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Counteracting the Extraterritorial Jurisdiction through Refusing Recognition and Enforcement

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Abstract

In China's development in foreign business, companies are suffering losses which British and European companies have experienced as well decades ago from the United States extraterritorial jurisdiction, effective countermeasures are needed badly. UK and EU respectively adopted blocking statutes to counteract in last century. Though both are blocking statutes, they have different aims and targets, they're respectively against two kinds of extraterritorial laws. Countermeasures set therein can be concluded to three: refusing the effects of foreign judgments and orders from foreign authority, recovering the damages from specific awards and prohibiting the providing of information to foreign authority. This article mainly discusses the first countermeasures through comparing existing Chinese one with EU and UK. The adoption of "the Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures" is China's first try in blocking statute, which absorbs some experience therefrom but also leaves some gaps. Through comparative analysis this article aims to provide for advice on this matter.

Keywords

China, The United States, UK, EU, Extraterritorial Jurisdiction, Countermeasures, Blocking Regulations

1. Introduction

With the sanction from the United States against Bank of Kunlun in 2012, extraterritorial jurisdiction attracted Chinese people's attention again. In light of an official response published by US Department of the Treasury, the reason for sanction is providing financial service to more than 6 Iranian Banks involving Iran's weapons of mass destruction project (WMDs). Since then, the United States frequently applied its extraterritorial laws to China's companies. Especial-

ly in 2018, United States Department of Commerce Bureau of Industry and Security (Hereinafter referred to as "BIS") has fined ZTE Corporation more than one billion dollars for Iran issues; US Attorney's Office in Eastern District of New York has sued Wanzhou MENG, CFO of HUAWEI, for conspiring financial fraud concerning Iran issues as well in 2019. The main reason for these sanctions is that those Chinese companies acted against some extraterritorial laws of United States, such as the Cuban Liberty and Democratic Solidarity Act of 1996 (hereinafter referred to as Helms-Burton Act) etc. In order to protect its own nationals' interest, Chinese scholars and the government started to do research and even bring it into legislation agenda (Para. 7 of Report of the Constitution and Law Committee of the National People's Congress on the Deliberation Results of the Proposals Submitted by the Presidium of the Fourth Session of the Thirteenth National People's Congress for Deliberation, 2021).

There're two main purposes of extraterritorial laws in the legal system of the United States, one is for economic purpose, to control international business, such as Anti-trust law (hereinafter referred to as Sherman Act); the other is for political purpose, to sanction other countries. Their common character is that the jurisdiction exercised thereunder has no reasonable legal basis and is cross the internationally accepted line. For example, "to seek international sanctions against the Castro Government in Cuba, to plan for support of a transition government leading to a democratically elected government in Cuba" as the purpose of Helms-Burton Act is clearly announced to public at the head of this act, which means that one sovereign state is using its domestic legislation to sanction another sovereign state's legal government under nowadays international law's ruling. It has taken legal measures like prohibiting indirect financing of Cuba to achieve this political goal. As a result, one of Cuba's largest foreign investors, Sherritt International, a Canadian mining company was sanctioned, (Conklin & Cadieux, 2006). However, with analysis we may discover that, the company and its executives are all Canadians, the mining activities happened in Cuba, the entities and people receiving investment were also inside Cuba. There's no reasonable contact with the United States, its extraterritorial jurisdiction cannot be justified.

At the very beginning, the attitude of United States towards extraterritorial law was negative. In American Banana Co. v United Fruit Co., Mr. Justice Holmes delivered the opinion:

> "[W]hile a country may treat some relations between its own citizens a governed by its own law in regions subject to no sovereign, like the high seas, or to no law recognized as adequate, the general rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where it is done."

However, only two years later, in United States v. American Tobacco Company, the Supreme Court changed its view sharply. In latter case the Court determined a contract violating Sherman Act, which was concluded by American

Tobacco Company and its British competitor, and which was allegedly legal in the place where it was made, namely the United Kingdom, (Bloch, 1968). In the same year, Mr. Justice Holmes ironically delivered "objective territoriality" principle in Strassheim v Daily, from which the effect doctrine originated, (Vagias & Dugard, 2014). This principle allows extraterritorial jurisdiction for "[a]cts done outside a jurisdiction but intended to produce and producing detrimental effects within it", (Vagias & Dugard, 2014). Since then, the United States began its extraterritorial application of laws. The proceedings against those external defendants will continue, regardless of the defendants' attitudes towards extraterritorial jurisdiction, and regardless of their absence in proceeding.

After the United States had started applying extraterritorial laws, they experienced some good taste. They found out that they can govern, sanction the rest of the world through their domestic legislation. Therefore, they expanded this kind of jurisdiction to many aspects, such as Foreign Corrupt Practice Act 1977 (hereinafter referred to as FCPA), Iran and Libya Sanctions Act (hereinafter referred to as ILSA) etc.

With the rise of extraterritorial laws in United States, companies from Canada, European Union, and many other countries were sanctioned and suffered great loss. In order to protect their interest, the rest of the world began to explore a way which is able to prevent harm from extraterritorial jurisdiction.

Blocking statute is the result of their trying, it means blocking the effects of extraterritorial laws. At least in 1950s, (Wallace, 2002), there was country adopting blocking statute. With the United Kingdom as predecessor, later in 1980s Australia and other countries of Commonwealth have adopted their blocking statutes one after another. In 1996, the European Union published 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 (hereinafter referred to as Council Regulation (EC) No 2271/96, 1996), which would apply automatically to 28 EU countries before Brexit.

Though there're a lot of blocking statutes in the rest of the world, the measures set therein are similar (Protection of Trading Interests Act 1980 of UK, 1980; Foreign Proceedings (Excess of Jurisdiction) Act 1984 of Australia; Foreign Extraterritorial Measures Act 1985 of Canada; Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996], OJ L 309/1; Ley de Protección al Comercio y a la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional of Mexico) In summary, three countermeasures exist in almost all blocking statutes, namely refusing to recognize the effects of foreign judgments (hereinafter referred to as target judgment) and orders from foreign authority (hereinafter referred to as target requirements), recovering the damages from specific awards and prohibiting the providing of information to foreign authori-

ty. Hereinafter only the first countermeasure would be analyzed.

Under a situation where valid target judgments or requirements already exist, and the properties inside the United States territory of the party against whom it is invoked are not enough for full enforcement, then they will need the assistance from other countries to get them fully enforced, such as his motherland, or assistance by some natural or legal persons with nationality of a third country, such as banks. This countermeasure may be helpful for blocking their effects and protecting that party's interest by refusing or requesting specific persons to refuse to recognize and enforce target judgment and requirement. It's taken by different countries, such as the United Kingdom, Australia, Canada, European Union and Mexico etc.

2. Relevant Countermeasure in United Kingdom

As we can learn from the second reading of Protection of Trading Interest Bill in United Kingdom, during the process of drafting, legislators in Commonwealth countries more focused on Sherman act, whereas in European Union it mainly targeted those sanction acts. Since there're similarities between the blocking statutes of Commonwealth countries, only the United Kingdom will be analyzed as example in the rest part of this chapter.

2.1. Background of Legislation

There're two blocking statutes which are applicable to United Kingdom, namely "The Protection of Trading Interests Act 1980" (hereinafter referred to as 1980 Act) and Council Regulation No. 2271/96. The latter regulation as European Union secondary law and as a regulation shall directly apply to all Member States without transposition. Though once the United Kingdom exited, the Union laws shall have immediately lost their binding force, The United Kingdom Parliament granted them a new source of force through European Union (Withdrawal) Act 2018. From the day of Brexit, its binding force as a European Union secondary law has gone but a new kind of binding force as a domestic law was born. Considering Council Regulation No 2271/96 will be discussed in the part of European Union, only 1980 Act is going to be discussed in this part.

The main target of 1980 Act is Sherman Act. Many scholars, even the officials regard 1980 Act as the British response to Sherman Act, (Kahn, 1980). As having already been mentioned, Sherman Act despite not for sanction, is one famous extraterritorial law. Due to threefold damages set therein, plaintiffs would prefer to bring an action before US courts for more damages. In addition, the stated-owned character of British shipping companies easily leads to price-fixing, (Carroll, 2020). As a result, triple damages which may appear in anti-trust litigation would bring adverse influence on the interest of United Kingdom.

Since 1950s, the attitude of the United Kingdom towards the extraterritorial laws especially Sherman Act began to harden, (Carroll, 2020). 1980 Act was not British first try to block the extraterritorial law of the United States. Back to

1964, United Kingdom has already adopted Shipping Contracts and Commercial Documents Act 1964 (hereinafter referred to as 1964 Act) to refuse the effects of target requirements. However, the 1964 Act was too specialized whose applicable scope was limited into a small area, which means that it's not able to protect the victims who are suffering from extraterritorial laws in different industries.

In 1970s, there were two cases significantly influencing the Secretary of State for Trade of the United Kingdom and the Parliament, Uranium anti-trust litigation and Cunard & Bibby Lines case. In the former case, Rio Tinto-Zinc, a British mining company, was facing the risk of paying triple damage totally up to US$6 billion for the unexpected increase of the price of uranium by non-US producers outside the United States. In the latter case, Cunard, Bibby Lines and two British nationals were convicted by a United States grand jury then faced a fine up to US$6 million for violating US Sherman Act by establishing rates despite their under British and European Union laws totally legitimate actions. Besides, the mainstream in the United Kingdom wasn't in favor of this kind of extraterritorial jurisdiction because they deem it violating international law.

Considering all the factors mentioned hereabove, in order to protect the country's interest, the 1980 Act as the successor of 1964 Act came into life.

The 1980 Act, as stated during its second reading by the Secretary of State for Trade (Mr. John Nott), "[t]his Bill is to reassert and reinforce the defenses of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us", is a response to US extraterritorial law.

2.2. Concrete Countermeasure

1980 Act set different measures to block the effect of target judgment and target requirement respectively. They are in Section 1 and Section 5.

Concerning target judgments when the judgment debtor's assets in the territory of United States are not enough for full enforcement, the judgment creditor may apply for enforcement before a British court. Since the British courts are not allowed to recover any sum under target judgment, the effect of target judgment is blocked. Practically speaking, to some extent this measure is able to validly prevent the national's interest from US's harm, because the parties involved in some extraterritorial cases don't or seldom operate in the United States. Therefore, they have few assets there, which means that other countries' recognition and enforcement is necessary to the full enforcement of target judgments.

At first, we shall look at how 1980 Act refuses the recognition of target judgment. With regard to recognition and enforcement of foreign money judgments in the United Kingdom, there're four approaches which can be divided into two groups, direct approach and indirect approach. On the grounds that the target judgment may come from any foreign country, recognition is probable to be sought through all the four approaches by the judgment creditor.

In order to directly enforce a foreign judgment in the United Kingdom, the judgment creditors must register it first. Once the creditor registers a foreign

judgment in a High Court of the United Kingdom, it shall have the same effect as a judgment directed granted by that court, which means that high court has recognized and could enforce it. The first two direct approaches are through Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 in which the reciprocal conditions of recognizing and enforcing a foreign judgment were set. The former one applies to those judgments from the region in Her Majesty's dominion. The latter one applies to all foreign judgments from specific countries, mostly commonwealth countries, which Her Majesty is satisfied with. In accordance with Section 5 subsection (1), target judgments are not allowed to be registered through these two approaches.

The judgments rendered by a US court as the main target of 1980 Act neither belong to the applicable scope of Administration of Justice Act 1920 nor the Foreign Judgments (Reciprocal Enforcement) Act 1933, which indicates that they are not to be reciprocally recognized and enforced. Notwithstanding there're still other approaches for them to be recognized, such as through treaty or common law.

The third direct approach is through Hague Convention on Choice of Court Agreements. The United Kingdom is a contracting state thereof. Pursuant to its Article 8, once a judgment fulfils all the conditions set in the Convention, the United Kingdom must recognize and enforce it, refusal to recognition and enforcement due to domestic legislations is not allowed for treaties' superiority. In addition, due to the signature of the United States in 2009, US keep the initiative to ratify it. With ratification US enjoy the rights rendered by Hauge Convention which may force United Kingdom to undertake its obligation. Fortunately, the Convention itself excludes anti-trust matters, so that even if the United States become a contracting state in the future, judgments resulting from Sherman Act cannot be recognized through this Convention.

When a foreign money judgment is not able to obtain recognition or registration through the methods mentioned hereabove, there's only one way left for it, namely through common law. In comparison with those which can be directly recognized, to recognize a judgment through common law is an indirect approach. The judgment creditors have to bring a suit before a British court, the judgment he obtained in a foreign country would be the evidence creating a debt against the other party, (Browne & Watret, 2020). Since Section 5 subsection (1) prohibits British court to entertain any proceedings for recovery of any sum under target judgment as well, judgments with extraterritorial effects cannot be indirectly recognized through common law.

Then we shall look at the scope of target judgment under 1980 Act's regime. Though 1980 Act mainly targeted Sherman Act, based on the lesson of 1964 Act which can only counteracted in one narrow area, the scope of the judgments which 1980 Act is going to block in the future are broader than those only resulting from Sherman Act. Or the Acts relating to reciprocal recognition mentioned hereabove shall not be added into the provision, because they don't apply

to US judgments. In accordance with Section 5 (2), target judgments include any overseas judgments for multiple damages and judgments based on a provision or rule of law specified or described in an order under Section 5 (4). Legislators were aiming to create one blocking statute which is applicable to as many extra-territorial laws as possible, so that they don't have to legislate a new law or start the amending procedure in case other extraterritorial laws or conflict in new areas appear. In 1988, due to their foresight, 1980 Act directly apply to an Australian Act simply just through a Secretary of State order, judgments based thereon would lose the quality to be registered according to Foreign Judgments (Reciprocal Enforcement) Act 1933.

We also need to pay attention to the interpretation of judgment, for the reason that the laws may give the word "judgment" other meaning except court final decision. A court may make a number of decisions during a proceeding, but only some of them can be defined as target judgment. According to Cambridge Dictionary, judgment normally means the final decision of a court of law. So far there's no misunderstanding or confusion about the definition of judgment. Nevertheless, judgment under Administration of Justice Act 1920, the Foreign Judgments (Reciprocal Enforcement) Act 1933 or Part 74 of English Civil Procedure Rules-enforcement of judgments in different jurisdictions all shall be interpreted as not only the final decision of the court, but also the order or whatever it's called issued by the court or even by a tribunal. So, the question is, which legal instruments the judgment here shall refer to?

Since 1980 Act itself hasn't interpreted the meaning of judgment, we shall interpret its wording with consistency of context. The word "court" in section 5 shall not include tribunal or other authority because they were separately mentioned in section 2. Since the requirements or prohibitions, namely target requirements were also separately regulated in section 1, as a result, the judgment shall only be interpreted as the final decision of a court proceeding.

Concerning the extraterritorial laws or regulations which blocking statutes are going to counteract (Hereinafter referred to as "target regulation"), section 5 subsection (2)(b) and subsection (4) empowered the Secretary of State to adjust the scope of extraterritorial laws restraining competition through order. Though during the 40 plus years after 1980 Act had come into force, only one order was made by Secretary of State in exercise of his power under subsection (4), section 5 subsection (2)(b) and subsection (4) left a door for future counteraction.

Finally, in order to protect national interest as far as possible, 1980 Act created an exception of non-retroactivity (lex retro non agit). Pursuant to Section 5 (6) a judgment for multiple damages is not allowed to be recognized even if it was rendered earlier than the adoption of 1980 Act.

As for the enforcement of section5, it's difficult to collect any data about how many proceedings were rejected therefor. But with a real case, SAS Institute Inc v World Programming Ltd, based on other section of 1980 Act as reference, this law is really enforced.

Concerning target requirements, Section 1 empowers the Secretary of State to issue orders for the purpose of counteracting specific foreign measures affecting the trading interest of the United Kingdom. Similar to section 5, this section didn't explicitly specify its target regulations, it only specifies a broad area, international trade.

As a result, the first step to counteract is to determine the target regulations which this section applies to by order, in other words, the laws or measures which according to Secretary of State's mind may bring adverse influence on the United Kingdom trading interest. After coming into force of 1980 Act, there were 3 orders issued totally.

After the target regulations have been determined, the next step is to obtain the information when United Kingdom trading interest is endangered. Despite the intent of the authority to protect the trading interest of the nationals or anyone doing business there, they are not able to know everything happening to them. Therefore, the Secretary of State needs the people to inform him the target requirements imposed or threatened to be imposed based on target regulations. As a result, subsection (2) empowers the Secretary of State to set an obligation on the people doing business there of noticing. It also means that this section applies to anyone who carries on business in United Kingdom regardless their nationality.

As the Secretary of State has known the target requirements, the final step is to direct that specific person not to comply with the target requirements for the purpose of avoiding damages to United Kingdom interest as he deems appropriate.

After 1980 Act had been adopted, it experienced two amendments, namely in 1991 and 1993. However, no amendment was made to section1 and Section 5. During legislation process of UK blocking statute, the pain they suffered more originated from Sherman Act, namely those extraterritorial laws restraining competition. Therefore, Section 5 didn't leave a door for sanction acts of the United States. Since the judgment in Section 5 cannot be interpreted as requirement, requirement in section1 as well cannot be interpreted as judgment, which means 1980 Act is not able to block the effect of a judgment resulting from US sanction acts. With the rise of US economic sanctions, the European Union reacted quickly, there's no need for the United Kingdom to fight alone due to its membership. 1980 Act and Council Regulation No 2271/96 together created a comprehensive counteracting legal system for the United Kingdom. However, the attitude in practice of European Union may not be the same tough as the United Kingdom, we shall see the enforcement of Council Regulation No 2271/96 discussed Hereinafter.

3. Relevant Countermeasure in European Union

Long before legislation at Union level, France has already adopted one of the earliest blocking statutes in 1960s, (Li, 2020), namely French law 68 - 678 of 26

July 1968 which is still valid today. With the signature and coming into force of the Single European Act and Treaty on European Union (the Maastricht Treaty, hereinafter referred to as TEU), economic and political integrations of European Union are greatly deepened. The legal basis of Council Regulation No 2271/96 appeared at this moment as well, (Stoll et al., 2020) Article 73c was inserted into Treaty establishing European Community (Treaty of Rome, which was renamed as Treaty on the functioning of the European Union by Lisbon Treaty in 2009, Hereinafter referred to as TEEC 1992 version), article 113 of TEEC 1992 version was replaced. These two articles plus article 235 of TEEC 1992 version justified the response countering US extraterritorial jurisdiction at Union level.

3.1. Background of Legislation

Different from the United Kingdom which suffered from Sherman Act, the extraterritorial laws influencing EU are mostly those sanction acts due to their economic relationship with Cuba, Libya, and other countries.

Cuba is an important trade partner of European Union, in 1970s it was even one of the most important Latin American markets of its one Member State, Spain, (Byron, 2000). The trade of Cuba with European Union though had fallen to only 8.5 per cent, (Byron, 2000) in 1980s but quickly rose to 30 per cent in 1990s, (Byron, 2000). Similar situations happened to EU-Iran and EU-Libya trade. EU is Iran's second biggest trade partner, and the biggest trade partner of Libya. On 12 March 1996, just half a year before Council Regulation No 2271/96 was adopted, Helms Burton Act came into force. With the pending ILSA together they drew the attention of the Council of European Union, (de Vries, 1998). Hereinafter is an example of how Helms Burton Act would influence EU interest.

Under Helms Burton Act's ruling, the United States citizens are able to bring action against "trafficking" in property which was confiscated by Cuba in early 1960s. "Trafficking" here has a very broad meaning, its definition includes possessing, selling, transferring, buying, leasing, managing or controlling confiscated property, as well as using or benefiting therefrom and profiting, causing, or directing the trafficking of a third person. The extremely broad applicable scope of Title III would lead to heavy obstacle for European business operating in Cuba. For instance, if a factory belonged to an US company but was expropriated by Cuban government before 1960, then the government sold it to a private entity, this private entity sold it to another private entity, when EU companies enter Cuban market and intend to buy or lease or simply use this factory, it's very difficult for them to discover the fact that this factory was confiscated by Cuban government several decades ago, notwithstanding they would still be sued for damages due to trafficking. Or in another situation, a EU company had already bought a factory which was confiscated by Cuban government before Helms Burton Act came into force, unless the company could sell it in three months from the beginning of Title III's effective date, or the company would

either violating Title III or losing its legitimate property, because it's allowed neither to possess nor sell it.

Therefore, once these sanction acts came into force, many EU residents or companies would be sanctioned and if there's no countermeasure, damages to EU interest would occur. Since the European Union as a whole has maintained trade relationship with Cuba, Iran etc., they would look for a blocking statute at Union level as well, (de Vries, 1998). In addition, that the Union acts together would make the defend stronger.

As we can see, the adoption of blocking statutes of UK and EU were both out of concern over their economies; they were both aware of the fact that their national interests were at risk; they both knew what is threatening their interest; and they both made decision to protect and counteract. The only difference is that their economies were endangered by different extraterritorial laws, so they have different emphasis.

3.2. Concrete Countermeasure

The purposes of blocking statutes of UK and EU are similar, whereas the concrete countermeasures are different. In the original text of Council Regulation No 2271/96, article 4 set the rule on refusing to recognize or enforce any judgment (target judgment) or decision (target requirements) resulting from the legal instruments specified in annex. In comparison with the countermeasure of UK, the method to refuse, and the scope of the subjects who must follow this rule are wider.

Regarding the methods, the subjects who must comply with EU regulation are not allowed to recognize target judgments in any manner, whereas the methods in UK are limited to the refusal of registration of foreign judgments. Regarding the subjects, all the people referred to in article 11 shall refuse to recognize any target judgments, whereas in UK only courts are obliged to refuse recognition. Normally, people would deem the court as the sole subject to assist enforcement. However, private companies may be required to execute relevant judgments or decisions as well, such as bank or import-and/or export firms, (de Vries, 1998). During the process of enforcement, if the defendant is unwilling to pay the penalty and the court finds money in his bank account, court would require the bank to transfer the money. When the hereabove mentioned bank was incorporated within European Union, it involves the Council Regulation No 2271/96. If that bank does provide for assistance, it indicates that the bank recognizes the binding force of that judgment. In this example, the EU countermeasure is able to successfully counteract, while the UK one cannot.

For that reason, the first paragraph of Article 5 also prohibits any person referred to in Article 11 to comply, whether directly or indirectly, namely through a subsidiary or other intermediary person, actively or by deliberate omission, with any request or prohibition, including orders of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from ac-

tions based thereon or resulting therefrom. All the decisions, requests, prohibitions, and orders mentioned in Article 4 and Article 5 constitute the target requirements in EU blocking statute's ruling. As showed in Bank Melli Iran v Telekom Deutschland GmbH, even if in the absence of an order directing compliance, compliance requested by secondary sanction which is issued to all public is also prohibited.

The first step to fully understand Council Regulation No 2271/96 is to identify the applicable scope of this regulation.

While drafting Article 11, the European Union tended to protect their interest as wild as possible, one approach is that they adopted both personal jurisdiction and territorial jurisdiction to expand the applicable scope, another approach is the simultaneously adopted Joint Action which would be discussed Hereinafter. In accordance with article 11, Council Regulation No 2271/96 applies to any natural person being a resident in Union and a national of a Member State; any legal person incorporated within the Union; any natural or legal person referred to in Article 1(2) of Regulation (EEC) No 4055/86; any other natural person being a resident in the Union, unless that person is in the country of which he is a national; or any other natural person within the Union, including its territorial waters and air space and in any aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity.

Paragraph one distinguishes EU resident and its Member States' national. EU residence concerns the duration of establishing inside European Union, whereas the nationality concerns citizenship. Differing from normal criterion of EU residence, for the purpose of wildly protecting, EU residence in this Regulation has its own special meaning, which carries much more people than the normal one. In combination with paragraph 4, all EU residents except those who are in a third country and hold nationality of that country, shall comply with this Regulation.

Paragraph 3 targeted those natural persons who hold nationality of Member States but established outside the Union, or shipping companies which were incorporated outside the Union but controlled by Member States nationals, if they registered their vessels in that Member State in accordance with its legislation. Provided that the natural person and the shipping company both established outside the Union, there's opportunity for them to register their vessels outside the Union, whereas the owner of the vessels still decide to register them in Member States, then their intents to be protected by that Member State can be deduced therefrom. Since they wish to enjoy the rights, they shall meanwhile undertake the obligations.

Paragraph 5 targeted those who haven't gained EU residence yet but are inside the Union and employed by any employer, (de Vries, 1998), including Member States nationals. It means people holding tourist visa, family visit visa etc. or Member States nationals coming back just for visiting etc. are excluded.

As for the most important subject, any legal person especially banks incorporated within the Union falls into the scope. Subsidiaries incorporated outside EU

are definitely not bound by Article 11 due to their separately independent legal personalities, nonetheless this article prohibited their parent companies from acting through subsidiaries. Another approach besides subsidiaries to operate overseas is through the branches without independent legal personality. In the field of banking, pursuant to an official report of US Offices of Foreign Banking Organizations, EU banks much more prefer to use branches rather than subsidiaries for the operation of business overseas. Branches as assets of their owner have no capacity to undertake obligations or liabilities alone. The rightful final receiver of target requirements is their owner with legal personality, which implies conflict between their obligation under Council Regulation No 2271/96 due to their nationality and their obligation under US extraterritorial laws due to their presence inside the territory of the United States. Though European Union and the United States both show their tough attitude theretoward in laws, judges act carefully while practicing in order to prevent private commercial entities from being victim of the game played by states or the supranational. The Aérospatiale test though deriving from a Supreme Court's decision on transferring information to the United States for litigation, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, it shall have some reference value in this circumstance for they both concern the order of the courts. More specifically speaking, an order directing transfer of information from the court to a private entity shall fall into the scope of Article 5 paragraph 1 as well. Before the judges in US courts order compliance, namely violation of blocking statutes, the Aérospatiale test applies. As we can learn from an empirical study, when the foreign states actively enforce their blocking statutes, US courts normally will not order violation thereof; by contrast when the blocking statutes are just paper tiger, US courts normally ignore it, (Hoda, 2018). This result of empirical study in fact provides an opportunity for foreign states, by truly enforcing their blocking statutes they can successfully block full or partial effect of extraterritorial laws, (Hoda, 2018). Unfortunately, the European Union hasn't seized the opportunity.

Differing from the rule in UK, the European Union normalized the compliance with Council Regulation No 2271/96, while only with the order issued by Secretary of State the relevant subjects in UK have to refuse the recognition and enforcement of target requirement. Considering some situations where the compliance with Council Regulation No 2271/96 would seriously damage the interest of that person or the Union indeed exist, the second paragraph of Article 5 empowers a special Committee to authorize relevant persons, to comply with target requirements which this Regulation tries to block for the purpose of avoiding huge damages. The criteria for application of this waiver provision set therein is significantly subjective, in other words, anytime when the Commission deems sufficient, which possibly cause its existence in name only. In addition, they themselves generated further assistance for US to hurt their own interest by interpreting Council Regulation No 2271/96.

In Bank Melli Iran v Telekom Deutschland GmbH, the Court of Justice of the

European Union (CJEU) the first time has interpreted Article 5 of EU blocking statute, (Brook, Hill, & Murphy, 2022). Bank Melli Iran (Hereinafter referred to as BMI) is an Iranian Bank which was included in Specially Designated Nationals and Blocked Persons List (Hereinafter referred to as SDN list) maintained by Office of Foreign Assets Control (OFAC) of the United States. The SDN list is a secondary sanction list which prohibited any person to trade outside the territory of United States with any person or entity thereon. The defendant, Telekom Deutschland GmbH (Hereinafter referred to as Telekom), is a subsidiary of Deutsche Telekom AG approximately half of whose turnover derives from its US market. It concluded several contracts with BMI. The specific contract at issue which shall expire between 25 January 2019 and 7 January 2021 ordinarily, required Telekom to provide BMI for telecommunication service inside Germany. Telekom notified BMI of the termination of all the contracts between them just ten days after OFAC had issued the SDN list, namely 16 November 2018. BMI filed an action before the Landgericht Hamburg, which held that the termination of Telekom was consistent with Article 5 of Council Regulation No 2271/96; then BMI appealed to the Hanseatisches Oberlandesgericht Hamburg. In this appeal the Hanseatisches Oberlandesgericht referred four questions to CJEU. Having regard to those questions concerning Article 5 paragraph 2, according to CJEU's interpretation, it's possible for Telekom to terminate the contract, namely comply with the requirement of US, without authorization referred to in paragraph 2 and without providing reasons, as long as economic loss that Telekom may suffer is seriously substantial.

Considering the concession made by EU, Regulation No 2271/96 may be identified as paper tiger by US courts, they would ongoing request EU companies to violate EU blocking statute.

As for the penalty, Council Regulation No 2271/96 itself didn't exercise this power, by contrast it empowered Member States to set their own penalty rules with discretion to some extent. For example, those who deliberately or negligently violate Article 5 paragraph one of this Regulation would be fined up to 500,000 Euro in Germany in light of Außenwirtschaftsgesetz von Bundesrepublik Deutschland, Artikel 19 Absatz 4 Satz 1 Nummer 1und Absatz 6, Außenwirtschaftsverordnung von Bundesrepublik Deutschland, Artikel 82 Absatz 2. Whereas in Austria, the highest fine is only 73,000 Euro, (Müller & Kühnert, 2021). According to the result of an open public consultation collected by European Commission, the majority of respondents deemed the determination of Member States to punish actions breaching the Regulation inefficient.

Another approach to protect their interest is the at the same time adopted Joint Action, in case where protection and countermeasure are needed but no relevant rule was set in Council Regulation No 2271/96, because the Union is only able to exercise the power which it was empowered by primary laws, namely the treaties. For the areas where the European Union has no competence nevertheless some extraterritorial laws do harm the Union's interest, for comprehensive protection the Joint Action requires the Member States to take necessary

measures, (de Vries, 1998).

3.3. Amendments of Council Regulation No 2271/96

After Council Regulation No 2271/96 had been adopted on 22 November 1996, it experienced three amendments, namely in 2003, 2014 and 2018. Except the first amendment in 2003 involved only procedure setting in Article 8, the latest two amendments related to substantial changes of the Regulation. In accordance with and for the purpose of Council Regulation No 2271/96 original text, the Commission had the power to add or delete legislative instruments driving from the laws specified in the Annex. Rather than deleted, this provision has been replaced by the second paragraph of Article 1. The power to add or delete legislative instruments of the Commission has never gone, by contrast has been enlarged. Pursuant to Regulation No 2271/96 as amended in 2014, the legislative instruments which could be added to the Annex are not limited to those legal instruments deriving from the laws specified in the Annex, but all with extraterritorial application and causing adverse effects to the Union. Later in 2018, the Commission adopted a delegated regulation adding three laws and one regulation concerning Iran sanctions to the Annex. Three laws thereof were adopted in 2012, namely before 2014, which indicates a reasonable assumption, that the amendment in 2014 was the preparation for the amendment in 2018, on the ground that the original text didn't empower the Commission to add laws to the Annex, but only regulations or legislative instruments.

Comparing two methods of determining target regulations, one is EU way through annex, the other is UK way through Secretary of State order, regarding the amendments the latter is more flexible. It can react to the new changes in target regulation more quickly than the former one which must comply with complicated and slow procedural requirements.

Moreover, a new amendment to Regulation No 2271/96 is in process. Taking into account that 25 years have already passed by after the adoption of EU blocking statute, still only in 2018, US sanctions posed on Iran costed EU businesses more than US$22.5 billion in direct losses, not to mention those indirect losses, (Geranmayeh, 2019). The EU operator has sensed the reason that a number of realistic factors such as value chain restrained the enforcement and compliance of Council Regulation No 2271/96 and aimed to change the situation by further amending. In comparison with EU's ambition to deter and counteract the extraterritorial jurisdiction, some companies hold negative attitude thereto. UK finance association, despite Brexit the amendment of Regulation No 2271/96 may influence the legislation in United Kingdom, gave negative feedback to the amending initiative. Global businesses heavily rely on the US Dollar, the adverse consequence of being excluded from US market far outweighs the financial gain from dealing with sanctioned countries. By deterring and counteracting extraterritorial sanctions, the EU deteriorates the conflict of laws transnational companies may face while operating in both EU and the United States, whereas some

other companies hold positive attitude thereto. SPECTARIS e.V. thought that for now EU companies and financial institutions have to give up their business opportunity with Iran due to the possible penalty and sanction from US, so that the European Union must provide stronger protection to them and not tolerance other countries' sanctions anymore. There's no doubt that entities standing on different position hold different opinions. The operators in finance, one of the departments which depend most heavily on the US dollar and may suffer most greatly from the sanctions of the United State, long for only no or less conflict with the United States. However, the operators in those departments which were less influenced by US sanctions, such as medicine technology, which was expressly exempted by US sanctions, could gain more business chances if the blocking statute can successfully counteract, will not lose their existing business if the blocking statute fails. Anyway, new amendment was planned to be adopted in the second quarter of 2022, since the majority of respondents giving feedback in 2021 about the impact of Council Regulation No 2271/96 indicated its unsuccess, many EU lenders prefer the compliance with US extraterritorial laws to EU blocking statute, (Dupont, 2018), we shall continue pay attention thereto and see what would happen in the future.

In conclusion, with analysis of the structure and rule settings in Council Regulation No 2271/96, we may easily discover, on the one hand, the European Union intended to expand the applicable scope as far as possible resulting some extraterritorial application itself, (de Vries, 1998); on the other hand, the Union had tried to keep themselves all the time inside reasonable boundary over which they may go to the same destination as the United States. The countermeasure discussed here could have achieved its goal falls it were effectively implemented, whereas the fact is that from the lowest level of court to the final interpreter of EU law, CJEU, courts tried to practice the law in a way complying with the extraterritorial laws of the United States. The Union's objectives of free movement of capital and removal of any restrictions on direct investment though indeed suffered significant setback, it's the temporary superior optimal solution for EU regarding to their economy.

4. China's Blocking System and Points to Improve

Similar to the backgrounds of UK and EU, as mentioned in chapter one, more and more Chinese companies are sanctioned by US extraterritorial laws, which resulted in great loss to economy. In order to defend its own interest, China paid attention to blocking statute as well. After several years of exploring and legislation, China also has its own blocking statutes. However, these blocking statutes can only counteract partially.

4.1. Status Quo

After the adoption of "Anti-Foreign Sanction Law (Hereinafter referred to as AFSL)" by the Standing Committee of National People's Congress, and "the

Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (Hereinafter referred to as Ministry of Commerce Blocking Regulation)" by the Ministry of Commerce of China in 2021, China has its own blocking statutes. However, the former one aims at primary sanction, which is totally different from the topic of this paper, secondary sanction. The latter one as department rules, unlike 1980 Act and Council Regulation No 2271/96 which are both ranking highly in their legal system respectively, is the lowest regulation in Chinese legal system which is not empowered to intervene court procedure. As a result, there's no provision regarding refusal to recognize and enforce target judgment, China can only refuse target judgments through general approach, namely through the Civil Procedure Law.

Legal basis on which China's People's courts are empowered to recognize foreign judgments is limited to international treaties and reciprocity. Since China hasn't concluded relevant treaty with the United States, the only way for US judgments to be recognized in China is through reciprocity. In most US States, according to Uniform Foreign-Country Money Judgments Recognition Act courts shall recognize foreign money judgments including China's judgment out of due process. If we only look at the provisions set in laws, the premise of reciprocity is easy to be fulfilled. However, practice is always more complicated. That the theoretical possibility for recognition exists doesn't indicate this possibility is frequently exercised. Taking into account the sensibility in the relationship between China and the US, until 2009, the District Court for the Central District of California, the first US court, the first time, (Song, 2018), has recognized a China's judgment, Hubei Gezhouba Sanlian Indus. Co. v Robinson Helicopter Co. This case provided for basis on which China's court exercises reciprocity, (Song, 2018). Unsurprisingly 8 years later, the Intermediate People's Court of Wuhan City in Hubei Province has recognized the first US judgment, Liu Li v. Tao Li et al. for Recognition and Enforcement of a Civil Judgment of a Foreign Court and Liu Li v Tao Li and Tong Wu, Court Docket No. EC062608, on the basis of reciprocity, (Song, 2018). With these precedents US judgments can be successfully recognized in China's territory provided that they don't harm China's essential interest.

As the theoretical and practical basis allow China's court to recognize US judgments, in addition, those judgments which based on extraterritorial laws are not explicitly blocked in China, as a result, these judgments either shall be recognized then harm national's interest or must be refused through another approach.

Another approach to deny US judgment is to determine that judgment has violated China's law's basic principles, sovereignty, national security and/or social public interest. This provision is more a rule of principle, principle of protecting national interest, than a detailed rule. Therefore, according to the experience of law practicing of the author, China's judges, especially those in the courts of first instance and second instance, are reluctant to apply a rule of principle, on the grounds that at first, they don't have much time and energy during their busy

work and under heavy pressure to think about and apply the principle, secondly they may burden risk to be overruled and undertake the liability.

Taken into account all the factors and analyses in this subsection, it's difficult to block US judgments based on extraterritorial laws pursuant to China's existing legal system.

With regard to the target requirement, the Ministry of Commerce blocking regulation combines the countermeasures in 1980 Act and Council Regulation No 2271/96, requires Chinese nationals to inform the relevant department of State Council when their normal trade with third country is restrained or prohibited by foreign measures. After evaluation the department governing commerce can issue bans to prohibit nationals to follow target requirements.

Like 1980 Act of UK, China didn't normalize the compliance with the Ministry of Commerce blocking regulation, the obligation of refusing the recognition of target requirement appears only when there's a ban issued by Ministry of Commerce. Nationals are entitled to apply for waiver as well, the Ministry of Commerce has full discretion to decide whether to issue the waiver nonetheless, which is in lack of transparency.

Differing from the wide applicable scope of the blocking regulations of the UK and EU, this regulation only applies to Chinese nationals.

Regarding the determination of target regulations, the Ministry of Commerce blocking regulation didn't specify them directly, but still learned from the UK method. It described in article 5 the foreign measures which it aims to counteract and left the discretion to Ministry of Commerce.

These provisions intend to construct a comprehensive legal system counteracting target requirement, but there're two big problems. The first one is that this regulation only applies to those situations where foreign laws and measures restrain or prohibit China's nationals to do business with third country, namely the sanction acts, which mean extraterritorial laws like FCPA aren't targeted. The second problem is the regulation didn't create an obligation, but a power, for the Ministry of Commerce to protect nationals' interest, which means that this regulation may end up as a paper tiger like Council Regulation No 2271/96, especially when the maximum fine for violation is only Yuan 200,000.

4.2. Importance of Legislation on This Countermeasure

Though some companies may actively pay all the damages and/or fines according to target judgment or target requirement in order to continue their operation in US Market, for instance, ZTE Corporation paid US$1 billion fines to US to save the company. Other companies may have no intent to surrender and are eager for remedy to fight against this kind of injustice in their own country.

4.2.1. Comprehensive Rule Is Pareto Superior

There's gap concerning target judgment in Chinese blocking legal system. Adopting specific rules concerning target judgment involves these issues: cost for legislation, and interest saved for relevant nationals.

Legislation is not simply coming up with one draft then approving it, a lot of status quos would be changed. During the process of legislation which normally lasts years, at least experts in law and representatives in People's Congress must be involved. As for experts, they do get more work, nobody could say they are worse off nevertheless. Fund, reputation, promotion and other visible or invisible benefits come therewith, they are better off comparing to no legislation. As for representatives or authorities who bring this into agenda, there's no clear line between better off and worse off for them. On one hand, once they get elected and enjoy the rights, they are in the meantime obliged to serve people. Hence, an obligation which has already existed before cannot be deemed as worse off. On the other hand, in comparison with working on "n" legislations, after adding this one, the number becomes "n + 1" which indeed means more burden. However, more burden is not equal to worse off. The first step to adopt one new rule is to put this idea on agenda, either into five-year legislation plan or through legislation decision. No matter through which way once it's determined it means this idea was repeatedly discussed and demonstrated then finally approved by relevant authority. Since they themselves deem it necessary to legislate and are willing to do this work, they are not worse off therefore.

As for the cost, normally speaking, actions brought under Sherman act or other laws with extraterritorial effect against Chinese companies relate to millions even billions of US Dollar. Instances like Animal Science Products, Inc., The Ranis Company, Inc. v Hebei Welcome Pharmaceutical Co. Ltd., North China Pharmaceutical Group Corporation are able to support this view. In Animal Science Products, Inc., et al. v. Hebei Welcome Pharmaceutical Co. Ltd., et al., the plaintiffs alleged that the defendants, two Chinese companies, conspired to fix price and quantity of vitamin C exported to the United States from China which violated the Sherman Act, and claimed treble damages up to US$147 million, which is equal to approximately RMB 1 billion. Though the case has been remanded three times by court of appeal and supreme court, final judgment has not yet been available, we shall notice that the judgment awarding plaintiffs US$147 million was following a jury trial. While juries' verdicts are regarded as common sense and the truth, (McClellan, 2008) it's rare to be overturned. Regardless of whether in this case the plaintiffs' claim will be dismissed or granted, it indicates that China's companies are exposed under high risk. Without any countermeasure it's possible in the future that more and more China's companies would be enforced to pay more damages. As long as part of the companies' interest can be saved, their total profit would rise. As a result, the tax which they are obliged to pay would rise in the meantime, which is able to cover the cost of legislation.

In summary, with comprehensive rules China's companies are better off due to protection or potential protection to their interest, experts are better off due to their gain of reputation, promotion etc., representatives in People's Congress or relevant authorities are not worse off, the state finance is also not worse off.

Therefore, nobody's worse off but somebody's better off, comprehensive rule is Pareto superior.

4.2.2. The Only Way to Set New Rule

In order to have binding force to courts, adopting a new law is the only way.

Though China's judges are as well bound by judicial interpretations issued by supreme court, technically speaking they cannot be counted as law in broad sense. They are interpretation of laws which were born due to ambiguity of legal provision and die with the end of the law's ruling or with the end of that ambiguity. Interpretations are barely allowed to break through the literal meaning of provisions, which means China's courts are not able to set new rule.

Like the division in some other countries, such as Germany, enforcement of judgments in China is part of civil procedure system. On the grounds that law in narrow sense is the exclusive regulator of procedure systems, this countermeasure must be adopted by National People's Congress or its Standing Committee. It indicates that the here above mentioned Ministry Commerce blocking regulation is in lack of enough hierarchy to regulate judgment.

5. Conclusion

During the hot time of adopting blocking statutes, namely 1950s-1980s, (Wallace, 2002), China was under planned economy scheme or at the beginning of market economy, they did few international trades and investments. Therefore, they were seldom influenced by US extraterritorial laws. Chapter I of this article introduces that with the rise of China's economy, nowadays China's companies and nationals are suffering similar sanctions and damages as what Europeans and British have suffered decades ago, which leads to urgent need for blocking statute. Since many countries have already designed and adopted their blocking statute, it's a big chance before China to learn some lessons therefrom.

In Chapter II and III, 1980 Act and Council Regulation No 2271/96 are chosen as two typical blocking statutes, they have different targets, they base on different legal system, namely common law and civil law, they represent different approaches to counteract. Through the analysis of their legislation background, the countermeasures set therein, and the amendments react against new moves of the United States, China may be in combination with its own situation and need to decide what it tends to learn. However, legislation is not the final step of counteracting, countries cannot equal the adoption of blocking statutes to successful protection. Only with effective enforcement blocking statute can be a real blocking statute.

Despite AFSL and Ministry of Commerce blocking regulation, the former law aims to counteract the US primary sanctions, which is different from the target sanction in this context; the latter rules though set some blocking rules, its applicable scope is limited to one aspect. China's blocking system has not yet been comprehensively established. Chapter IV demonstrates the importance of legislation for China, legislation would be the superior optimal choice.

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Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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