuit of unilateralism and hegemonic mentality, China upholds genuine multilateralism and advocates for the construction of a human community with a shared future. China promotes the development of globalization towards a healthier, more balanced, and more inclusive direction. Therefore, the construction of China's extraterritorial application system should be based on multilateralism. In the legislative, judicial, and enforcement processes, the legitimate interests and concerns of other countries are taken into account, and the bottom line of the system construction is to not violate the prohibitive provisions of international law. As XI Jinping notes, "Acting from a so-called 'position of strength' is not the way to handle international affairs, and hegemonic, domineering and bullying acts should be firmly rejected. In addressing international relations, we should observe the purposes and principles of the UN Charter and the principle of extensive consultation, joint contribution and shared benefits. We need to practice true multilateralism and oppose actions that use the name of so-called 'rules' to undermine the international order and cause confrontation and division."[41]

Furthermore, whether the extraterritorial application of domestic laws can be effectively implemented in practice ultimately depends on a country's national strength. It is unnecessary and unattainable to blindly expand the scope and extent of extraterritorial application without considering a country's own capabilities. XI Jinping emphasizes, "We must recognize that the evolution of the

41 习近平出席上海合作组织成员国元首理事会第二十一次会议并发表重要讲话 (Statement by XI Jinping at the 21st Meeting of the Council of Heads of State of the Shanghai Cooperation Organization), 人民日报 (*People's Daily*), p. 1, Sep. 18, 2021.

principal contradiction facing Chinese society does not change our assessment of the present stage of socialism in China. The basic dimension of the Chinese context—that our country is still and will long remain in the primary stage of socialism—has not changed. China's international status as the world's largest developing country has not changed."[42] It is clear that a sober understanding of China's international status as the world's largest developing country and of the current "West strong, East weak" pattern is a prerequisite for thoroughly and rationally constructing China's extraterritorial application system. Therefore, the principles of constructing China's extraterritorial application system should be based on the actual needs of China's international status, national strength, and the protection of significant interests, while taking into account our capabilities and designing appropriate institutional arrangements.

C | Implementation Pathway

The construction of China's extraterritorial application system aims to appropriately expand the application of our domestic laws beyond our national borders, while effectively preventing and countering the improper application of foreign laws within our jurisdiction. Therefore, China's extraterritorial application system should have the dual functions of "defense and offense," and the construction of the system should be carried out from both "defensive" and "offensive" perspectives.

1. Blocking and Countering the Improper Extraterritorial Application of Foreign Laws. China is currently at a critical juncture in realizing national rejuvenation, and China-US relations are facing a paradigm shift and entering a period of turbulence and transformation.[43] In this context, the external legal challenges that China faces mainly manifest in certain Western countries, led by the United States, using the extraterritorial application of their domestic laws as a means to interfere in China's internal affairs, exercise "long-arm jurisdiction" over Chinese entities and individuals, and impose unilateral sanctions. Therefore, for the construction of China's extraterritorial application system, the urgent task is to focus on countering external sanctions, external interference, and "long-arm jurisdiction," and to construct a legal system that blocks and counters the improper extraterritorial application of foreign laws.

So far, China has promulgated a series of laws and regulations aimed at blocking and countering foreign actions, including China Anti-Foreign Sanctions Law, the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures, and the Provisions on the Unreliable Entity List. The Chinese legal system for blocking and countering the improper extraterritorial application of foreign laws has taken initial shape. However, due to being in the early stages of formation, the current legal norms

42 Central Propaganda Department of the Communist Party of China, 习近平新时代中国特色社会主义思想学习纲要 (*An Outline for the Study of XI Jinping Thought on Socialism with Chinese Characteristics for a New Era*), 学习出版社 (Xue Xi Chu Ban She), and 人民出版社 (People's Publishing House), at 11 (2019).

43 See DA Wei, 选择国内战略、定位中美关系 (Choosing Domestic Strategies and Locating China-US Relations), 2 美国研究 (*The Chinese Journal of American Studies*), (2019).

in China generally suffer from vague and insufficiently operational provisions, which require urgent modification and improvement.[44] Taking China Anti-Foreign Sanctions Law as an example, although the law provides general provisions on the basic principles, countermeasures, and obligations of China in countering external sanctions, it lacks specific provisions regarding the coordination mechanism for countering external sanctions, regarding the formulation of countermeasures list as well as regarding the specific enforcement procedures. Therefore, in order to effectively implement the various systems designed to counter external sanctions under this law, it is necessary to develop more specific implementation rules and regulations.[45]

From the perspective of administrative law enforcement, although Chinese administrative agencies have addressed a series of cases in countering and blocking actions, they still have room for improvement in law enforcement capabilities and practical experience. Therefore, administrative agencies should quickly develop relevant law enforcement practices and improve the executability, predictability, and necessary deterrence of China's blocking and countering legal system by setting up good demonstrations of law enforcement cases.

From a judicial perspective, the role of Chinese courts needs to be strengthened. According to the Organic Law of the People's Courts of the People's Republic of China, the Supreme People's Court can interpret specific legal issues that arise in trial work and can issue guiding cases.[46] Therefore, for issues that arise during judicial trials involving the China Anti-Foreign Sanctions Law and future blocking and countering laws, the Supreme People's Court can promote legal improvement and institutional building by issuing judicial interpretations and guiding cases.

2. Promoting the Extraterritorial Application of Chinese Law. Blocking and countering the improper extraterritorial application of foreign laws falls under the "defensive" aspect of China's extraterritorial application system, aiming to create a "shield of the rule of law in foreign-related affairs." As the world's largest trading nation, the second-largest economy, and a developing major country China also needs, in the long run, to accelerate the "offensive" aspect of building its extraterritorial application system, focusing on creating a "spear of the rule of law in foreign-related affairs," providing strong legal safeguards for the great rejuvenation of the Chinese nation and the building of a human community with a shared future.

After years of construction, the socialist rule of law system with Chinese characteristics has basically taken shape. Within this system, legislation concerning national security and major interests has already included provisions with

44 See XU Weigong, 论次级经济制裁之阻断立法 (On Blocking Statues to Fight Against Secondary Economic Sanctions), 2 法商研究 (*Studies in Law and Business*), (2021); SHEN Wei, 中美贸易摩擦中的法律战——从不可靠实体清单制度到阻断办法 (Legal Warfare in the US-China Trade Friction: From the Unreliable Entity List System to Blocking Regulations), 1 比较法研究 (*Journal of Comparative Law*), (2021).

45 See HUO, fn. 17.

46 中华人民共和国人民法院组织法 (Organic Law of the People's Courts of the People's Republic of China), Art. 18.

extraterritorial effect, and there has been an accumulation of law enforcement and judicial practices regarding the extraterritorial application of domestic laws. However, compared to the practical needs of safeguarding national interests and the long-term goal of improving international legal rules and reforming the global governance system, China's legislation, law enforcement, and judicial practices are still in the preliminary stages. Thus, it is urgent to accelerate the construction of China's extraterritorial application system.

From a legislative perspective, Chinese legislative body should accelerate the development and implementation of a strategic plan for foreign-related legislation. Based on the priority of safeguarding national security and interests, the legislative body should focus on key areas and gradually formulate new laws or amend existing laws to expedite the construction of a legislative system that has extraterritorial effect. This will provide legal guarantees for law enforcement and judicial practices.

In the process of formulating new legal provisions or amending existing ones, the focus should be on safeguarding China's rights and interests. It is important to clearly determine the boundaries of China's extraterritorial application and fully consider the legitimate concerns of foreign countries and compatibility with international legal rules. Based on this, it is necessary to clearly define the conditions, methods, scope, and legal consequences of China's extraterritorial application. Through the design of practical laws, regulations and rules, it is important to ensure the implementation and effect of these measures.

From an enforcement perspective, Chinese administrative agencies should actively and cautiously enforce laws, regulations, and departmental rules that have clear extraterritorial effect. Furthermore, agencies must exercise discretion appropriately by rationally interpreting the laws and regulations to gradually determine their extraterritorial application. In law enforcement practices, efforts should be made to enhance the predictability and relative stability of China's extraterritorial application. It is important to note that administrative law enforcement may lead to actual legal conflicts between countries. Therefore, administrative agencies should focus on reducing international disputes that may arise from conflicts of enforcement jurisdiction by utilizing or establishing multilateral and bilateral mechanisms. This will create a favorable external environment for China's peaceful development.

At the judicial level, the role of Chinese courts is particularly important. The independent exercise of judicial power in accordance with the law is a universally-followed rule of law principle in contemporary countries. Compared to administrative agencies, Chinese courts have inherent relative independence and moderation in participating in the construction of the foreign-related rule of law system, making them more easily accepted by the international community. Therefore, Chinese courts should fully utilize their transnational judicial governance authority.[47] This can be done by

47 See HUO Zhengxin, 论全球治理体系中的国内法院 (On Domestic Courts in the Global Governance System), 3 中国法学 (*China Legal Science*), (2018).

appropriately interpreting and applying the law in judicial practice, promptly publishing guiding and typical cases, actively participating in international judicial assistance and transnational judicial dialogues,[48] and forming a mutually supportive interaction pattern with legislative and administrative agencies.[49] Together, the courts and these agencies can jointly promote the construction and improvement of China's extraterritorial application system.

V Conclusion

The need to keep in mind both our internal and international imperatives serves as a fundamental concept and experience in the CPC's governance. Advancing the rule of law in domestic and foreign-related affairs in a coordinated manner is a clear reflection of rule of law.[50] In the systematic undertaking of advancing the rule of law in domestic and foreign-related affairs in a coordinated manner, it is crucial to establish China's extraterritorial application system. This system is essential for effectively addressing challenges, preventing risks, utilizing legislative, enforcement, and judicial means to safeguard national sovereignty, security, and development interests. It is also a critical institutional development that, as a responsible major country, promotes the improvement of international legal rules and the transformation of the global governance system.

Therefore, accelerating the construction of China's extraterritorial application system should be based on the protection of national sovereignty, security, and development interests. It is necessary to fully leverage the advantages of China's national system and governance system, under the unified leadership by the CPC, and to coordinate and design from the perspectives of legislation, enforcement, and judicature. There is a need to strive to complete institutional construction that is both defensive and offensive, and that is perfect in terms of law, regulations and rules. Furthermore, as an opponent of hegemonism, a practitioner of multilateralism, and a defender of rule of law in international affairs, China should focus on substantive fairness and reasonableness, and friendly consultations in form, taking into account the legitimate concerns of other countries and the international community. The bottom line of the institutional development should be not to violate the prohibitive provisions of international law.[51]

Based on this foundation, China should promote the formation of a Chinese experience-based approach in extraterritorial application through mature and sound legislative, enforcement, and judicial practices. It should integrate this

48 See CAI Congyan, 中国崛起、对外关系法与法院的功能再造 (Rise of China, Foreign Relations Law and the Re-Construction of Functions of Courts), 5 武汉大学学报（哲学社会科学版）(*Wuhan University Journal* [*Philosophy & Social Sciences*]), (2018).

49 See XIAO Yongping, 提升中国司法的国际公信力：共建“一带一路”的抓手 (Enhancing the International Credibility of Chinese Judiciary: The Key Role of Building the Belt and Road), 1 武大国际法评论 (*International Law Review of Wuhan University*), (2017).

50 ZHANG Jing, 习近平法治思想中关于涉外法治的重要论述阐析 (Analysis of Important Discourse on Rule of Law in XI Jinping Thought on the Rule of Law in the Context of International Rule), 9 中国司法 (*Justice of China*), (2021).

51 See HE Zhipeng, 涉外法治：开放发展的规范导向 (Foreign-Related Rule of Law: Normative Orientation of Open Development), 5 政法论坛 (*Tribune of Political Science and Law*), (2021).

approach into the evolution of the rule of law in its international affairs system, actively participate in the formulation, reform, and improvement of international legal rules in this field, and create a favorable international legal environment for peaceful development and the building of a human community with a shared future.

Acknowledgments This article is a phased research achievement of the National Social Science Foundation's major project "Building China's Rule of Law System for Extraterritorial Application of Domestic Law" (Project Approval Number: 20ZDA031). When writing this article, I received assistance from LIU Jing and CHEN Ruida, doctorate students at the School of International Law, China University of Political Science and Law. I would like to express my sincere appreciation for their assistance.