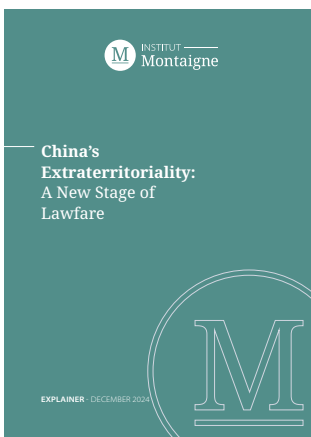


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China's Extraterritoriality: A New Stage of Lawfare



The new European Commission has made economic security a priority, through innovation and protecting the EU from market distortion, technology theft and coercion. The EU has adopted new trade defense instruments to reduce its supply chain vulnerabilities and is rethinking its industrial policy. Yet, its strategy has one blindspot: the EU has no clear policy to deal with extraterritoriality, least of all Chinese extraterritoriality. This is shortsighted and could damage the EU's long-term economic and political interests.

A GROWING USE OF EXTRATERRITORIALITY

Extraterritoriality – that is, the application of national laws abroad – is not a new phenomenon, but it is gaining traction. In a world characterized by strategic competition, mass subsidies, de-risking and weak multilateral organizations, countries are looking for new ways to safeguard their political and economic interests. Many are turning to law to achieve this. This includes China.

A Trump presidency is likely to further tighten export control measures for US – and European – companies trading with China. In a context of growing economic rivalry, a Trump presidency may be tempted to use extraterritorial measures, especially export controls, to limit tech exports. It may also put pressure on European countries to follow suit in return for continued US support to Ukraine and Europe. In such a scenario, China is likely to respond with similar tit-for-tat measures. This would be particularly problematic for European companies operating in both markets. It would involve high compliance costs and/or risks fines

and market access denial in case of non-compliance with one of the two legal regimes.

China's perspective on extraterritoriality has evolved. For the longest time, the concept was associated with the "century of humiliation" – the period between 1842 and the Pacific War during which Western powers imposed their own consular laws and jurisdiction on China. Today, it is seen as an opportunity to safeguard and assert China's interest. Xi Jinping sees law as a strategic tool and extraterritorial norms have proliferated under his leadership.

Chinese extraterritoriality has three aims: first, to defend against foreign interference and sanctions; second, to legitimize China's foreign policy actions and strengthen Chinese global influence; and third, to deploy China's public security agenda on a global scale.

China's extraterritoriality is primarily designed to respond to, and manage, systemic rivalry with the United States. China's defensive toolkit is designed to reduce the impact of US economic sanctions and to respond to US export control restrictions, which have heavily targeted China's access to dual-use technologies. Some of China's defensive tools, such as the Blocking Rules, resemble those put in place by the EU to shield companies from being forced to comply with foreign sanctions.

China also applies its laws abroad to increase its global presence and influence through a realist approach focused on the balance of power with the United States. It has attempted to use Chinese law to deal with ongoing disputes, such as in the South China Sea, and resorts to legal language to legitimize its actions.

China enforces public security policies extraterritorially, primarily to silence criticism of China. It has developed a comprehensive array of laws and enforcement practices to target Chinese dissidents and opponents. There is also evidence of China establishing unregistered police stations abroad and attempting forceful repatriation of PRC nationals. Intimidation, persuasion to return to China and rendition of PRC

nationals in foreign countries all pose a significant challenge to European democracies and to their decision-making.

China is exploring a more offensive approach to extraterritoriality, in the form of economic sanctions, to assert its power – though it has yet to use it. Extraterritoriality is increasingly seen as a way to assert power and to constrain the others, for example by putting pressure on foreign individuals and companies to comply with Chinese laws or to ignore foreign laws, even when they are based abroad. Although China has not used law to put pressure on foreign companies already active in, or trading with, China, it could do so in the future.

China's modus operandi favors attacking where there is no defense in place. A more offensive use of extraterritoriality by China will depend on three factors. First, the decision and willingness of the top leadership to employ such tactics during moments of international tension; second, a stronger international role for the renminbi and lower overall exposure to the dollar; and third, the countermeasures third-countries could take to respond to Chinese extraterritorial norms. Without credible deterrence, the EU could easily be subjected to Chinese economic sanctions, and the untested anti-coercion instrument is likely to be insufficient to create deterrence.

EUROPE'S RESPONSE

The EU needs to understand that Chinese extraterritoriality has changed. Chinese extraterritoriality is no longer solely about managing US-China strategic competition. It is also a tool to promote China's norms and jurisprudence abroad, a way to retaliate against foreign interference, and an instrument to assert political and economic interests.

The EU needs to understand how Chinese extraterritoriality impacts EU interests now and in the future – and plan accordingly. The EU's current approach is

largely predicated on the need to respond to US extraterritoriality. However, China's decisions to enforce its national security laws abroad, including in European countries, should give the EU cause for concern and spur it on to rethink its approach.

The EU should continue to work with like-minded partners on combatting forceful repatriation and transnational repression. While national security falls squarely under the sovereign authority of member states, national governments should be open to discussing transnational repression inside the EU and to share best practice. The EU should also continue to work with like-minded partners and international organizations on this issue.

The EU must be open to developing a new form of offensive extraterritoriality. The EU has historically resisted an offensive use of extraterritoriality and has preferred to castigate the US for (ab)using extraterritoriality. The possible escalation of US-China technology

competition in the coming years imposes a change of approach. Advocates of a more offensive strategy on extraterritoriality already point that change is happening, given the EU's new emphasis on using trade defense instruments, such as the Anti-Coercion instrument. But an offensive extraterritorial regime needs to be able to impose costs, and to ensure compliance with European export control interests, for example *vis-à-vis* Russia.

The EU should show that it is ready to deny access to the EU's single market. The EU's economic security instruments are mainly about reciprocity, not about promoting the EU's strategic interests. This is particularly true in relation to China. Yet, the EU single market is a strategic priority for China and crucial for its economic health. Losing access to it would be deeply damaging to China's interests and constitute a powerful deterrent for the EU. The EU single market is the best leverage the EU has. It must come up with a credible plan that demonstrates intent and capability.