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The Extraterritorial Effect of the Anti-Foreign Sanctions Law on the People's Republic of China

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Abstract

The plurality of international law has led to a cross-cutting relationship between national laws, and legal pluralism favors the legal regulation of persons rather than territory. The transcendence of territorial doctrine in legislation breaks with the framework of the territorialized order established by the Westphalian system that limits jurisdiction to the territory. In response to the growth of Western foreign intervention, China put forward the Anti-Foreign Sanctions Law to exercise extraterritorial jurisdiction against foreign discriminatory restrictive measures to protect the legitimate interests of States, organizations, and individuals in China. Under the convergence of public and private law, the Anti-Foreign Sanctions Law combines the attributes of public and private law. It uses a combination of various clauses to establish extraterritoriality. The basis of jurisdiction has evolved from the strict territoriality principle to the flexible effects doctrine and protective principle. Thus its extraterritoriality has expanded through subject matter jurisdiction, operational mechanism, and the target of the anti-foreign sanctions. The extraterritoriality of the Anti-foreign Sanctions Law will be challenged at both the international and domestic levels: the limits to the exercise of national legislative jurisdiction within the framework of international law, the competition between the extraterritorial prescriptive jurisdiction of the enacting State and the adjudicative jurisdiction of the territorial State, and the balance between national sovereignty and commercial interests.

Keywords

Anti-Foreign Sanctions Law, Extraterritorial Effect, Extraterritorial Application, Effects doctrine, Protective Principle

1. Introduction

The order in the pre-global era was regional, and all legal orders were deter-

mined by land (Schmitt, 1950/2017). "Law" belongs to a word with a boundary meaning in etymology, and each law contains its internal edge, which is the basic process of dividing space (Schmitt, 1950/2017). In ancient Greece (800 BC-146 BC), the decrees issued by Solon were called Nomoi; the wording "Nomoi" originated from the Egyptian wording "Nomes" and had spatial meaning. The wording "Nomoi" originally referred to the provinces or regions of the Ptolemaic dynasty (Schmitt, 1950/2017). Similarly, Homer's description of "Nomos" in the *Odýsseia* highlights the connection between law and land (Homer, 8 BC/2003).

So far, the history of international law is a history of appropriation, which is the connection point between all space and power, order, and field (Schmitt, 1950/2017). At a specific time, the seizure of other countries' jurisdiction was also attached. For example, the application of extraterritorial jurisdiction, namely extraterritoriality in China, could be traced back to the late 19th century, when civilized countries seized the territorial jurisdiction on the territory of uncivilized nations and semi-civilized countries, also known as consular jurisdiction (Liu, 2015). Until 1927, in the *Lotus* case, the Permanent Court of International Justice explicitly prohibited a country from exercising its jurisdiction on the territory of other countries (Fei, 1991). However, international law does not prohibit a government from exercising its jurisdiction on its territory in respect of any foreign acts. A country enjoys broad discretion in exercising its jurisdiction within its territory concerning persons, property or acts outside its territory (United Nations, 2006).

The diversity of laws in the international community makes the domestic laws of various countries cross each other. The objective law of developing the market economy requires breaking through the territorial restrictions, and the long-term transnational activities in the private sphere led to the extraterritorial effect of domestic laws. The extraterritorial effect of domestic law expansion can be understood by legal pluralism. Compared with legal centralism, legal pluralism advocates that many different laws can apply to the same situation (Dupre, 1999), so it tends to regulate people rather than territory by law. Furthermore, the transcendence of legal territorialism shows its effectiveness as a universal movement leading to freedom, which goes beyond the traditional way and breaks the territorial order framework established by the Westphalia system to restrict jurisdiction within the territory.

The global rule of law has a long way to go. A new round of interventionism with the center for the national interest and protectionism as its core has brought a crisis to global governance. The theory that human rights are higher than sovereignty is clamoring for it. The expansion of the security principle has prompted the global governance system to return from multilateralism to great power centralism (Wang, 2022b). The growth of western foreign interference, from safeguarding national security to regulating international human rights, has led to China's increasing reliance on exercising extraterritorial jurisdiction.

In response, China enacted an anti-foreign sanctions law to counter foreign discriminatory restrictive measures to protect the legitimate interests of its country, organizations, and individuals. There are broad and narrow anti-foreign sanctions laws. The limited anti-foreign sanctions law only refers to the *Anti-Foreign Sanctions Law of the People's Republic of China* (hereinafter referred the *Anti-Foreign Sanctions Law*) promulgated in 2021, which is relatively thin in content and incomplete in provisions. In addition, the broad anti-foreign sanctions law also includes laws whose legislative purpose is not to impose anti-sanctions but which have become effective means in reality, such as the *Foreign Trade Law of the People's Republic of China*, the *Anti-Secession Law of the People's Republic of China*, and the *Export Control Law of the People's Republic of China*. This article focuses on the extraterritorial effect of the narrow anti-foreign sanctions law. It first discusses the legal nature of public-private integration, thus identifying the nature of the *Anti-foreign Sanctions Law*. Part III defines the connotation of extraterritorial effect, contrary to extraterritorial jurisdiction and application. Part IV probes into the extraterritorial effect of the *Anti-Foreign Sanctions Law*. In this part, the article first examines the legislative mode, then the jurisdictional basis developing from strict territorial principle to flexible effects principle with protective principle, and last but not least, the expansion trend of extraterritorial effect. Finally, Part V analyzes and summarizes the challenges faced by the anti-foreign sanctions clauses with extraterritorial effects from three dimensions. First is the limitation of the state's prescriptive jurisdiction under the framework of international law. Second is the dispute between the legislative state's extraterritorial prescriptive jurisdiction and the forum state's judiciary jurisdiction. The third is the balance between national sovereignty and commercial interests.

2. The Nature of the Anti-Foreign Sanctions Law

The division between public law and private law can reflect the nature of the legal norms of the *Anti-Foreign Sanctions Law*, and it is related to whether such law can be applied extraterritorial. However, it has yet to be systematically discussed in Chinese academic circles. The mutual integration of public and private law is the combination of them in the same legislation, which has yet to eliminate the differences between them in the subject of the legal relationship, the way of adjustment, and the object of adjustment.

In the stage of ancient international law, the standard of dividing public law and private law appeared. The division of public law and private law can be traced back to Domitius Ulpianus and Gaius, the Roman jurists. To prevent the state from interfering excessively with families and individuals, Ulpianus proposed that public law should be used to stipulate the duties of state officials, and private law should be used to define personal interests (Zhou, 2014). Gaius divided public law and private law in the first volume of *Institutiones*: "Public law involves the Roman empire regime, while private law involves personal interests

(Watson, 1981/1997)." Later, scholars of judicial positivism, glossator, and scholasticism denied the significance of dividing public law and private law. Among them, J.A.C. Thomas insisted that all laws should serve the interests of the society and meet the interests of members; the nature of laws did not depend on whether they were based on the interests of the whole community or individual citizens (Watson, 1981/1997). In the stage of modern international law, public law and private law are increasingly infiltrating. From the 17th to 19th Century, the struggle of the bourgeoisie and the rationalism of the classical natural law school promoted the division of public law and private law (Shen, 1985). In the 20th Century, the nature of law had gone through a process of separation from public law and private law to gradual integration with the transformation of capitalism from free competition to monopoly. For example, Lenin argued that there was no traditional private law problem in socialist countries because all laws were aimed at safeguarding national interests and citizens' interests (Zhang, 2018). In the stage of modern international law, public law and private law are integrated. Compared with exploring the public or private nature, Chinese scholars mainly focus on the interaction between them.

Furthermore, in the modern international law stage, where public law and private law blend, the *Anti-Foreign Sanctions Law* is neither a pure public law nor a pure private law, so it cannot be framed by public law or private law. From the legislative purpose, this law, as a social norm, has specific tasks, one of which is to safeguard national sovereignty, security, and development interests, and the other is to protect the legitimate rights and interests of citizens and organizations. From the perspective of the adjustment method, it is a comprehensive method combining civil law, criminal law, and procedural law. Its public law attribute is that it uses state power to provide individuals and organizations with an independent, inviolable, sovereign, and territorial order. Moreover, its private law attribute shows that private law gives the injured party the right to compensation for damages, microscopically protecting citizens' and organizations' legitimate rights and interests. From the perspective of function, this law has the dual functions of compensating the losses suffered by the victimized citizens and organizations in China and punishing the illegal acts that violate international law, the basic norms of international relations, and the principle of non-interference in internal affairs. The former is an arbitrary norm, allowing the injured party to appeal to the people's court or unilaterally waive damages; the latter is a mandatory legal rule, which shall not be derogated from, and the parties have no room for self-modification or exclusion. As the *Anti-Foreign Sanctions Law* indicates private law and public law attributes, the theory of the division of public law and private law helps use public law and private law to combine adjustment methods, rationally distribute power and rights, and realize public social interests and personal interests at the same time.

In essence, the *Anti-Foreign Sanctions Law*, as a mixed law with both public law and private law attributes, has the little controversy over its private law

attribute because the strict principle of territory does not restrict it. At the same time, its public law attribute may be questioned because of the "Public Law Taboo" (Dodge, 2002). Foreign courts will not apply the *Anti-Foreign Sanctions Law* when making judgments and will not recognize the execution of judgments produced under the *Anti-Foreign Sanctions Law*. However, with the deepening of international exchanges, international law has gradually broken through the traditional principle of public law taboo, so the public law attribute clauses in China's *Anti-Foreign Sanctions Law* can also have an extraterritorial effect.

3. The Identification of the Extraterritorial Effect of Domestic Laws

To define the wording "extraterritorial effect", we should first clarify the extraterritorial jurisdiction. The International Law Commission regards "jurisdiction" as a state's sovereign power or authority and divides it into three kinds of jurisdiction: prescriptive, adjudicative, and enforcement (United Nations, 2006). *Restatement of the Law Second*, *the Foreign Relations Law of the United States* defines "jurisdiction" as a state's capacity. *Restatement of the Law*; *Third*, *Foreign Relations of the United States* divides jurisdiction into prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction (Hixson, 1988). Prescriptive jurisdiction is the power of the state to make laws for specific persons or acts; Adjudicative jurisdiction is the authority to subject persons or things to the process of a state's courts or proceedings; Enforcement jurisdiction is the authority to compel compliance or punish non-compliance with the laws of a state (Hixson, 1988). Under the Chinese legal system, jurisdiction includes the state's prescriptive jurisdiction to make rules, Enforcement jurisdiction for the state to enforce and implement laws and regulations, and Adjudicative jurisdiction of the people's court to apply rules to hear cases (Liao, 2019). Therefore, extraterritorial jurisdiction means that a state extends the scope of the application of sovereign power and authority in three dimensions: prescriptive, adjudicative, and enforcement sphere.

What is the extraterritorial effect? The validity of law includes the validity of the objective, the validity of time, and the validity of space, in which the validity of space is the geographical scope of legal validity, including the territorial and extraterritorial effects (Zhang, 2018). Throughout various definitions of extraterritorial effects, the concept of extraterritorial effects consists of three elements: "domestic law", "extraterritorial", and "taking effect". No disagreement exists in the element of "domestic law" among academic circles, while there are different understandings of "extraterritorial" and "taking effect".

What is the wording "extraterritorial"? Some scholars regarded extraterritorial effects as domestic laws regulating offshore acts in Hong Kong, Macau, Taiwan Province, and other foreign countries and regions (Huo, 2020). Some scholars consider the extraterritorial effect as the effect of a country's laws occurring outside the country (Zhou, 2021), in which "outside the country" means beyond the

territory. Some scholars regarded extraterritorial effect as the effect of a country's laws on people, things, and acts outside its jurisdiction, in which "outside the jurisdiction" includes other countries' jurisdiction and international public areas such as the high seas, excluding contiguous areas, exclusive economic zones and continental shelves that are not territorial but still under the jurisdiction (Liao, 2022). Similarly, the International Law Commission has interpreted the concept of "extraterritoriality" (the Chinese version from the International Law Commission translates it into "治外法权", while the author prefers to translate it into "域外管辖权") as "beyond a country's territory", including its land, internal waters, territorial waters, and adjacent spaces (United Nations, 2006). Therefore, the scope of "offshore" is more significant than that of "beyond the country", and the scope of "beyond the country" is more important than that of "beyond the jurisdiction".

From the perspective of which objects domestic laws have specific effects on, some scholars regarded extraterritorial effects as a country governing persons and things outside its territory by its laws (Qu, 2021). Some scholars considered the extraterritorial effect as a country's domestic law regulates the acts beyond the territorial boundary, regarding the place of the regulated acts as the standard to divide the territorial effect and the extraterritorial effect, regardless of the result or intention (Huo, 2020). Extraterritorial legislation includes legislation governing the acts of legislative states' nationals abroad and legislation applied to the acts of nonnationals outside the territory of legislative states (Senz & Charlesworth, 2001). The former, such as the *Criminal Law of the People's Republic of China*, regulates the violation of Chinese criminal law by China's state functionaries and soldiers outside the territory. In contrast, the latter, such as the *Securities Law of the People's Republic of China*, regulates the issuance and trading of securities outside China that disturbs the domestic market order and damages domestic investors' legitimate rights and interests. Some scholars regarded the extraterritorial effect as a country's laws regulating acts outside its jurisdiction and universally binding its people and property (Liao, 2022). The criteria for identifying the objects of effectiveness, including people, property, and act, are the broadest, which is conducive to protecting the extraterritorial effects of China's domestic laws.

In essence, the extraterritorial effect is a kind of extraterritorial jurisdiction. Compared with extraterritorial jurisdiction, extraterritorial effect belongs to the category of prescriptive jurisdiction and is the result of the state exercising prescriptive jurisdiction (Liao, 2022). The author is inclined to think that as long as there is no explicit prohibition in international law, the state has the right to exercise its prescriptive jurisdiction to the maximum extent within its jurisdiction to formulate extraterritorial effect clauses. It is more appropriate to regard extraterritorial effect as a country's law binding on people, property, and acts beyond its jurisdiction.

In addition, China distinguishes between extraterritorial effect and extraterri-

torial application, which are closely related but have apparent differences. The types of jurisdiction involved are different. The extraterritorial effect is the result of the state exercising its prescriptive jurisdiction. In contrast, extraterritorial application, as the way to achieve the extraterritorial effect, is the process of the state exercising its law enforcement jurisdiction and adjudicative jurisdiction (Liao, 2022). For example, Article 12 of the *Anti-Foreign Sanctions Law* gives Chinese citizens and organizations the right to bring a lawsuit to the people's court against any organization or individual that implements or assists in implementing discriminatory restrictive measures is the extraterritorial application of this law.

4. The Legislative Status of Extraterritorial Effect Clauses of the Anti-Foreign Sanctions Law

The *Anti-Foreign Sanctions Law* is a law that adjusts the composition of discriminatory restrictive measures and the responsibility the targeted shall bear. In other words, the individual or organization that adopts discriminatory restrictive measures against any Chinese citizen or organization should accept the responsibility. The subject and way of taking responsibility are other objects of this law's adjustment. Its extraterritorial application is mainly used to regulate discriminatory restrictive measures beyond the territory of China. This article explores the legislative mode, legal basis, and expansion trend of the *Anti-Foreign Sanctions Law* with extraterritorial effect to see the lamps through the mist.

4.1. Legislative Mode of Extraterritorial Effect Clause: Comprehensive Use of Various Clauses

Scholars in China have summarized four modes of clauses with extraterritorial effects in the current Chinese laws. Establishing extraterritorial effect through the clauses of the scope of territorial legal application; establishing extraterritorial effect through subject matter clauses; establishing extraterritorial effect through clauses in other legislations; establishing extraterritorial effect through comprehensive application of various kinds of clauses (Liao, 2022). The *Anti-Foreign Sanctions Law* mainly establishes the extraterritorial effect of this law through subject matter clauses and comprehensive application of clauses.

The legislative mode of the subject matter clause is usually characterized by the precise definition of a specific act (Liao, 2022). On this basis, the extraterritorial effect of the law is set. The term "discriminatory restrictive measure", a general term for a kind of action, was first put forward in Article 3 of the *Anti-Foreign Sanctions Law*. Discriminatory restrictive measure, the legal basis for adopting anti-foreign sanctions, has not been interpreted in legislation and judicial practice. And it depends on the administrative organs to make substantive value judgments according to specific circumstances. *Modern Chinese Dictionary* defines "discrimination" as "unequal treatment" and "restrictive" as "not exceeding the prescribed scope", which lacks reference. Thus, the specific an-

ti-foreign sanction decisions issued by the Ministry of Foreign Affairs are the best tool to understand their meaning. According to the legislative purpose and general purpose of Article 1 of the *Anti-Foreign Sanctions Law*, Chinese scholars regarded discriminatory restrictive measures as the ones implemented by foreign states that violate China's sovereignty, national security, development, and interests and legitimate rights and interests of private entities (Zhou, 2022). In light of the Ministry of Foreign Affairs practice, China has included the United States' interference in China's internal affairs and endangering national security under the pretext of involving Xinjiang, Hong Kong, and Taiwan affairs by domestic laws in discriminatory restrictive measures. Therefore, combined with the legislative purpose and practice of this law, the author regards the discriminatory restrictive measures as the ones that foreign countries adopt, harming the interests of China and its individuals and organizations under the pretext of China's internal affairs in accordance with domestic laws. On this basis, it is emphasized that foreign discriminatory restrictive measures are related to China and according to the different points of contact, including the effect on the territory and the protection of national security and interests. First, the mode of subject matter clause is set with the effect on the territory as the point of contact. Regarding the effect on China's territory as the point of contact is introducing the effects doctrine into the subject matter clause. In Article 3 of the *Anti-Foreign Sanctions Law*, this kind of substantial effect is manifested in that foreign discriminatory restrictive measures endanger China's national sovereignty, security, development interests, and the legitimate interests of private entities in China. Second, the mode of subject matter clause is set with the protection of national security and interests as the point of contact. For example, Article 1 and Article 3 of the *Anti-Foreign Sanctions Law* stipulate that this law applies to foreign discriminatory restrictive measures that harm China's national sovereignty and security. Therefore, based on identifying discriminatory restrictive measures, the *Anti-Foreign Sanctions Law* takes effect on territory and protective principle as the point of contact and brings the foreign discriminatory restrictive measures that infringe on the interests of China, organizations, and citizens into the scope of application, giving the *Anti-Foreign Sanctions Law* extraterritorial effect.

On this basis, the *Anti-foreign Sanctions Law* has expanded the extraterritorial effect through other clauses. The legislative mode of establishing extraterritorial effects through other clauses is manifested in establishing extraterritorial effects through other laws. Article 13 of the *Anti-Foreign Sanctions Law* aims to link it with different laws, administrative regulations, and departmental rules. Based on China's overall security concept, the scope of China's sovereignty, security and development interests can include people's security, political security, economic security, military security, cultural security, and social security. Therefore, the *Anti-foreign Sanctions Law* consists of the connection with the *Cyber Security Law*, the *Data Security Law*, the *Personal Information Protection Law*, the *National Security Law*, the *Anti-Espionage Law*, the *Anti-monopoly*

Law, and the *Criminal Law*, which all have extraterritorial effects. For example, Article 7 and Article 8 of the *Criminal Law* and the crime of betraying the state in specific provisions promulgate that the acts of colluding with foreign countries to endanger national sovereignty, territorial integrity, and security have extraterritorial effects. In addition, Article 12 of the *Anti-Foreign Sanctions Law* prohibits any organization or individual from executing or assisting in the execution of discriminatory restrictive measures through the third-party regulation clause. Such acts of executing or assisting in executing discriminatory restrictive measures may occur beyond or within China's territory, which also gives this article extraterritorial effects.

4.2. Legal Bases of Extraterritorial Jurisdiction Clauses: Effects Doctrine and Protective Doctrine

A proper relationship between the state exercising prescriptive jurisdiction and the targeted is necessary (Brownlie, 1966/2003). The two experimental connecting elements of jurisdiction generally accepted by international law include territory and nationality, leading to territorial and personal jurisdiction. Besides, modern international law also recognizes new jurisdictional connecting elements such as the objective territoriality principle, effects doctrine, protective principle, nationality principle, and passive personality principle (United Nations, 2006).

The extraterritorial effect of China's *Anti-Foreign Sanctions Law* surpasses traditional territorialism. It tends to include more flexible liaisons, bringing all acts related to discriminatory restrictive measures into the prescriptive jurisdiction. From the perspective of the natural process, discriminatory restrictive measures can be divided into upstream, midstream, and downstream. Upstream acts, which can be called policy-making, refer to the act in the first stage related to the adoption of discriminatory restrictive measures, with formulation, decision, and implementation of discriminatory and restrictive laws by foreign authorities and government officials, as well as the instructions made in accordance with the related laws. Mid-stream acts, which can be called assisting acts, refer to the ones in the second stage of providing support for discriminatory restrictive measures. Its manifestations include: First, providing financial support for discriminatory restrictive measures, which is directly or indirectly conducive to the implementation of discriminatory restrictive measures; Second, the acts of government officials who have made significant contributions to discriminatory restrictive measures; Third, financial institutions make important transactions with the targeted in an informed manner. Downstream acts, which can be called compliance acts, refer to the ones in the third stage of complying with and implementing discriminatory restrictive restrictions.

For a state to validly assert its extraterritorial jurisdiction, it must have some connections, reflected in the general principles, to the targeted; these principles are the territoriality principle (the objective territoriality principle and the effects doctrine), nationality principle, passive personality principle, and protective

principle (United Nations, 2006). Then, does the clause with the extraterritorial effect of the *Anti-foreign Sanctions Law* conform to the principle of jurisdiction recognized by international law?

The effects doctrine is the expansion of territorial jurisdiction. It refers to applying domestic laws to conduct outside its territory that causes an effect within. The United States took the lead in establishing the effects doctrine in the mid-20th century. In 1945, the *United States v. Aluminum Co. of America*, an anti-monopoly case, defined the effects doctrine as a standard to determine whether the domestic law in the anti-monopoly field has an extraterritorial effect. Even if the act did not take place on the national territory or the actor was not a national citizen, domestic law can be applied as long as the act affects the national interests. Since then, the effects doctrine has been continuously developed and expanded in the United States. The *Second Restatement of Foreign Relations Law of the United States* limits the effects doctrine to rare circumstances when conduct is generally regarded as a crime; the effect within the conduct is direct, substantial, and foreseeable; and the rule is consistent with the principles of justice in states that have reasonably developed legal systems (Hixson, 1988). The *Third Restatement of Foreign Relations Law of the United States* only requires that the act is intentional, which directly cancels the requirements of effect that is direct, substantial, and foreseeable, as well as the requirement that the international community generally recognizes the act as a crime (Hixson, 1988). Up to now, the effects doctrine has exerted a significant effect on the laws of various countries, and it is widely applied in the extraterritorial application of anti-monopoly laws and securities laws, showing a trend of development in the field of personal data protection law.

The effects doctrine, a criterion for extraterritorial effect, was first applied in China's economic control legislation. Article 2 of the *Anti-monopoly Law* and Article 2(4) of the *Securities Law* introduce the effects doctrine, which shows its influence on the domestic market order. After that, the effects doctrine shows its influence on national sovereignty, security, development interests, and the legitimate interests of citizens and organizations, such as Article2 of the *Data Security Law*, Article 15 of the *Cyber Security Law*, Article 44 of the *Export Control Law*, Article 2 of *the Provisions on the Unreliable Entity List* and Article 1 and Article 13 of the *Anti-foreign Sanctions Law*.

With the expansion of the effects doctrine, China's *Anti-foreign Sanctions Law* is based on protecting the rights and interests of the state and private entities. The effects doctrine is reflected in the situation that the *Anti-foreign Sanctions Law* exercises jurisdiction on discriminatory restrictive measures outside the territory while impacting the country. In other words, while imposing anti-foreign sanctions, China's jurisdiction over acts outside the territory based on the effects doctrine is a unique form of extraterritorial jurisdiction based on the substantial influence of extraterritorial acts on China and territorial jurisdiction. Once this discriminatory restrictive measure has an effect within the territory of

China, the law imposes responsibility on the targeted, which is enough to reflect the negative evaluation of this kind of action in the *Foreign Sanctions Law*. For example, in 2022, China's Ministry of Foreign Affairs determined that Raytheon Technology and Lockheed Martin, the United States military enterprises, assisted the US arms sales program in selling weapons to Taiwan Province, China, violating the relevant provisions of the *Anti-foreign Sanctions Law* (Wang, 2022a). China's Ministry of Foreign Affairs exercises its extraterritorial jurisdiction because these companies, in violation of Article 12 of this law, are not allowed to assist in implementing discriminatory restrictive measures taken by foreign countries against China. By selling weapons to Taiwan province, a significant incident will happen that will lead to Taiwan province's secession from China, seriously damage China's sovereignty and security interests, and objectively affect China, which meets the threshold of "substantial effect".

The protective principle may be understood as referring to the jurisdiction that a state may exercise concerning persons, property, or acts abroad that constitute a threat to the fundamental national interests of a state, such as a foreign threat to the national security of a state (United Nations, 2006). The state can exercise jurisdiction regarding the country's vital interests, mainly involving sovereignty or political independence (Ryngaert, 2015). Although the protective principle, like the effects doctrine, requires an impact on legislating state, the difference is that the protective principle does not need to cause actual damage to the legislating state as an element (International Bar Association, 2009). As an effective principle of the jurisdiction in the framework of international law, the protective principle should be applied within strict limits to avoid developing it into an all-encompassing clause.

Currently, the protective principle mainly focuses on criminal cases, such as cyber crimes, terrorist crimes, currency counterfeiting, immigration fraud, etc., which are usually limited to specific crimes and political acts. It is particularly significant to new types of cyber crimes and terrorist offenses. Some countries have also broadened their interpretation of "vital interests" to address terrorism security concerns (United Nations, 2006). However, introducing the protective principle in anti-foreign sanctions is controversial, especially in the case of secondary sanctions. Under such circumstances, Article 12 of the *Anti-Foreign Sanctions Law* extends the extraterritorial effect of this law to individuals and organizations in third countries other than the targeted countries. It requires that discriminatory restrictive measures should not be implemented or assisted in the implementation to safeguard our vital national interests. The protective principle requires a direct threat to national security (Emmenegger, 2016), excluding ordinary commercial transactions between third countries and the targeted entities (Meyer, 2009). Taking the threat of Iran's nuclear weapons program as an example, the extensive trade sanctions imposed by the United States on Iran conform to the protective principle and the effects doctrine; If the United States learns that a third country individual or company provides Iran with

nuclear weapons materials, it can also impose secondary trade sanctions on the third country actors (Meyer, 2009). In other words, Iran's nuclear weapons program and its acts of supporting, aiding, and abetting the program reasonably pose a direct threat to the national security of the United States and can be supported by the protective principle and the effects doctrine; However, ordinary commercial transactions are activities that have no direct threat to national security, and the protective principle cannot provide a sufficient jurisdictional base for them. The rationality of establishing a link between them is debatable. The same reasoning applies to the direct threat to China's national sovereignty and security posed by foreign individuals or organizations assisting the US arms sales program to Taiwan province.

Extraterritorial jurisdiction based on the protective principle emphasizes the damage of extraterritorial acts to the country's vital interests. As for the connotation of "essential interests" in the protective principle, countries and regions have not yet reached a consensus. Take the United States as an example. In accordance with Article 402(3) of the *Restatement of the Law*, *Third*, *Foreign Relations Law of the United States*, vital interests include the state's security or other state interests. In *United States v. Rumayr*, the US court held that the protective principle applied to the defendant's conduct might adversely impact national sovereignty and security or its government functions (Senz & Charlesworth, 2001). Whether discriminatory restrictive measures threaten vital national security interests, the potential basis of jurisdiction is the protective principle. Avoid over-applicating anti-foreign sanctions to prevent endangering national interests in a specific case. Otherwise, the risk brought by this tendency is that it will blur the substantive evaluation of vital national interests, lower the threshold of anti-foreign sanctions, and aggravate the risk of this article as a cover. In particular, including national development interests into the scope of vital national interests will significantly curb trade freedom, make it difficult for people to trade in social life, and fundamentally hinder the free economy. Any state behavior may permanently harm the vital interests of other countries. Therefore, the protection of national sovereignty and security in the *Anti-foreign Sanctions Law* aims at protecting China's vital interests. In contrast, the rationality of applying the protective principle to prevent endangering China's development interests is debatable. In summary, the effects doctrine, supplemented by the protective principle, is the jurisdictional basis for the extraterritorial application of China's *Anti-foreign Sanctions Law*.

4.3. The Expansion of Extraterritorial Effect Clause: The Operating Principle of the Anti-Foreign Sanctions Regime

Looking back at the historical evolution of prescriptive jurisdiction beyond territorialism, the author found that Roman law still needed to involve the rules of prescriptive jurisdiction in the ancient international law stage. In the stage of modern international law, the Westphalian system marked the initial establish-

ment of territorialism. In the 17th century, Hugo Grotius, Paul Voet, and Ulrik Huber adopted strict territorialism, emphasizing the absolute sovereignty of territory and advocating that a country's laws were only valid within its territory (Qu, 2021; Mann, 1964; Yntema, 1966). In the 19th century, Justice Joseph Story extended the jurisdiction to the nationals who did not live in his territory based on territoriality. Although this jurisdiction lacked territoriality, it could only be enforced in his territory, and to some extent, it retained territoriality. Story's viewpoint dominated the principle of international jurisdiction (Mann, 1964). At the beginning of the 20th century, the *Lotus* Case of the Permanent Court of International Justice surpassed Huber and Story's viewpoint. It advocated that the state should enjoy perspective jurisdiction based on sovereignty, but it should not exceed the restrictions of international law on its jurisdiction. In addition, Cook also questioned the logic of the territoriality principle (Cook, 1943). At the stage of modern international law, countries tend to give up the pure principle of territoriality. Many countries have gone through a process of change from non-recognition to recognition of the extraterritorial effect of domestic laws, and China is no exception. Since the 1980s, whether domestic laws can have extraterritorial effects has become a heated debate in academic circles. Chinese scholars began to inquire about legislation's territorial and extraterritorial effects on intellectual property, anti-monopoly, bankruptcy, and securities. Currently, the extraterritorial effects of the *Anti-foreign Sanctions Law* have not received much attention from Chinese academic circles and need further explanation.

Looking at the development trend of China's legislation in the field of anti-foreign sanctions, before the promulgation of the *Anti-Foreign Sanctions Law*, China's anti-foreign sanctions regime includes laws and regulations as follows: the *Provisions on the Unreliably Entity List* and the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures*; and other contents of the anti-foreign sanctions law were scattered in various other legislations, including the *Foreign Trade Law*, the *Anti-Secession Foreign Law*, the *Foreign Investment Law and the Export Control Law*. The narrow anti-foreign sanctions regime includes the *Provisions on the Unreliably Entity List*, the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures*, and the *Anti-foreign Sanctions Law*. In addition, the broad anti-foreign sanctions regime consists of a narrow regime and other legal regulations that play the role of anti-foreign sanctions. The research on the extraterritorial effect expansion of the *Anti-foreign Sanctions Law* is limited to the narrow scope of the anti-foreign sanctions regime. This article reviews and sorts out the evolution of China's anti-foreign sanctions legislation and explores the operational principle of China's expansion of its extraterritorial effect.

First, the expansion of the extraterritorial effect of the *Anti-foreign Sanctions Law* is realized by expanding the subject matter jurisdiction. Currently, the subject matter jurisdiction of the *Provisions on the Unreliably Entity List*, the *Rules*

on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures, and the *Anti-Foreign Sanctions Law* are different. Article 2 of the *Provisions on the Unreliably Entity List* stipulates that improper international economic and trade activities of foreign countries are under the subject matter jurisdiction; Article 2 of the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures* stipulates that improper extraterritorial application of foreign regulations and other measures are under subject matter jurisdiction, and Article 6 stipulates the factors for determining the subject matter jurisdiction; Article 3(2) of the *Anti-foreign Sanctions Law* stipulates that discriminatory restrictive measures are under the subject matter jurisdiction. The former two limit the subject matter jurisdiction to the economic and trade field, and its scope is relatively narrow, so it is challenging to meet the needs of countering foreign interference, which often leads to the following consequences: even if some foreign misconduct harms China's sovereignty, security, and development interests, and damages the legitimate rights and interests of private entities, it escapes from the regulation of China's *Anti-foreign Sanction Law* because it does not belong to the economic and trade field. Therefore, it is reasonable to extend the regulation of misconduct to all fields, consistent with the legislative purpose of comprehensively countering foreign discriminatory restrictive measures. From the perspective of legislative intent, the subject matter jurisdiction of the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures* is limited to secondary sanctions, that is, the extraterritorial application of foreign laws and measures that prohibit or restrict economic and trade activities between Chinese entities and the targeted (Ministry of Commerce, 2021). Compared with the former, the subject matter jurisdiction of the *Anti-Foreign Sanctions Law* includes primary and secondary sanctions, that is, unilateral sanctions against foreign countries that endanger China's sovereignty, security, development interests, and legitimate rights and interests of citizens and organizations (The State Council Information Office of the People's Republic of China, 2021).

Second, the expansion of the extraterritorial effect of the *Anti-foreign Sanctions Law* is realized by changing the operational mechanism. The difference between the operational mechanism of the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures* and the *Anti-foreign Sanctions Law* lies in whether the relevant subjects must fulfill their reporting obligations before the subject matter jurisdiction is determined. In these two sanction-related regulations, the operational mechanism has developed from "report-determination-release" to "determination-release" mode. The operational mechanism of the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures* is "subjects related report-determining inappropriate extraterritorial application of foreign legislation and other measures-issuing an injunction-applying for exemption". Chinese citizens, legal persons, or other organizations should first judge whether their

normal economic and trade activities with third countries or regions are improperly prohibited or restricted by extraterritorial application of foreign regulations and measures that violate international law and basic norms of international relations (Liao, 2021). However, the *Anti-Foreign Sanctions Law* does not require citizens and organizations to fulfill their reporting obligations. Its operating mechanism is "identifying discriminatory restrictive measures-making countermeasure list-imposing countermeasures-issuing orders". The relevant departments of the State Council take the initiative to identify whether an act constitutes a discriminatory restrictive measure and make a decision to list the individuals and organizations directly or indirectly involved in the development, decision-making, and implementation of discriminatory restrictive measures and impose anti-foreign sanctions. Although the subject matter jurisdiction of the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures* and the *Anti-foreign Sanctions Law* is vague compared with the enumerated legislative mode that directly lists the types and names of foreign laws, measures, and discriminatory restrictive measures, the *Anti-Foreign Sanctions Law* actively examines and determines discriminatory restrictive measures, and does not need the report of the relevant subjects, which substantially expands the subject matter jurisdiction.

Third, the expansion of the extraterritorial effect of the *Anti-foreign Sanctions Law* is realized by expanding the targeted of the anti-foreign sanctions. At present, China's anti-foreign sanctions regime has developed into a two-tier sanctions regime that combines primary sanctions and secondary sanctions. The primary sanctions restrict or prohibit China's trade with the targeted states. Secondary sanctions restrict or prohibit the third state from assisting the targeted state subject to the primary sanctions. Although it is not stipulated, it intends to impose sanctions on the third states, which is designed to make the third states impose the same sanctions against the targeted states under the primary sanctions, transforming unilateral sanctions into multilateral sanctions. In addition, the targeted of anti-foreign sanctions include not only individuals and organizations directly or indirectly involved in the development, decision-making, and implementation of the discriminatory restrictive measures but also individuals and organizations with specific particular identities, status, or qualifications related to the targeted mentioned above, such as spouses, immediate family members, senior executives, actual controllers, organizations that control or participate in the formation and operation, among others. The particular identities, status, or qualifications are the state that determines whether they are included in the countermeasure list. In accordance with the provisions of the *Anti-foreign Sanctions Law*, the targeted includes particular subjects. However, it is highly inappropriate to regard it as the subject to be sanctioned from the necessity standpoint. Primarily, it is not easy to justify the inclusion of family members in the countermeasure list in reason and logic.

All newly promulgated laws must be coordinated under the existing legal

framework. Therefore, to study the expansion trend of extraterritorial effects, China should place the *Anti-Foreign Sanctions Law* in the whole anti-foreign sanctions regime for analysis. To sum up, China's anti-foreign sanctions regime in the narrow sense includes the *Provisions on the Unreliably Entity List*, the *Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures*, and the *Anti-foreign Sanctions Law*. The expansion of extraterritorial effects is conducive to forming a network of these laws and regulations to protect China from discriminatory restrictive measures.

5. Challenges of Extraterritorial Effect Clauses of the Anti-Foreign Sanctions Law

Extraterritorial legislation is a controversial legal category. Only when a country exercises its extraterritorial prescriptive jurisdiction to the extent that it does not violate international law can it be recognized by other countries; otherwise, it will lead to diplomatic protests, blocking statutes, counter-laws, international lawsuits, and restraining orders. Therefore, China should consider the rationality of extraterritorial prescriptive jurisdiction and the general acceptability of the international community, and whether the extraterritorial effect clauses of the *Anti-Foreign Sanctions Law* can satisfy legislators, members of its society, and the international community.

5.1. Limitations on Prescriptive Jurisdiction in the Framework of the International Law Norms

The *Anti-Foreign Sanctions Law* is the legal basis of China's anti-foreign sanctions against foreign countries. It is necessary to ensure the compliance and legitimacy of China's anti-foreign sanctions at the international level, especially under the WTO framework. In essence, China's trade control implemented in accordance with the *Anti-Foreign Sanctions Law* are unilateral sanctions with extraterritorial effect, among which the anti-foreign sanctions promulgated in the Article 6(3) prohibits or restricts organizations and individuals in China from trading and cooperating with the targeted beyond territory are typical trade control. For example, in the case of "China's Anti-foreign sanctions against the US human rights sanctions in Xinjiang", China held that Chairman Maenza, Vice-Chairman Turkel, Commissioner Bhargava, and Commissioner Carl of the United States Committee on International Religious Freedom intervened in Xinjiang affairs and China's internal affairs, which violated the *Anti-Foreign Sanctions Law*, thus Chinese citizens and organizations were prohibited from trading with them (Ministry of Foreign Affairs, 2022). Such acts were all beyond the jurisdiction of China. Whether the trade control with extraterritorial effect is in line with Article 21 of the *General Agreement on Tariffs and Trade* (hereinafter referred to as GATT1994), the national security exception, to avoid that the measures may violate the core rules of WTO, namely, most-favored-nation treatment, national treatment, and prohibited quantitative restrictions? In other

words, if the targeted challenges China's extraterritorial trade control by seeking WTO dispute settlement, it will mainly invoke the national security exception clauses.

To ensure the legality and legitimacy of Chin's trade control with extraterritorial effect under the WTO framework in accordance with the *Anti-Foreign Sanctions Law*, China's trade control should not deviate from the subjective and objective factors of the national security exception clause. According to the national security exception clause in Article 21 (b) (iii) of the GATT1994, when an emergency is taken in time of war or other emergency in international relations, the contracting party may take any action that it considers necessary for the protection of its essential security interest. Among them, objective factors refer to "taken in time of war or other emergency in international relations"; Subjective factors refer to the determination of "essential security interests" and "necessary for the protection" of measures.

First of all, to determine whether there is an emergency in international relations between China and other countries, it is necessary to make it clear whether discriminatory restrictive measures can trigger a situation that threatens the essential security interests of the country with the degree of war. Take the United States as an example of sanctioning China on the pretext of human rights. Human rights, an essential embodiment of US legal imperialism and an important carrier of US values, have become an important starting point for the United States to interfere in other countries' internal affairs. Suppose China intends to invoke the national security exception to justify anti-foreign sanctions imposed on the United States. In that case, it needs to bear the burden of proof and provide the following evidence: First, the emergency endangering China's national defense and military interests is objective and persistent; Second, the emergency of international relations involves the United States; Third, it affects the security of Xinjiang, the border of China; Fourth, the emergency of international relations is known to the international community; Fifth, it leads to the European Union and other countries and regions imposing related sanctions on China.

Secondly, to determine whether foreign discriminatory restrictive measures threaten China's essential security interests, it is necessary to clarify the scope of China's essential security interests. The essential security interest in the national security exception is an uncertain legal concept. Its connotation and extension are vague, so our country has the right to self-judging while interpreting it. As it is difficult for member countries to interpret only based on semantics, each country judges the connotation and extension of essential security interests based on its particularity. It is worth noting that, according to China's overall security concept, China's national security includes people's security, political security, economic security, military security, cultural security, and social security, and its definition covers the national economic interests that are not included in the essential security interests defined by WTO. Therefore, China must exercise restraint when invoking national security exceptions and compare

the specific national security interests damaged by foreign discriminatory restrictive measures with the essential security interests in national security exceptions to determine whether they belong to the category of essential security interests. Distinguish emergencies in international relations from simple economical and trade disputes, and only impose trade restrictions on discriminatory restrictive measures that endanger national people's security, political security, and military security. Because the category of essential security interests changes with the development of the ages, we should pay attention to the possibility of our national security interests being classified into the variety of essential security interests. Moreover, in the trial process, the concept and category of China's essential security interests are put forward to Dispute Settlement Body, and the Panel will evaluate whether it conforms to the principle of good faith.

Finally, to determine the necessity of the extraterritorial application of anti-foreign sanctions, to make our country invoke national security exception clauses in the way of self-judging and not be arbitrary, it is necessary to examine whether there is a minimum requirement of plausibility between the essential national security interests protected and the anti-foreign sanctions taken. Judging from the current anti-foreign sanction practice of relevant departments of the State Council, the anti-foreign sanctions imposed against discriminatory restrictive measures all meet the minimum requirements of the plausibility of not being untrustworthy and not being irrelevant to emergencies in international relations. Furthermore, the extraterritorial application of China's anti-foreign sanctions needs to be examined by WTO rules. Otherwise, a slight carelessness will quickly leave member countries a powerful weapon to challenge China in WTO-related cases.

5.2. The Dispute between Extraterritorial Prescriptive Jurisdiction of the Legislating Country and Adjudicative Jurisdiction of the Territorial Country

The conflict of extraterritorial effect clauses of domestic laws is rooted in different national policies of different countries, and countries will not put foreign national policies above their interests when formulating extraterritorial effect clauses. In other words, the root of the fundamental conflict lies in the different national policies between countries, such as the conflict between China's anti-foreign sanctions policy and the US human rights policy. The United States insisted on the theory that human rights are superior to sovereignty. It thus enacted the Xinjiang-related bill to impose a trade embargo on cotton from Xinjiang on the grounds of human rights policy. In response, China implemented anti-foreign sanctions with extraterritorial effects against individuals and organizations that directly or indirectly participated in formulating, deciding, and implementing the discriminatory restrictive measures. When a country's extraterritorial jurisdiction overlaps with the jurisdiction of the territorial country, the concurrent jurisdiction of various countries leads to disputes over priority juris-

diction, usually involving prescriptive and adjudicative jurisdiction. The US courts have formulated the principle of foreign sovereign compulsion to deal with the competing claims of jurisdiction caused by extraterritorial measures.

Because China's individual or organization complying with the extraterritorial anti-foreign sanctions is likely to conflict with the extraterritorial application of the US domestic laws, can these individuals or organizations reject the litigation request according to the principle of foreign sovereignty compulsion as a defense when facing the conflict between domestic laws of two countries? In other words, according to the principle of foreign sovereign compulsion, can the Chinese government be exempted from responsibility for the anti-foreign sanctions implemented in accordance with the *Foreign Sanctions Law*?

Based on the similar functions of blocking statute and anti-foreign sanctions law, both have merged to a certain extent, so the author brings blocking statute into the field of anti-foreign sanctions law to study its mechanism. In this field, four legislative mechanisms exist to counter the improper extraterritorial application of foreign domestic laws. First, the legislation prohibits compliance with foreign proceedings, including the giving of evidence and the production of documents in foreign proceedings. Second, legislation that prohibits compliance with orders or enforcement of judgments from foreign countries has adverse effects on national interests. Third, legislation forbids abiding by foreign laws and measures with extraterritorial effects within the country's jurisdiction (Senz & Charlesworth, 2001). Fourth, "claw-back" legislation. The anti-foreign sanctions regime of China's Anti-Foreign Sanctions Law includes the third legislative mechanism mentioned above.

In the judicial practice of the US courts, this article probes into the changing track of applying the principle of foreign sovereign compulsion in the field of anti-foreign sanctions. The principle of foreign sovereign compulsion is frequently used in anti-monopoly and involves cases of refusing to provide evidence and produce documents in foreign proceedings. When discussing the application of the principle of foreign sovereign compulsion, scholars usually talk about it from the perspective of anti-monopoly law. Until 2001, in the *United States v. Brodie* case, the US court, for the first time, formed a basic understanding to prohibit invoking the foreign sovereign compulsion doctrine to defend compliance with foreign blocking statutes with extraterritorial effects within the US territory.

The doctrine of foreign sovereign compulsion means that when there is a conflict between the laws of two countries, in general, the law of the territorial country of the parties takes precedence, and the defendant can seek exemption from liability according to this principle (Peng, 2014). In other words, the defendant cannot abide by the domestic laws with the extraterritorial effect of the US on the grounds of foreign sovereign compulsion. Then, can the foreign sovereign compulsion doctrine become the defense of China's individuals and organizations to abide by the *Anti-Foreign Sanctions Law* with extraterritorial ef-

fect?

In *United States v. Brodie* 2001, the United States District Court for the Eastern District of Pennsylvania began to focus on discussing the relationship between the foreign blocking statutes with extraterritorial effect to comply within the territory and the doctrine of foreign sovereign compulsion. The court restricted the application of the foreign sovereign compulsion doctrine in countermeasures, determining the fate of China's anti-foreign sanctions in the US courts. In this case, the US court dismissed the defendant's claim with foreign sovereign compulsion as the primary defense.

In this case, the indictment charges the defendants with conspiracy to sell ion exchange resins to Cuba through intermediaries, violating the *Trading with the Enemy Act* (hereinafter referred to as TWEA) and the *Cuban Assets Control Regulations* (hereinafter referred to as CACRs). While the defendants moved this court to dismiss the indictment under the foreign sovereign compulsion doctrine, they alleged that the blocking statutes of Canada, the United Kingdom, and the European Union criminalize compliance with the CACRs and compel defendants to trade with Cuba. First, the court made it clear that the foreign sovereign compulsion doctrine has never been and should not be applied in the criminal context because the fact that a criminal suit has been brought demonstrates the executive branch's determination that the injury to the United States from the alleged conduct outweighs the potential injury to foreign relationships. Second, the blocking statutes could not form the basis of a foreign sovereign compulsion defense because they do not force these defendants to sell any product to Cuba or to travel to Cuba. The blocking statutes only prohibit certain persons from not trading with Cuba only if the decision not to deal with Cuba is because of the CACRs or instructions based on the CACRs; corporations and persons in Canada, the United Kingdom, and the European Union can decide not to trade with Cuba for any other reason. Third, a specific order or action issued by a foreign government directed at the defendant can be the basis of a foreign sovereign compulsory defense; A specific order or action can satisfy the need for a real threat of prosecution under foreign law, while the blocking statutes themselves alone cannot pose a threat of tangible sanctions to defendants; Besides it would be difficult for a foreign government to get evidence of a company or individual did not trade with Cuba because of its desire to comply with CACRs. In *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.* case 1979, the Coordinating Commission for the Conservation of Commerce and Hydrocarbons (hereinafter referred to as Coordinating Commission) established by the Venezuelan government in 1959 supervised concessionaires rigorously, conducted regular reviews of their sales policies, promulgated rules regarding the sale of oil extracted there, and also imposed sanctions for violation of the rules included suspension of the right to ship oil out of the country. Concerning the effect of sales to Interamerican on the stability of world oil prices, the Coordinating Commission called officials of both Supven and Monven, respectively,

and issued specific orders that no other Venezuelan oil was to reach Interamerican, which allowed the defendants to invoke the foreign sovereign compulsion doctrine as a defense.

In *United States v. Brodie*, the US court has reached a consensus on whether foreign blocking statutes can be a foreign sovereign compulsion defense. In accordance with the case law of the United States, the exercise of foreign sovereign compulsory defense requires proof that the foreign government has issued a specific order or action to force it not to comply with US laws; That failure to comply with foreign laws will lead to the risk of severe sanctions; Where a party finds itself subject to conflicting orders from sovereigns, it should make all efforts to comply with US laws. Therefore, from the perspective of US judicial practice, invoking the foreign sovereign compulsory doctrine to defend observing a foreign country's anti-foreign sanctions law is challenging. Because the *Anti-foreign Sanctions Law* regulates a wide range of groups, the law is not a specific order or action to particular subjects. In light of this fact, China's individuals or organizations need help seeking substantive defense to invoke the foreign sovereign compulsory doctrine before the Ministry of Foreign Affairs issues a specific order. In other words, it is difficult for the extraterritorial effect of the *Anti-Foreign Sanctions Law* itself to produce an actual legal effect in the United States.

5.3. Balance between National Sovereignty and Commercial Interests

Compared with the expansion of the extraterritorial effect of domestic laws in the anti-monopoly field, which is beneficial to the protection of China's market interests, the expansion of the extraterritorial effect in the anti-foreign sanctions field may easily lead to the negative effect of restricting the market interests. Article 12 of the *Anti-Foreign Sanctions Law* prohibits individuals or organizations outside the territory from implementing or assisting in the implementation of discriminatory restrictive measures. Once the conduct is recognized as a foreign discriminatory restrictive measure, the obligations not to implement and assist in implementing will occur, forcing individuals and organizations to make costly choices between China and the targeted, especially the United States, the two dominant global economies. Thus, it isn't easy to achieve the expected counter effect. Foreign individuals or organizations will face a dilemma: if they refuse to comply with the orders of China's Ministry of Foreign Affairs, they will bear the liability for tort damages, and if they violate their laws and regulations, they will take criminal or civil punishment. For example, in December 2021, the US promulgated *To ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes* (US Congress, 2022), which restricts imports from Xinjiang on the grounds of forced labor, unless the goods are proved not subjected to forced labor. US importers will face lawsuits for in-

fringement damages by Chinese citizens and organizations if they implement such discriminatory restrictions. If they violate the US regulations prohibiting the import of goods from Xinjiang, they will incur domestic penalties. The author believes that formulating, deciding, and implementing discriminatory restrictive measures is far more harmful than implementing or assisting in the implementation. The act of individuals and organizations implementing or assisting in implementing discriminatory restrictive measures is not all intended to undermine a country's national sovereignty, security and development interests. However, they may only consider commercial interests. The expansion of the extraterritorial effect of the *Anti-Foreign Sanctions Law* is not the same as the expansion of anti-foreign sanctions. To prevent the anti-foreign sanctions from hitting too wide, it is necessary to follow the following two steps to judge and seek the boundary within the anti-sanctions regime.

The first step is compensating for infringement damages, filing the losses, and diluting the mandatory rules. The *Anti-foreign Sanctions Law* regulates the act of executing or assisting in executing discriminatory restrictive measures, and its purpose is to cut off the ability to impose discriminatory restrictive measures. Article 12(2) excludes acts that do not endanger China's sovereignty, security and development interests or assist in implementing discriminatory restrictive measures from imposing anti-foreign sanctions on them. It is helpful to balance the relationship between national sovereignty and commercial interests by solving the civil method and relaxing the punishment, thus assuming the property responsibility, including compensation for losses and nonproperty responsibility for stopping infringement. If both parties have a legal basis when concluding the contract and then lose the legal ground due to the change of the situation that China promulgated the *Anti-foreign Sanctions Law*, they may propose a re-negotiation procedure in accordance with Article 533 of the *Civil Code*. In other words, Chinese individuals or organizations conclude contracts with foreign individuals or organizations for trade. After the conclusion of the contract, China implemented anti-foreign sanctions according to the *Anti-Foreign Sanctions Law* to restrict or prohibit trade between the two sides, which led to a fundamental change in the balance between the two parties in the contract. In such a case, both parties have the right to request renegotiation and can stop the performance to comply with anti-foreign sanctions. If no new agreement is reached, both parties can stop performing their contractual obligations. However, can civil liability effectively curb the acts of implementing or assisting in implementing foreign discriminatory restrictive measures? Civil law is committed to restoring interest damage, and civil tort is a responsibility investigation mechanism based on the consequences of interest damage. It is only aimed at the cases where the implementation or assistance of discriminatory restrictive measures causes the consequences of interest damage to citizens and organizations in China. Civil tort liability cannot cover harmful acts that do not cause damage to citizens and organizations, except those that endanger national sovereignty, se-

curity, and development interests. On the one hand, it leads to the wrong orientation of "responsibility for infringement consequences, no responsibility for no infringement consequences"; on the other hand, it leads to the defects of the anti-foreign sanctions regime.

The second step is to impose anti-foreign sanctions to punish harm and prevent potential acts. Tort compensation aims to compensate for damages, while anti-foreign sanctions focus on punishing acts harmful to national interests to deter and prevent results. In accordance with Article 15 of the *Anti-Foreign Sanctions Law*, it does not directly impose anti-foreign sanctions against foreign individuals and organizations that implement or assist in the implementation of discriminatory restrictive measures. Only when this act endangers China's national sovereignty, security, and development interests can necessary anti-foreign sanctions be taken. On one hand, it reflects the harmful result as one of the constitutive requirements. On the other hand, it reflects the priority of tort liability. Judging whether to take anti-foreign sanctions can be comprehensively analyzed from three dimensions: First, the degree of personal viciousness in execution or assisting execution; Second, the degree of harm caused by the discriminatory restrictive measures implemented or assisted in implementation; Third, the extent of harmful consequences caused by the acts of executing or assisting in execution to China. In detail, it is necessary to investigate the actual harm of the act of executing or assisting in the execution to our country, as well as the subjective cognition and the subjective viciousness of the targeted individuals or organizations.

The combination of free trade economies is far more potent than the international order between equal sovereign states (Schmitt, 1950/2017). While safeguarding national sovereignty, China should consider the social facts and commercial interests related to the *Anti-foreign Sanctions Law*. Otherwise, on the one hand, it caters to the need to counter foreign discriminatory restrictive measures. On the other hand, it brings adverse effects. Although it seems that it is easy to solve problems and ensure the efficiency of anti-foreign sanctions, its interference in the commercial field increases the worries of commercial entities about the investment environment, which leads to the disconnection between anti-foreign sanctions and commercial interests, and, ultimately indirectly affects social interests and economic development.

6. Conclusion

In recent years, China has attached great importance to the function and role of countermeasures in foreign relations. In *Sticking to the Path of Socialist Rule of Law with Chinese Characteristics and Providing a Strong Legal Guarantee for Building a Socialist Modern Country in an All-round Way*, in 2020, the General Secretary emphasized that we should take a coordinated approach to promote the rule of law at home and in matters involving foreign parties; in addition, take a collaborative approach to encourage domestic and international governance

and better safeguard national sovereignty, security, and development interests; firmly maintain the global system with the United Nations as the core and the international order based on international law and norm; uphold the basic principles of international law and international relations based on the purposes and principles of the *UN Charter*. This idea became a powerful weapon to counter foreign discriminatory restrictive measures, and it was affirmed in the form of law after that. The *Work Report of the Standing Committee of the National People's Congress* in 2021 summarized that the main tasks since the third session of the 13th National People's Congress included "serving the overall situation of the country's diplomacy", "persisting in safeguarding the national interests and clarifying China's position on questions involving Hong Kong, Xinjiang, and Taiwan". Moreover, the "Main Tasks for the Next Year" clearly put forward "centering on countering sanctions, interference, and long-arm jurisdiction" and "strengthening legislation in foreign-related fields". China has increased the strength of countermeasures in domestic legislation to implement this policy requirement.

Good laws created in a state are conducive to good governance. The enactment of the *Global Magnitsky Human Rights Accountability Act*, the *Hong Kong Human Rights and Democracy Act*, and the *Uyghur Human Rights Policy Act* by the United States are intended to meddle in the affairs of other countries on the pretext of human rights shows that the international community has not yet emerged from the jungle society. At present, socialism with Chinese characteristics has entered a new era, economic development and national wealth are constantly accumulating, and the period of information, intelligence, and big data is coming. It is increasingly urgent to enjoy and protect property rights and security rights (Zhang, 2021). However, the ideological game under the pretext of human rights will not only exist but also become more acute. In response, China established an anti-foreign sanctions regime and tried applying it to judicial practice. On the one hand, constructing an anti-foreign sanctions regime is now in the first stage. Scholars in China divide anti-foreign sanctions into direct ones and indirect ones. The former includes formulating general anti-foreign sanctions legislation and imposing anti-foreign sanctions against other countries under the extraterritorial application of domestic laws; the latter forms checks and balances between countries to improve the extraterritorial application regime of domestic laws (Liao, 2019). China's anti-foreign sanctions regime is now in the stage of a direct model, and there is still a long way to go to establish a complete anti-foreign sanctions regime. On the other hand, the anti-foreign sanctions regime's perfection must avoid legal assimilation. China and the United States belong to different legal culture circles, and Chinese law is a "duty-based, ethicist, and statutory law" type of law. Due to the anti-foreign sanctions law regime being in a legal field with solid technique, it has strong compatibility with foreign laws. We should avoid the impact and influence of westernization in perfecting our anti-foreign sanctions regime.

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Conflicts of Interest

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