



EXTRATERRITORIAL SANCTIONS WITH A CHINESE TRADEMARK

EUROPEAN RESPONSES TO LONG-ARM LEGAL TACTICS



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Abstract

China has recently updated its laws on the (security) screening of foreign investment, promulgated a new export controls law, drawn up an ‘unreliable entity’ list, and adopted an EU-style statute blocking the extraterritorial jurisdiction of US law. Beijing wages legal warfare (‘lawfare’) against Hong Kong, in the South China Sea, along the Belt and Road, and in cyberspace. Given today’s global geopolitical contestation it is only a matter of time before the European Union feels the grip of the long arm of Chinese law. Historically, the EU Blocking Regulation has provided for a unified European response to the extraterritorial application of sanctions. However, the proliferation of such sanctions requires a deeper debate on possible additional measures to increase deterrence and, if needed, to counteract them. This paper asks how the EU might prepare to be better protected against such lawfare, and finds inspiration in the established practice of hedging against secondary sanctions, as adopted by the US Treasury Department.

Contents

1. Introduction	1
2. Nature and aims of sanctions.....	1
3. Extraterritoriality.....	4
4. The United States.....	6
5. China.....	9
6. European responses	14

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1. Introduction

Recent US sanctions directed against third parties engaging with Iran and Russia have attracted a lot of attention because they affect European business operations and undermine the EU's ability to autonomously strategise the course of its trade and investment policies. A [review](#) of such 'secondary sanctions' regimes and their evolving geopolitical contexts predicts that the People's Republic of China (PRC) will follow suit in using these measures.¹ With the ink on the EU-China Comprehensive Agreement on Investment not yet dry,² the flexing of Beijing's legal muscles lends further credence to warnings not to go soft on economic relations with a 'systemic rival'.³

This paper adds to the prescriptions to correct Europe's strategic myopia in defining its relations with China by conducting an exploratory examination of the long arm of Chinese law (Section 5). It does so in the light of established practice of the Treasury Department in exercising extraterritorial jurisdiction of US law (Section 4). Before addressing the question of how the EU might prepare to protect itself better against 'lawfare'⁴ from China and the US (Section 6), a few general observations will be made on the nature and aims of sanctions (Section 2) and their extraterritoriality (Section 3).

2. Nature and aims of sanctions

Sanctions constitute one of the most frequently used foreign policy tools in international relations. Yet the term 'sanctions' does not have any commonly agreed definition. The term can simultaneously carry a positive connotation, as when one speaks of the 'legal sanction' in the sense of conferring on a title or a normative proposition the legitimacy of law. Most of the time, however, the notion carries the negative connotation of a penalty or a punishment of deviant behaviour.

¹ This paper is based on the author's contribution to T. Stoll et al., 'Extraterritorial Sanctions on Trade and Investment and European Responses', Study requested by the Committee on International Trade (INTA) of the European Parliament and published as doc. PE 653.618 by the Policy Department for External Relations Directorate General for External Policies of the Union, November 2020. The author is grateful to Weinian Hu, Research Fellow in the Regulatory Policy unit of CEPS, for her contribution to section 5 of this paper.

² The 'unscrubbed' text was published on 22 January 2021 on the website of the European Commission's DG Trade at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237> (last accessed 22 January 2021).

³ The term 'systemic rival' was introduced by the European Commission and High Representative for Foreign Affairs and Security Policy, 'EU-China: A strategic outlook', JOIN(2019) 5 final, 12 March 2019. For a critical review of Europe's fast-tracked 'in principle' conclusion of negotiations of the investment treaty with China before US President Joe Biden took office, see N. Barkin, 'Watching China in Europe', January 2021.

⁴ 'Lawfare', a term coined in 2001 in the US, has effectively deployed financial, insurance and energy law to boost US power and check that of its adversaries. See C.J. Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts', Speech prepared for the 'Humanitarian Challenges in Military Intervention Conference', Carr Center for Human Rights Policy Kennedy School of Government, Harvard University Washington, D.C., 29 November 2001. China has explicitly adopted the concept of 'legal warfare' (*falu zhan*) and applies it in Hong Kong, in the South China Sea, along the Belt and Road, in cyberspace and actual space. See D. Cheng, 'Winning Without Fighting: Chinese Legal Warfare', Report for The Heritage Foundation, 21 May 2012. See also S. Blockmans, 'Why Europe Should Harden its Soft Power to Lawfare', CEPS Commentary, 15 June 2020.

The international lawyer Jean Combacau defined sanctions as “measures taken by a state acting alone or jointly with others in reply to the behaviour of another state, which, it maintains, is contrary to the international law”.⁵ Thus, the idea of imposing sanctions presupposes a breach of an international norm. Georges Abi-Saab and other eminent scholars have confirmed this, by defining a sanction as a coercive response to an internationally wrongful act authorised by a competent social organ.⁶ It may be inferred from that definition that a ‘competent social organ’ is not an individual state acting in its own right (i.e. no ‘private justice’), but rather a body authorised to act on behalf of a collective interest, such as, for example, the UN Security Council (UNSC) or the Council of the European Union.⁷

In international relations, sanctions are not limited to the interruption of economic relations but encompass measures devoid of economic significance, such as diplomatic sanctions. Moreover, beyond their traditional use by states, sanctions have been adopted by international organisations to assist them in fulfilling their mandates.

In more recent practice, sanctions have been widely understood to be imposed in reaction to behaviour that the sender, individual states or international organisations, considers objectionable, even if this has not been codified as illegal. EU law professor Panos Koutrakos describes sanctions as measures that “connote the exercise of pressure by one state or coalition of states to produce a change in the political behaviour of another state or group of states”.⁸ This comes closer to the ‘effects doctrine’ that the US has subscribed to in international law.⁹

It is widely recognised by scholarship that compliance is often not the only, or even the primary, aim of sanctions but that they fulfil other functions. These include the desire to demonstrate the sender’s willingness and capacity to act, to anticipate or deflect criticism, to maintain certain patterns of behaviour in international affairs, to deter further engagement in the objectionable actions by the target and third parties, to support international institutions, to promote subversion in the target, or to assuage domestic audiences.¹⁰ While each situation may see a combination of two or more of these objectives, the central aim of restrictions

⁵ Combacau, C. (1992), ‘Sanctions’, in R. Bernhardt (ed), *Encyclopedia of Public International Law*, Amsterdam: North-Holland, at 313.

⁶ Abi-Saab, G. (2001), ‘The Concept of Sanction in International Law’, in Gowlland-Debbas, V. (eds.), *United Nations Sanctions and International Law*, The Hague: Kluwer Law International, at 39.

⁷ See also Crawford, J. (2001), ‘The Relationship Between Sanctions and Countermeasures’, in Gowlland-Debbas, V. (eds.), *United Nations Sanctions and International Law*, The Hague: Kluwer Law International.

⁸ Koutrakos, P. (2001), *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments*, Oxford: Hart Publishing, at 49.

⁹ See N. Samie (1982), ‘The Doctrine of “Effects” and the Extraterritorial Application of Antitrust Laws’, *University of Miami Inter-American Law Review*, Vol. 14, No. 1, 23-59.

¹⁰ See Barber, J. (1979), ‘Economic sanctions as a policy instrument’, *International Affairs*, Vol. 55, No. 3, 367–384; and Lindsay, J. M. (1986), ‘Trade sanctions as policy instruments: A re-examination’, *International Studies Quarterly*, Vol. 30, No. 2, 153–73.

imposed in reaction to undesirable acts is mostly geared toward exercising pressure to alter the political behaviour of the targeted parties.¹¹

During the second half of the 20th century, trade embargoes and other restrictive measures of an economic nature were the preferred means of putting pressure on rogue states. Such ‘economic sanctions’, fourteen cases of which were imposed by the UN and more than fifty by the US and the EU combined,¹² have been defined as the “deliberate, government inspired withdrawal, or threat of withdrawal, of customary trade or financial relations”.¹³

Economic sanctions such as comprehensive trade embargoes often produce indiscriminate and perverse effects in target countries. The humanitarian catastrophe caused by the comprehensive UN embargo on Iraq in the early 1990s is a case in point.¹⁴ Practice has also taught governments that economic sanctions might hurt the domestic economy of a sanctioning state as well, depending on market size and trade flows. Lessons have been learned from Russia’s counter-sanctions against restrictive measures adopted by the EU, prohibiting, *inter alia*, European businesses from investing in the modernisation of Russia’s energy sector as a reaction to Russia’s war against Ukraine.¹⁵ The Russian counter-sanctions included pressure on France not to halt its plans to deliver €1.2bn worth of warships to Russia; and on food and plant exports from Italy, the Netherlands and other EU countries.¹⁶ The European Commission and the European External Action Service (EEAS) now routinely conduct an impact assessment of a sanctions campaign on EU economies before adopting restrictive measures. This gives member states’ experts time to haggle over the details of the restrictive measures.

The EU prefers to employ ‘targeted’ sanctions, which departs from the full economic embargoes that dominated the international landscape up until the mid-1990s. Yet the negative conditionality tied to its ‘restrictive measures’ imply that economic pain is inflicted on the target. Targeted (or ‘smart’) sanctions were designed precisely to correct the above-mentioned effects. Because they do not presume to affect the economy as a whole, they are not expected to bear significant humanitarian consequences, impoverishing the population and criminalising society. By putting the punitive spotlight on members of the leadership and the

¹¹ See Portela, C. (2014), ‘The EU’s Use of ‘Targeted’ Sanctions: Evaluating Effectiveness’, CEPS Working Document No. 391, March.

¹² See Cortright, D., and G. A. Lopez (eds.) (2002), *Smart Sanctions: Targeting Economic Statecraft*, Lanham: Rowman & Littlefield Publishers, at 1.

¹³ Hufbauer, G. C., J. J. Schott, K. A. Elliott and B. Oegg (2007), *Economic Sanctions Reconsidered*, 3rd ed., Washington, D.C., Peterson Institute for International Economics, at 3.

¹⁴ See Mueller, J., and K. Mueller (1999), ‘Sanctions of Mass Destruction’, *Foreign Affairs*, Vol. 78, No. 3, 43-53.

¹⁵ Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, OJ 2014 L 229/1.

¹⁶ See Blockmans, S. (2014), ‘How should the EU respond to Russia’s war in Ukraine’, CEPS Commentary, September.

elites they hold responsible for wrongdoings, the senders attempt to signal to the citizenry that they do not seek to cause general harm.¹⁷

Nevertheless, the types of measures considered ‘targeted’ actually feature different degrees of ‘targetedness’: oil embargoes hit the economy far harder than arms embargoes and lead to a much wider proliferation of circumvention tactics.¹⁸ Thus, arranged as a continuum, visa bans would constitute the most discriminatory measure, while sanctions affecting transportation or the financial sector would have the widest consequences.¹⁹ The EU sanctions’ practice seems designed to follow a gradual approach: from asset freezes and visa bans on natural and legal persons to more comprehensive sanctions prohibiting European traders and investors from engaging with blacklisted counterparts.

Reductions in aid or suspension of trade preferences adopted under Article 96 of the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, on the one part, and the European Community and its member states on the other part (Cotonou Agreement) are referred to as ‘appropriate measures’. In the context of the European Neighbourhood Policy (ENP), the phrase ‘less for less’ is preferred to tie a drop in financial support by the EU to backsliding of reforms by the authorities of a neighbouring country. The withdrawal of the application of the Generalised System of Preferences (GSP) from beneficiaries is not referred to as a sanction either, even if, like most of the restrictive measures mentioned above, they are intended to produce effects on the trade with targeted countries.²⁰

3. Extraterritoriality

Since the outbreak of the global financial crisis in 2008, the security environment has been marked by a shifting balance of power, an increasing use of hybrid threats, space and cyber warfare, disinformation, and the growing role of non-state actors.²¹ While these developments have pushed the EU toward a proliferation of targeted sanctions mechanisms, including the creation of sanctions lists for ‘horizontal’ (as opposed to ‘vertical’, i.e. country-specific) purposes, such as the fight against chemical and cyber warfare,²² and against violators of

¹⁷ See Portela, C. (2010), *European Union Sanctions and Foreign Policy: When and Why Do They Work?* London: Routledge.

¹⁸ See Blockmans, S. (2013), ‘Curbing the circumvention of sanctions against Iran over its nuclear programme’, *Common Market Law Review*, Vol. 50, No. 2, 623-640.

¹⁹ See Biersteker, T., S.E. Eckert and M. Tourinho (2012), ‘Designing United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium (TSC)’, August 2012.

²⁰ Portela, C. and J. Orbie (2014), ‘Sanctions under the EU Generalised System of Preferences and foreign policy: Coherence by accident?’, *Contemporary Politics*, Vol. 20, No. 1.

²¹ See COM(2020)605 final, EU Security Union Strategy.

²² See, inter alia, Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, OJ 2018 L 259/25; and Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ

human rights (including genocide, extrajudicial killings, and torture),²³ the US and China are increasingly seeking to extend the reach of their domestic law overseas, compelling foreign companies and people to do the bidding of Washington or Beijing. The impact of such extraterritorial sanctions driven by political considerations poses new, if indirect, challenges to the EU.

As Gideon Rachman noted in a recent op-ed in the *Financial Times*: “The rise of extraterritoriality is the latest sign of the sad decline of (...) the rules-based international order, under which big powers at least pretended to play by the same rules as everybody else.”²⁴ Now, the US and increasingly also China seem to think that they can play by different rules. “This looks less like the 21st century, as imagined by international lawyers and more like the 19th century, in which imperial powers imposed their will on others.”²⁵

Indeed, when sanctions are imposed or authorised by an institution like the UN Security Council or the EU’s Council of Ministers to coerce targeted entities to abort their internationally wrongful acts, then questions of extraterritorial jurisdiction generally do not arise. But claims have increasingly emerged in the context of economic issues whereby some states, particularly the US, seek to apply their laws outside their territory in a manner which may precipitate conflicts with other states or international organisations. These measures are referred to as ‘secondary sanctions’, as opposed to ‘primary sanctions’, which are aimed at targets within the sending state’s jurisdiction.²⁶

The US, and perhaps China, has the power to enforce its laws around the world. For midsize powers that is not an option. For the EU, whose normative power extends beyond its territory,²⁷ for instance through its application of antitrust legislation and the General Data Protection Regulation (GDPR), imposing secondary sanctions to meet political ends is not a preferred option. Like smaller players, the Union, which is bound by Article 21 TEU to respect and promote international law, rather supports international rules-making bodies such as the World Trade Organization (WTO), which has ruled against both China and the US on occasion.

2019 L 129I/1, implemented for the first time in July 2020 against individuals and entities from China, DPRK and Russia.

²³ Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 L 410I/1.

²⁴ Rachman, G. (2020), ‘Beware the long arms of American and Chinese law’, *Financial Times*, 22 September.

²⁵ Idem.

²⁶ See Ruys T. and C. Ryngaert (2020), ‘Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions’, *The British Yearbook of International Law*, <https://doi.org/10.1093/bybil/braa007>.

²⁷ Bradford, A. (2020), *The Brussels Effect*, Oxford: Oxford University Press; and Torremans, P. (1996), ‘Extraterritorial Application of EC and US Competition Law’, *European Law Review*, Vol. 21, No. 4.

4. The United States

The US has gone furthest in the use of extraterritorial law. Its most important weapon is one available to no other state — the dollar’s status as the global reserve currency. The rationale rests on the premise that foreigners often use the American financial system and so become vulnerable to prosecution under US law. Concomitantly the US can threaten foreign companies and individuals with financial sanctions, wherever they are.

The application of American economic sanctions to subsidiaries of US-based corporations established in Europe can be traced back to a case of 1961-65 involving an effort by the administration of Lyndon Johnson to impose its embargo on trade with China on the French subsidiary of the Fruehauf-Seymour Group.²⁸ Several states made diplomatic protests at these extraterritorial jurisdiction claims.²⁹ The issue flared up again in the early 1980s when the US tried to punish the Soviet Union for the imposition of martial law in Poland by requiring European companies like Alsthom-Atlantique to cease work on construction of the Siberia-Western Europe natural gas pipeline, and thus prevent the export of western technologies to the communist bloc.³⁰ Though no court has directly held the US pipeline regulations unlawful, they were withdrawn under pressure from the then European Community and its member states, which issued several joint *démarches*.³¹

The adoption of legislation in the US imposing sanctions on Cuba, Iran and Libya has stimulated opposition in view of the extraterritorial reach of these measures. The extension of sanctions against Cuba in the Cuban Democracy Act of 1992, for example, prohibited the granting of licences under the US Cuban Assets Control Regulations for certain transactions between US-owned or controlled firms in the UK and Cuba. This led to the adoption of an order under the 1980 Protection of Trading Interests Act by the UK government.³²

Amending the 1992 legislation, the adoption of the Helms-Burton Act in March 1996 tightened sanctions by providing for, inter alia, the institution of legal proceedings before US courts against foreign persons or companies deemed to be ‘trafficking’ in property expropriated by Cuba from US nationals.³³ In addition, the Act enabled the US to deny entry into the country of senior executives (and their spouses and minors) of companies alleged by the State Department to be ‘trafficking’. Together with the 1996 D’Amato Act,³⁴ intended to impose

²⁸ ILM (1966), Vol. 5, at 476. The text is available at <https://casetext.com/case/united-states-v-fruehauf-2> (last accessed 30 December 2020).

²⁹ See, e.g., Report of the 51st Session of the International Law Association (1964), at 565.

³⁰ See ‘Current Legal Developments’, *ICLQ*, Vol. 37 (1987), at 398.

³¹ *Aides mémoires* of 14 March and 28 April 1983, on file with the author.

³² BYIL (1993), Vol. 64, at 643.

³³ ILM (1996), Vol. 35, at 357. This part of the legislation was suspended by President Clinton for the second half of 1996.

³⁴ ILM (1996), Vol. 35, at 1273.

sanctions on persons or entities participating in the development of the petroleum resources of Iran or Libya, this legislation was challenged by many states,³⁵ not just for its purported violation of international law,³⁶ but also for the threat of litigation and heavy damages. The EU in particular took a strong stance on the US approach,³⁷ with the adoption of a ‘Blocking Regulation’³⁸ (prohibiting legal persons incorporated in the EU from complying with US law and court orders) and the threat of bringing the Helms-Burton Act before a WTO dispute settlement panel. The latter attempt was deflected by an undertaking by President Clinton, who had been reluctant to sign the Act in the first place, to continue to issue waivers, deferring effectiveness of its provisions.³⁹

Less trigger-happy than some of his predecessors, President Obama preferred to use the power of America’s extraterritorial jurisdiction. The Treasury Secretary was Obama’s “favorite combatant commander”.⁴⁰ Among those finding themselves in the Treasury’s crosshairs were 14 football executives, including nine current or former FIFA officials, arrested in Switzerland in 2015 and extradited to stand trial in the US.⁴¹ Their mistake was to process allegedly corrupt transactions through US banks. Of more geopolitical significance was the sanctions war that the US waged to force Iran to the negotiating table and reverse its alleged quest for a nuclear weapon.⁴² For European banks, the severe penalties that were imposed by American financial authorities for their dealings with Iran still evoke bad memories. BNP Paribas famously received a \$9 billion fine in 2014 for violating US sanctions.

³⁵ See Lowe, V. (1997), ‘US Extraterritorial Jurisdiction: The Helms-Burton and D’Amato Acts’, ICLQ, Vol. 46, 378.

³⁶ OAS Doc. OEA/SER.P AG/doc. 3375/96, 4 June 1996.

³⁷ See the letter to the Congressional Committee considering changes in the US export control legislation, reproduced in ILM (1996), Vol. 35, at 1329; Decision 95/145/EC, ECSC of the Council and the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, OJ 1995 L 95/45; a démarche of the European Community, reproduced in BYIL (1992), Vol. 63, at 725; European Commission Press Release WE 27/96 of 18 July 1996.

³⁸ Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ 1996 L 309/1. Its most important provisions nullify any effects in the EU of any judgment of a court or tribunal and of any decision of an administrative authority based on those extraterritorial sanctions (Article 4); forbid EU persons from complying with a number of extra-territorial sanctions, unless authorised to do so (Article 5); and allow EU persons to recover in court damages caused by those extraterritorial sanctions (‘clawback’ provision) (Article 6).

³⁹ ILM (1997), Vol. 36, at 529. On 18 May 1998, the Understanding with respect to the Disciplines for the Strengthening of Investment Protection was reached, whereby the EU agreed to suspend action in the WTO in exchange for an EU-wide exemption by the US from the extraterritorial elements of the Helms Burton Act. See BYIL (2006), Vol. 76, at 850.

⁴⁰ Lowrey, A. (2014), ‘Aiming Financial Weapons from Treasury War Room’, *New York Times*, 3 June.

⁴¹ Collett, M., B. Homewood and N. Raymond (2015), ‘World soccer rocked by U.S., Swiss arrests of officials for graft’, Reuters, 27 May.

⁴² From a wealth of literature, see, e.g., R. Nephew (2018), *The Art of Sanctions: A view from the field*, New York: Columbia University Press. On the EU’s range of defences, see Blockmans, S. (2018), ‘The art of sticking with the nuclear deal: Why Europe should defy Trump on Iran’, CEPS Policy Brief No. 2018/01, February.

Russia is also a target for US sanctions, which is where the German port of Sassnitz came into the picture. Russian ships completing the controversial Nord Stream 2 gas pipeline to Germany have been docking there. This attracted the attention of US senators Tom Cotton, Ted Cruz and Ron Johnson, who in August 2020 sent a letter to the town and a German company involved in the project, threatening them with sanctions.⁴³ Mike Pompeo, then US Secretary of State, warned companies involved in Nord Stream to “get out now, or risk the consequences.”⁴⁴ German politicians were outraged by this and worry that President Biden may well keep up the pressure on Russia instigated by his predecessor. US law is sufficiently vague to make any German bank or law firm involved in Nord Stream potentially vulnerable to US prosecution.⁴⁵

The Trump administration took up the sanctions cudgel with much enthusiasm. Following the crackdown on the pro-democracy movement in Hong Kong, the US targeted Carrie Lam, Hong Kong’s chief executive and some of her colleagues. Lam reported that she faced difficulties using credit cards.⁴⁶ But perhaps the most spectacular extraterritorial application of US sanctions law by the Trump administration was the arrest of Meng Wanzhou, CFO of Huawei Technologies, who was detained upon arrival in Vancouver, Canada on 1 December 2018 on an American extradition request for fraud and conspiracy to commit fraud in order to circumvent US sanctions against Iran.⁴⁷ Huawei has also been targeted by US laws that prevent the sale of American computer chips to the Chinese tech giant.⁴⁸ This will make it much more difficult for Huawei to roll out its 5G technology around the world.

Finally, the 2018 US ‘Clarifying Lawful Overseas Use of Data Act’, aka CLOUD Act, amended the 1986 ‘Stored Communications Act’ (SCA) and gives American law enforcement authorities the power to request data stored by most major cloud providers, even if it is electronically-stored communications data located outside the US.⁴⁹ This extraterritorial jurisdiction has raised

⁴³ ‘Sens. Cruz, Cotton, Johnson Put German Port on Notice for Involvement in Russia’s Nord Stream 2 Pipeline’, doc. 202-228-7561, 5 August 2020, available at https://www.cruz.senate.gov/?p=press_release&id=5294 (last accessed 30 December 2020).

⁴⁴ Lee, M. (2020), ‘US warns firms about sanctions for work on Russian pipelines’, *The Washington Post*, 15 July.

⁴⁵ Lohmann, S. and K. Westphall (2019), ‘US-Russia Policy Hits European Energy Supply’, SWP Comment 2019/C 06, February.

⁴⁶ Marlow, I. and N. Lung (2020), ‘Hong Kong Leader Carrie Lam Has Credit Card Trouble After U.S. Sanctions’, *Bloomberg*, 18 August.

⁴⁷ Fife, R. and S. Chase (2018), ‘Canada arrests Huawei’s global chief financial officer in Vancouver’, *Globe and Mail*, 5 December.

⁴⁸ Shepardson, D., K. Freifeld and A. Alper (2020), ‘U.S. moves to cut Huawei off from global chip suppliers as China eyes retaliation’, *Reuters*, 15 May.

⁴⁹ H.R.4943 - CLOUD Act - 115th Congress (2017-2018). The CLOUD Act is balanced by a number of safeguards intended to prevent abuse. For example, a Stored Communications Act (SCA) order seeking the stored contents of communications must be for specific data and will only be granted where the government can establish “probable cause” that a particular criminal offence has been committed and that there is “reasonable belief” or justification that the information sought is “relevant and material” to that ongoing criminal investigation. It thus does not allow mass and indiscriminate collection of communications data. In addition, service providers have the right to challenge these SCA orders where they conflict with domestic law.

concerns about the safety of (personal) data stored in the cloud and potential conflicts with the EU's GDPR.⁵⁰

5. China

*"The very notion of extraterritoriality is sensitive in China, because of its echoes from the 19th century, when many foreigners lived under their own laws in Chinese cities such as Shanghai."*⁵¹

Traditionally, when diplomatic tensions become high, China tends to employ a variety of 'economic instruments' to try to punish its opponent – in addition to official protests issued by the Ministry of Foreign Affairs. Such measures include launching anti-dumping investigations and subsequently imposing high tariffs on products of high demand in China (e.g. Australian barley and wines),⁵² using sanitary and phytosanitary (SPS) restrictions to halt agri-food imports (e.g. Philippines bananas, Australian beef and Norwegian salmon), suspending treaty negotiations (e.g. China-Korea Free Trade Agreement (FTA) against THAAD missile deployment in Korea), and issuing travel warnings (e.g. for Chinese students in Australia, citing racial incidents).⁵³ In the wake of the 'in principle' conclusion of negotiations over its investment agreement with the EU, China even threatened to "take all necessary measures" to safeguard Chinese firms' "legitimate rights", in response to Sweden's move to exclude Huawei and ZTE from its 5G network rollout.⁵⁴

To date, China does not have a coherent legal framework for extraterritorial application or to improve the settlement system of the renminbi (RMB) cross-border interbank payment system (CIPS) to support countermeasures.⁵⁵ Discussions among legal scholars and practitioners have so far focused on understanding how America's extraterritorial jurisdiction system works and on formulating strategies to hedge against and circumvent US sanctions.

When confronted with extraterritorial jurisdiction, the tactic of non-compliance with evidence collection and the recognition and enforcement of judgments has been used on the grounds of violations of China's sovereignty and public order. But Chinese state agencies may consider participating in litigation in individual antitrust or human rights cases. Even though their arguments may not be admitted in foreign courts' deliberations, courts will still listen and

⁵⁰ Church, P. and C. Potratz Metcalf, 'U.S. CLOUD Act and GDPR - Is the cloud still safe?', available at <https://www.lexology.com/library/detail.aspx?g=72241f56-b87e-41d5-8a6e-150d09365a25> (last accessed 30 December 2020).

⁵¹ Rachman, loc. cit.

⁵² See Editorial Board (2020), 'The worrying precedent in China's quarrel with Australia', *Financial Times*, 29 November.

⁵³ See Tan, S. (2020), 'China-Australia relations: Canberra's plan to scrap research accord labelled 'act of revenge' over trade dispute', *South China Morning Post*, 30 December.

⁵⁴ See 'China to take counter-measure against Sweden over excluding Huawei, ZTE from 5G rollout', *Global Times*, 21 January 2021.

⁵⁵ Improving legislation also means strengthening the review mechanism before banking information, data, and state secrets may be exported overseas, since they may serve as evidence in court.

become acquainted with Chinese laws, procedures and business contexts.⁵⁶ China does not use the argument that its state-owned enterprises (SOEs) would benefit from immunity to America's extraterritorial jurisdiction, in anti-dumping investigations and civil litigation. But China's claim that its SOEs are not public bodies has been dismissed by US courts, some of which have voluntarily granted immunity from prosecution in civil litigation to companies directly controlled by the Chinese central and local governments that are not operating in the US.⁵⁷ Chinese companies are generally advised to actively participate in litigation and use US legislation to protect their rights. TikTok/ByteDance, for instance, has counter-sued the US Commerce Department to confront the implementation of Executive Order 13942, prohibiting transactions with the Chinese company for "any provision of services (...) to distribute or maintain the TikTok mobile application, constituent code, or application updates through an online mobile application store."⁵⁸

A recent flurry of legislative activity nevertheless points to a more concerted effort at shoring up China's defences. In a period of less than a year, Beijing has updated existing laws on the (security) screening of foreign investment,⁵⁹ promulgated a new export controls law,⁶⁰ drawn up an 'unreliable entities' list, and adopted a statute to block the extraterritorial effect of foreign laws and measures.⁶¹ We will briefly explore the latter two innovations.

Taking a leaf out of the US rulebook, China's Ministry of Commerce (MOFCOM) on 20 September 2020 published its 'Provisions of Unreliable Entity List', targeting foreign companies accused of endangering Chinese national security.⁶² The provisions are based on the PRC's Foreign Trade Law and National Security Law. According to Article 2, restrictions and prohibitions can be imposed with immediate effect on "foreign entities" (i.e. individuals, enterprises and organisations) that are "endangering the national sovereignty, security, or development interests of China". In the same vein "normal transactions with Chinese

⁵⁶ For example, China's Ministry of Commerce has appeared in court in the "Vitamin C Anti-Monopoly Case" (Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.), referring to the Chinese law on the price fixing of imports and exports by enterprises. Although the Ministry's oral arguments and written opinions were not admitted by the Supreme Court, US federal courts took note of the Chinese government's positions. In many previous cases involving the Chinese government and officials, the Chinese Ministry of Foreign Affairs has submitted written opinions to refer US federal courts to the Chinese government's position.

⁵⁷ Li, Q. (2019), 'On American Extraterritorial Jurisdiction: Concept, Practice and China's Response', *Chinese Review of International Law*, Vol. 3 (in Chinese).

⁵⁸ See Commerce Department Statement on US District Court Ruling on TikTok Preliminary Injunction: <https://www.commerce.gov/news/press-releases/2020/09/commerce-department-statement-us-district-court-ruling-tiktok> (last accessed 30 December 2020).

⁵⁹ Wang, O. (2021), 'China's national security screening rules for foreign investments enter force', *South China Morning Post*, 19 January.

⁶⁰ Bush, N., S. Fang, J. Zhang and R. Xu (2020), 'China's New Export Law', DLA Piper, 19 October.

⁶¹ Beijing has also vowed to invoke Article 5 of the Cybersecurity Law to take measures to monitor, defend and deal with cybersecurity risks and threats originating from within and outside the country.

⁶² Available at: <http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml> (last accessed 30 December 2020).

enterprises, organisations, or individuals [can be suspended], in violation of market-based principles”, when seriously harming the legitimate rights and interests of such Chinese operators. As such, MOFCOM has cast a wide net, delegating the interpretation and implementation of the provisions to a new ‘working mechanism’. By virtue of Article 10, unreliable foreign entities may be restricted or prohibited from engaging in China-related import or export activities, investing in China, and/or entering into China. Their work or residence permit may be restricted or revoked, fines may be imposed, and so on.

By publishing the Chinese equivalent of the EU’s Blocking Regulation on 9 January 2021 the Ministry of Commerce moved its regulatory defences up another notch. Even if the US is mentioned nowhere in the text, MOFCOM’s order is in practice intended to block the extraterritorial effect of American secondary sanctions. In substantive terms, the order draws on the legislative design and experience of the EU in terms of the requirement to report secondary sanctions (and the threat of fines for operators who don’t), the issuance of injunctions, judicial remedies, etc., while also taking into account national conditions and the practical needs of the PRC in dealing with what it considers ‘unjustified’ extraterritorial application of foreign laws and measures:

“Article 2: These Rules apply to situations where the extra-territorial application of foreign legislation and other measures, in violation of international law and the basic principles of international relations, unjustifiably prohibits or restricts the citizens, legal persons or other organizations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations.”⁶³

Article 2 indirectly refers to secondary sanctions (cf. “third State”) and leaves open the question of whether American companies banned by the Treasury Department from doing business with China under US *primary* sanctions would fall outside the application of the Chinese blocking statute.⁶⁴ Pending further clarification from MOFCOM, for instance by adopting an EU-styled annex specifying which foreign laws are blocked, one can only speculate.

Less uncertain is the applicability of the blocking statute to Chinese citizens and *any* legal person under the PRC’s jurisdiction, including therefore foreign joint ventures and wholly owned companies registered in China.⁶⁵ In light of the point made in the previous paragraph,

⁶³ MOFCOM Order No. 1 of 2021 on Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures, 9 January 2021, available in English at <http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml> (last accessed 22 January 2021). On the EU’s blocking Regulation, see Section 4 of this paper.

⁶⁴ See Wang, Z. (2021), China adopts EU-style “blocking statute” - but does it apply to U.S. firms following “primary sanctions?”, *Pekingologist*, 10 January, with reference to the Q&A (in Chinese only) with law professor Han Liyu of Renmin University published on the website of MOFCOM: <http://www.mofcom.gov.cn/article/news/202101/20210103029706.shtml>.

⁶⁵ *Ibid.*

the statute would thus put its own natural and legal persons in the most difficult position of all. However, the Chinese statute also goes further than the EU Blocking Regulation in providing the government support necessary to offset significant losses resulting from non-compliance with foreign extraterritorial laws and measures (Article 11) and the fact that “the Chinese government may take necessary countermeasures based on actual circumstances and needs” (Article 12). With respect to the latter, subsidies come to mind.

While the above-mentioned laws are still settling and waiting to be enforced, it is clear that Beijing is moving its weight from the back to the front foot in dealing with the phenomenon of extraterritorial jurisdiction. That said, a general understanding in ongoing discussions in China is that prudence must be exercised, whether in terms of legislation or tactics, to counter the US application of extraterritorial jurisdiction. It is conceded that America is a superpower in many aspects, including technology, and that countering the US often does not yield the intended results. Before the extraterritorial applicability of Chinese law becomes a reality, domestic laws will be further scrutinised in the light of anti-monopoly, national security and other legislation and standards.

Going forward, the Chinese judiciary has been urged to examine domestic legal provisions, laws and administrative practices in order to identify which of them might be applied extraterritorially with sufficient judicial certainty. For instance, Article 2 of the ‘Law against Unfair Competition’, which refers to the term “operators” as natural persons, legal persons and unincorporated organisations engaged in the production, operation or provision of services, does not specify if overseas individuals or entities fall within the same remit: does the provision *de facto* apply to them? Another example pertains to Article 4, paragraph 3 of China’s ‘International Criminal Judicial Assistance Law’, which stipulates that:

“Without the consent of the competent authority of the People’s Republic of China, foreign institutions, organizations and individuals shall not conduct criminal proceedings in the territory of China. Institutions, organizations, and individuals within the People’s Republic of China shall not provide evidence materials and assistance provided by this Law to foreign countries.”

This clause does not stipulate the competent authority, approval process, time limit and materials to be provided, or the rules of operability.

With regard to national security, Article 8 of the ‘Anti-Secession Law’ foresees the use of “non-peaceful means” and other necessary measures to defend national sovereignty and territorial integrity should “separative forces” declare Taiwan independent. This provision, in fact a vague policy statement in nature, does not in principle qualify for extraterritorial application. In this respect, the language of the new National Security Law for Hong Kong (NSL), announced in June 2020, provides a somewhat sharper example of China’s drive towards the extraterritorial

application of domestic law.⁶⁶ Article 38 of the NSL is so sweeping that it makes even foreigners speaking overseas vulnerable to prosecution for ‘subversion’ (Article 1) in China:

“This Law 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.”

Remarkably, this provision gives the NSL an even broader reach than mainland criminal law, according to which a foreigner is not liable for an act that is a crime under the law unless either the act or the effect occurs in China. The NSL has no such limitation.

But as with the interpretation of Article 8 of the Anti-Secession Law, Article 4(3) of the International Criminal Judicial Assistance Law and Article 2 of the Provisions of Unreliable Entity List, it is ultimately not the substantive definition of the crimes that count but the institutions that will investigate, prosecute, and judge them on that matter. In law enforcement, ‘counterterrorism’ has served as a cover for repressing or monitoring minorities and dissidents. With the creation of new law enforcement institutions for Hong Kong dependent on appointment and appeals procedures that lead back to the PRC central authorities, the NSL that China has imposed on Hong Kong gives Beijing the means to destroy the freedom and autonomy the territory has enjoyed since the 1997 handover from the UK.

Early media reports suggested that many of the city’s business leaders were eager to believe that the NSL will be narrowly applied. But less than a year on there is little reason to believe that Beijing will apply it with restraint. The government of Xi Jinping has already demonstrated, on multiple fronts, its contempt for liberal freedoms.⁶⁷ Indeed, the NSL is a harbinger of China’s emerging power through legal discourse.⁶⁸ Western universities are taking the threat seriously.⁶⁹ The main fear is that Chinese students could be reported on and pursued for straying from Beijing’s official line – perhaps over Taiwan, Hong Kong or the plight of the Uighurs in Xinjiang. This risk has only increased as seminars move online, where they can be recorded. Some western academics and think tankers are also concerned about their own safety and are refusing to travel to China.

Beijing’s ventures into extraterritoriality have begun with free speech and are unlikely to end there. When, for instance, disputes occur over investments made in the context of the Belt and

⁶⁶ The official English translation of the Hong Kong national security law is available at <https://hongkongfp.com/2020/07/01/in-full-english-translation-of-the-hong-kong-national-security-law/> (last accessed 30 December 2020).

⁶⁷ See Declaration of the High Representative on behalf of the EU on the postponement of the Legislative Council elections in Hong Kong, 3 August 2020; and Liu, N. and P. Riordan (2020), ‘Hong Kong pro-democracy lawmakers resign en masse’, 12 November 2020.

⁶⁸ See Rudolf, M. (2020), ‘The Hong Kong National Security Law’, SWP Comment No. 56, November.

⁶⁹ Professor Patricia Thornton, who teaches Chinese politics at Oxford university, tweeted: “My students will be submitting and presenting work anonymously”, as protection against the law. See @PM_Thornton, 22 September 2020. Professors at US universities have announced similar moves.

Road Initiative (BRI), two ‘international’ commercial courts in China are designated to conduct the arbitration.⁷⁰ Going by the canons on conflict of laws and the territoriality-based choice of law rules, courts normally respect the freedom of contractual parties to choose the law of the forum when determining the applicable law at times of dispute. Chinese law prescribes that, where parties to an international contract fail to select the applicable law, the contract will be governed by the law of the state that has the closest link to it.⁷¹ In case of disputes regarding BRI-funded projects, Beijing expects that to be Chinese law.⁷² Under the present blueprint of the BRI’s legal architecture, a lending or any other kind of commercial agreement concluded between China and another country will opt for Chinese jurisdiction as the law of the forum in the event of dispute.⁷³ If, however, as its leadership proclaims, China is committed to upholding and modernising the multilateral trade system,⁷⁴ then it should mobilise the broad international buy-in for its connectivity and growth strategy to fit the BRI with a legal architecture and dispute settlement mechanism that spurs international solutions rather than imposes Chinese legal constructs.⁷⁵

6. European responses

Extraterritorial sanctions have important economic implications, particularly for the EU and its vulnerabilities.⁷⁶ Extraterritorial sanctions also raise critical questions as to their legality under general international law, WTO law and other specific international rules.⁷⁷ The EU, member states and a number of other OECD countries have been especially affected by such measures and have taken some action in response. As mentioned above (Section 4), they have, for

⁷⁰ Between the two courts, one is in Xi’an to arbitrate commercial disputes from projects on the Silk Road Economic Belt, one is in Shenzhen for disputes arising from the 21st Century Maritime Silk Road.

⁷¹ See Articles 4 and 6 of the Law on the Laws Applicable to Foreign-related Civil Relations, as well as Article 126 of the Chinese Contract Law and Article 145 of the General Principle of Civil Law.

⁷² For a special series of BRI-relevant judgments rendered by Chinese courts, see the website of the ‘Guiding Chinese Cases’ project of Stanford Law School, available at <https://cgc.law.stanford.edu/> (last accessed 30 December 2020).

⁷³ Recognising and enforcing foreign judgment in China is a difficult undertaking, treacherous and cost intensive. See Zhang, W. (2014), *Recognition and Enforcement of Foreign Judgments in China: Rules, Practices and Strategies*, The Hague: Kluwer Law International.

⁷⁴ See, e.g., Ming, Z. (2018), ‘China supports and upholds multilateral trading system’, *EUobserver*, 26 July.

⁷⁵ Blockmans, S. and W. Hu (2019), ‘Systemic Rivalry and Balancing Interests: Chinese Investment Meets EU Law on the Belt and Road’, *CEPS Policy Insight* No. 2019-04, 21 March. In order to achieve a swift and less costly dispute settlement solution, one may not be inclined to seek investor-to-state dispute settlement (ISDS) as a solution. In recent years, UNCITRAL has identified a few concerns with the mechanism, such as consistency, coherence, predictability, correctness of arbitral decisions, cost and duration, which require improvement. Other concerns pertain to arbitrators and decision makers, and cost and duration of ISDS cases. For details, see ‘Possible Reform of Investor-State Dispute Settlement (ISDS)’, note by the Secretariat, United Nations Commission on International Trade Law Working Group III, Thirty-sixth session, Vienna, 29 October – 2 November 2018, A/CN.9/WG.III/WP.149.

⁷⁶ See Section 3 of the Study conducted for the INTA Committee of the EP, *supra* n.1.

⁷⁷ *Ibid.*, Section 4.

instance, voiced their concerns when the Helms-Burton Act was concluded and adopted blocking statutes which are still applicable today.⁷⁸ Recently, courts in several member states have begun to enforce the EU Blocking Regulation more assertively.⁷⁹ Consistent enforcement is central to the statute's effectiveness. Only if enterprises can expect that the EU regulation will be enforced as vigorously as US sanctions legislation will they be inclined to align their conduct with European law and disobey diktats from the US Treasury Department. In 2018, after the US withdrawal from the Iran nuclear deal, the Commission updated and expanded the statute's application to these laws.⁸⁰ Arguably, the annex could be expanded further to comprise other pieces of US sanctions legislation (e.g. those concerning Nord Stream 2) and legal acts adopted by China, such as the Anti-Secession Law and the NSL for Hong Kong.

To fulfil its potential, the EU Blocking Regulation must be part of a more comprehensive and integrated European policy against extraterritoriality. For instance, it would be desirable in the future that extraterritorial sanctions adopted by China be countered continuously and consistently. Chinese political discourse has proved to be sensitive to international resistance to BRI and Covid diplomacy and have led to a change of course by Beijing.⁸¹ As a first step, the impact of statements on future extraterritorial sanctions could be amplified when issued jointly by the EU and like-minded states. Perhaps they could even lead to a clarification of international law on the issue.

In the overall interest of enforcing international law and with the aim of demonstrating the EU's determination and ability to back European companies facing the threat or impact of extraterritorial sanctions, recourse to judicial proceedings in China should be welcomed and supported, however unlikely their chances of success.⁸² In this respect, the diplomatic

⁷⁸ When the administration of US President Trump decided to lift the veto on Part III, the EU, together with candidate and EFTA/EEA countries, voiced their deep regret, as did Canada, Mexico, Japan and Russia. Also, the EU High Representative/Vice President, the Minister of Foreign Affairs of Canada and the EU Commissioner for Trade issued a joint statement to consider the extraterritorial application of unilateral Cuba-related measures contrary to international law, and further state: "We are determined to work together to protect the interests of our companies in the context of the WTO and by banning the enforcement or recognition of foreign judgements based on Title III, both in the EU and Canada." Doc. 190417_13, 17 April 2019.

⁷⁹ See, e.g., implementing provisions of the member states on specifying the system of sanctions established by Council Regulation (EC) No 2271/96 of November 22, 1996 such as, in the case of Spain, Law 27/1998. See more generally Arif, S. (2019), 'The EU Blocking Regulation and its Impact on European Companies', available at <https://www.kneppelhout.nl/actueel/the-eu-blocking-regulation-and-its-impact-on-european-companies> (last accessed 30 December 2020).

⁸⁰ Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ 2018 L 199/1.

⁸¹ Wheatley, J. And J. Kynge (2020), 'China curtails overseas lending in face of geopolitical backlash', *Financial Times*, 8 December; and 'China pulls back from the world: rethinking Xi's 'project of the century'', *Financial Times*, 11 December.

⁸² In view of, inter alia, the comments made in Section 5 about Article 4(3) of China's 'International Criminal Judicial Assistance Law'. Incidentally, the draft Comprehensive Agreement on Investment with China does not foresee an ISDS mechanism.

protection offered by member states is key. In addition, coordination and cost coverage should be considered, as is already envisaged in a similar form in the EU Blocking Regulation. In view of the dominance of the US dollar in the world economy, it should not be any surprise that the modest ‘oil-for-medicines’ barter system created by the Instrument in Support of Trade Exchanges (INSTEX) headquartered in Paris did not change business realities and attitudes to trading with Iran.⁸³ Ways should be explored to further improve the effectiveness of instruments such as INSTEX that secure the flow of essential financial services between the EU and its trading partners and to shield the legitimate operations of EU operators, in full compliance with multilateral international agreements.

A more structural solution may be the establishment of an EU Agency of Foreign Assets Control (EU-AFAC), an idea that has been knocking around for a while now.⁸⁴ Unlike the Office of Foreign Assets Control (OFAC) as part of the US Treasury Department, there is no EU agency at hand to oversee financial channels. An EU-AFAC could develop common standards, tools and certification mechanisms for due diligence to boost the confidence of European businesses that they are engaged in trade and investment with countries subject to the extraterritorial jurisdiction applied by third countries.⁸⁵

Such an EU agency could thus assist European companies seeking waivers and exemptions from American and – in the future – Chinese authorities. An EU-AFAC could strengthen EU legal protections for entities engaged in trade and investment with high-risk markets by developing guidelines related to a reinforced blocking regulation and by creating linkages to laws that underpin the Single European Payments Area (SEPA). This would ensure that institutions within the wider European banking system could not arbitrarily deny services to gateway banks or European businesses, effectively quarantining them because of their sustained links to high-risk jurisdictions. An EU Agency of Foreign Assets Control could – in theory – play a broad role in defending the bloc’s economic sovereignty and facilitating international trade and investment. But creating such an agency would be a challenge, not least because it would probably require Treaty change,⁸⁶ for which no unity exists among member states, some of

⁸³ Germany, France and the UK established, with technical and financial support from the Commission services and the EEAS, INSTEX as a special-purpose vehicle to facilitate payments for legitimate trade between the EU and Iran. The instrument was launched in January 2019, and five other member states (Belgium, Denmark, Finland, the Netherlands, and Sweden) and Norway have since joined as shareholders. See also Geranmayeh, E. and M. Lafont Rapnouil (2019), ‘Meeting the Challenge of Secondary Sanctions’, ECFR.

⁸⁴ See, e.g., Lohmann, S. (2016), ‘The Convergence of Transatlantic Sanction Policy against Iran’, *Cambridge Review of International Affairs*, 29:3, 930-951; and Lohmann, S. and K. Westphall (2019), ‘US-Russia Policy Hits European Energy Supply’, SWP Comment 2019/C 06, February.

⁸⁵ ‘France urges Europe to push back against ‘unacceptable’ US sanctions on Iran’, *France24*, 11 May 2018.

⁸⁶ A careful consideration is warranted here, in view of the tasks and the feasibility of such EU institutional structure, the relationship between the EU and its member states and the allocation of competences, and with regard to the democratic legitimacy, accountability and parliamentary control mechanisms.

which are wary of undermining their significant trade and investment flows with the US and China.⁸⁷

Indeed, when assessing the impact of foreign direct investments into the EU on security grounds, the Commission, in cooperation with member state authorities, should consider the likelihood that the transaction will make the EU target company more inclined to abide by extraterritorial sanctions, regardless of the country that imposed them.

In view of responses that aim to challenge the legality of American and Chinese extraterritorial sanctions, WTO dispute settlement is key. US criticism of the WTO has been directed against appellate procedure and the Appellate Body. WTO dispute settlement at panel stage is not affected and is being used by the US and other WTO members to the same extent as before. Clarification can be expected from the various panel reports on complaints against the US tariff measures on steel and aluminum, which are due to be circulated soon.⁸⁸ These reports will signify to what extent the more restrictive interpretation of the national security exemption will be further manifested. And because similarly worded (national security) exemptions are common in other areas of international economic law treaties, including friendship, commerce and navigation treaties, bilateral and multilateral investment treaties and FTAs, a report by a WTO panel could be influential also in dispute settlement under those agreements and help clarify the legal limits of the use of extraterritorial jurisdiction. Bringing a complaint could therefore strengthen the EU's reputation as a defender of the global rule-based trade and investment system.

Barring recourse to judicial protection, the EU might respond to extraterritorial sanctions by way of retorsion and thus act in a way that is unfavourable but lawful. In this respect it is worth noting the European Commission's recent proposals to strengthen the role of the euro to obtain greater monetary autonomy and to make EU-based financial-market structures more resilient to disruptive actions by third countries, including through the unlawful extraterritorial application of sanctions.⁸⁹ The sanctions information exchange repository envisaged by the Commission should encompass (anonymous) reporting on extraterritorial measures imposed by third countries to ensure, *inter alia*, that national penalties for breaching the EU Blocking Regulation are effective, proportionate and dissuasive.

In parallel, the Commission is carrying out a review of its trade policy⁹⁰ and has signalled its intention to bring forward a proposal to deter and counteract coercive actions by third

⁸⁷ There is, frankly, more mileage in improving the blocking regulatory system and coordination of implementation by member states.

⁸⁸ This includes complaints by China - DS 544; India - DS 547; the EU - DS 548; Canada - DS 550; Mexico - DS 551; Norway - DS 552; Russian Federation - DS 554; Switzerland - DS 556 and Turkey - DS 564.

⁸⁹ European Commission, 'The European economic and financial system: fostering openness, strength and resilience', COM(2021) 32 final, 19 January 2021.

⁹⁰ European Commission, 'A renewed trade policy for a stronger Europe', Consultation Note of 16 June 2020, available at: https://trade.ec.europa.eu/doclib/docs/2020/june/tradoc_158779.pdf (last accessed 22 January 2021).

countries no later than the fourth quarter of 2021.⁹¹ With respect to the latter, it is worth recalling that retorsion includes countermeasures in the sphere of diplomatic and consular relations, cultural exchanges, etc. A specific but unpopular countermeasure could be the blocking of financial transactions by the SWIFT system, which is constituted under Belgian law and subjected to European legislation and has in the past been used in connection with the implementation of UN sanctions. Imposing restrictions on financial transactions undertaken by SWIFT would, however, not only place serious burdens on foreign relations and on transatlantic relations in particular, it would also entail economic effects that could affect European businesses. Blocking financial transactions by the SWIFT system should therefore be considered only as a measure of last resort in case of a grave violation of international law with important repercussions on the EU, its member states and European enterprises, after the application of all other options has failed.

The above-mentioned measures could be used in combination. But in exploring realistic recommendations, the brittle character of common political will within the EU and the vulnerabilities of individual member states exposed to countermeasures should be kept in perspective. It is also important to understand how other (like-minded) states, such as Australia, Canada and Japan, and to a lesser extent Mexico and Switzerland, are affected and what positions they take. As the European Parliament has recently recalled,

“[t]he EU should continue to work with the US as a partner with whom it has to find solutions to trade issues of common interest and also to threats and to trade frictions, including the extraterritorial application of laws adopted by the US which are contrary to international law”.⁹²

The rationale of seeking cooperation with the US rather than with China on these matters is not only grounded in the constitutional DNA and protection of fundamental rights shared by the transatlantic partners. It also rests on the belief that stronger cooperation with the US will help the EU supranational institutions in building coherence between individual member states. On this basis options for more strategic action vis-à-vis systemic rivals that prey on open economies and democratic institutions could be discussed.

⁹¹ Letter of Intent to President David Maria Sassoli and to Chancellor Angela Merkel, 16 September 2020, available at: https://ec.europa.eu/info/sites/info/files/state_of_the_union_2020_letter_of_intent_en.pdf (last accessed 22 January 2021). See also Commission Work Programme 2021, available at: https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en (last accessed 22 January 2021).

⁹² European Parliament resolution of 7 October 2020 on the implementation of the common commercial policy – annual report 2018 (2019/2197(INI)). In the same vein, see the statement by the European Commission and the High Representative, ‘A new EU-US agenda for global change’, JOIN(2020) 22 final, 2 December 2020, at 10.