

# Application of U.S. Long-Arm Jurisdiction in Cross-Border Data Flows and China's Response

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In recent years, to implement the “America first” policy, the U.S. has relied on its dominant position in the cross-border flow of data, adopted the principle of minimum contacts, and depended on a relatively effective system of legal implementation to frequently exercise long-arm jurisdictions in the field of cross-border data flow for restraining China. To resist such, China should turn from passivity into activity of also building a legal system for the extraterritorial application of domestic law in the field of cross-border data flow. This includes improving the relevant rules, establishing extraterritorial jurisdiction of data enforcement, and granting full authority to China courts of law.

*Keywords:* cross-border data flow, long-arm jurisdiction, extraterritorial application

## Introduction

The cross-border flow of data fragments the place of data storage and the origin of data generation, blurring the boundaries of data jurisdiction. To achieve the control of extraterritorial data, the U.S. adopts an expansive jurisdictional policy and implements the long-arm jurisdiction in the field of cross-border data flow. Regardless of whether the data were generated, stored or transmitted within the U.S. border, or whether the cross-border flow of data met the legal requirements in the place of conduct, as long as it made a valid connection with the U.S., the U.S. courts can exercise jurisdiction over the data. This country has gradually extended the tentacles of its long-arm jurisdiction to the entire world, and has continuously expanded both the scope and the content of this measure (Bai & Zou, 2021). In the field of cross-border data flows, numerous countries have become the target of U.S. operation of long-arm jurisdiction.

The uneven flow of data across borders, mainly from developing countries to developed countries, has given the United States a significant advantage in this field. However, China has grown rapidly in cross-border data flows since 2005, surpassing the U.S. in 2019 to become the world's number one country in this field, and when the global epidemic broke out in 2020, China's cross-border data flows presented exponential growth. The U.S. data dominance is under unprecedented threat. To implement the “America first” policy and curb the development of China's cross-border data flows, the U.S. government frequently exercises long-arm jurisdiction to sanction Chinese companies with state power. As of December 22, 2021, the U.S. government placed 611 Chinese companies on its sanctions list on the grounds of safeguarding national security and diplomatic interests.

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This restricted the flow of data to Chinese companies and seriously affected their productions and operations. The U.S. exercise of long-arm jurisdiction goes beyond conventional law enforcement and has become an important tool for the U.S. to compete for data resources and to suppress China (Xi, 2020).

As a major country of data flow, China urgently needs to take more effective measures for solving the problem of long-arm jurisdiction imposed by the United States. Based on the clarification of applying U.S. long-arm jurisdiction in the field of cross-border data flows, this paper proposes that China should accelerate the construction of the specific legal system for the extraterritorial application of domestic data law to break the dilemma of U.S. sanctions against China.

### **Application of U.S. Long-Arm Jurisdiction in the Cross-Border Flow of Data**

The cross-border flow of data, as a driver of today's digital economy, is also one of the core issues in the U.S.-China trade war. China's rise in the field of cross-border data flows has shaken the U.S. global data hegemony, and the novel coronavirus epidemic has further enhanced the U.S. demand for cross-border data flows. To strengthen its control over extraterritorial data, the U.S. has extended its long-arm jurisdiction for applying to the field of cross-border data flows.

#### **Origins of U.S. Long-Arm Jurisdiction**

The United States keeps a confederate system of government, and the U.S. Constitution gives each state government independent sovereignty, but state courts can only exercise jurisdiction over legal persons who reside within their states. With the historical rise of the U.S. domestic economy, interstate commerce has become more frequent and interstate disputes have increased as a consequence. This problem was alleviated to some extent by the final decision in the 1945 case of *Washington State v. International Shoe Co.* In that case, International Shoe employed some salespeople to solicit business for it within the State of Washington, but did not maintain an office there. The operation of the sales staff was limited to only displaying sales samples at prices and terms determined by the company and soliciting orders from potential buyers, with contracts for the sale or purchase of merchandise entered into entities within Washington State. The State of Washington sued International Shoe Company for payment of social security taxes to the State of Washington pursuant to a tax assessment. International Shoe argued that the Washington State courts did not have jurisdiction over it on the grounds that the company was not headquartered in Washington and that the company did not conduct its corporate affairs within this state, before appealing the case to the U.S. Federal Supreme Court. The Supreme Court held that the regular and systematic solicitation of business within Washington State by International Shoe's sales staff and the constant flow of products into Washington State were sufficient to regard this company as conducting its affairs within Washington State. Therefore, the Washington courts had confirmatory jurisdiction over International Shoe.<sup>1</sup> The Supreme Court first articulated the doctrine of minimum contacts in this case that the state court maintained the jurisdiction over a non-resident defendant so long as it made a minimum connection to the forum. The minimum contacts doctrine is credited with ushering to long-arm jurisdiction in the United States. Bryan A. Garner, in his *Black's Law Dictionary*, specifically explained the term long-arm jurisdiction means that a court got jurisdiction over a citizen or legal person who was not a resident of the forum as long as he or she made a

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<sup>1</sup> See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310.

minimum connection to the forum. Long-arm jurisdiction extends the jurisdiction of the courts beyond the principles of territoriality.

### **Development of Long-Arm Jurisdiction in the United States**

U.S. long-arm jurisdiction was originally adopted to resolve the issues of state court jurisdiction over residents and legal persons of other states. Under the influence of hegemonic ideology, the U.S. arbitrarily modified and enhanced the long-arm jurisdiction, unilaterally expanded the scope of its application, and even forcibly extended it to a global scale. Today, U.S. long-arm jurisdiction has been common in the fields of export control, trade secret protection, antitrust, and anti-corruption. After the development of the Internet made the cross-border flow of data more frequent, long-arm jurisdiction also spread from the real world to the data domain.

The 2013 Microsoft Data Litigation case prompted the United States to begin extending its long-arm jurisdiction to the cross-border flow of data. In that case, the U.S. government kept requesting Microsoft's account information of a suspect in a drug-smuggling investigation after Microsoft had already provided the suspect's specific login time and location. Microsoft argued that the suspect's account information was stored on a server in Ireland, which became an offshore server over which the U.S. was not entitled to exercise jurisdiction. As a result, Microsoft refused to provide the U.S. government with the account information associated with the suspect. In July 2016, the Federal Court of Appeals for the Second Circuit ruled under the Stored Communications Act that the United States might not require domestic data service providers to submit data on overseas servers.<sup>2</sup> To gain control of that data abroad, in March 2018, the U.S. passed the Clarifying Lawful Overseas Use of Data Act (the "Cloud Act"). It allowed the U.S. government to directly require domestic data service providers to submit their data stored offshore, unilaterally giving the U.S. government the right to exercise long-arm jurisdiction over global data flows across borders (Huang & He, 2019).

### **Three Major Bases for the Application of Long-Arm Jurisdiction by the United States in Cross-Border Data Flows**

1. U.S. dominance in the field of cross-border data flows is practical support for long-arm jurisdiction. The United States has been the dominant player and the biggest beneficiary of this activity. First, as a pioneer of the Internet, the U.S. holds a significant advantage in Internet technology. The Internet is the main venue for cross-border data flow, and data service providers are its major medium. With strong Internet technology and powerful data service providers, the U.S. obtained strong control in the field of cross-border data flow. Secondly, as a data power, the U.S. advocated the free cross-border flow of data globally, but exercised strict territorial jurisdiction over data in the U.S., and collected data in the name of opening, which not only received the economic benefits brought by data, but also made the U.S. the actual controller of global data (Liu, 2021). Finally, the U.S. has introduced relevant legislation on data governance and signed treaties with other countries to actively promote the U.S. model of data governance and become the rule maker of cross-border data flow.

2. The minimum connection principle in cross-border data flow is the theoretical foundation for long-arm jurisdiction. The minimum contacts doctrine provides the legal basis for the exercise of long-arm jurisdiction in the U.S. and plays a pivotal role in U.S. judicial practice, while it is considered to have initiated the precedent of long-arm jurisdiction in the U.S. For example, Section 27 of the Restatement (Second) of the Conflict of Laws of

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<sup>2</sup> See *United States v. Microsoft Corp.*, 829 F. 3d 197 (2d Cir. 2016), at 217-218.

the United States mentions that a party's presence, residence, consent to jurisdiction, appearance in court, business activity, and making some kind of efforts influential to that place can all be considered as having a "minimum connection", and the court in that place can legitimately exercise jurisdiction over that party.

The United States implements long-arm jurisdiction in cross-border data flows based on the principle of minimum contacts, which breaks the traditional principles of territoriality and personal jurisdiction. As a consequence, any international business or individual is now subject to U.S. jurisdiction as long as their conduct has a nexus with the United States. The U.S. manages the most powerful data services and providers in the world; therefore it will be difficult for any country to bypass the U.S. for cross-border data flows. The highly generalized minimum nexus provides the legitimate basis for the U.S. to impose long-arm jurisdiction in the field of cross-border data flows (Shao, 2021).

3. Relatively effective system of legal implementation is the power base of long-arm jurisdiction. The interplay of the legislative, law enforcement, and judicial levels in the United States jointly constitute the legal system for the implementation of long-arm jurisdiction. At the legislative level, Congress has clarified the extraterritorial data jurisdiction through the Cloud Act and granted the law enforcement agencies the investigative and evidentiary powers of extraterritorial data. At the enforcement level, U.S. agencies can impose sanctions on foreign companies or individuals based on the principle of minimum contacts, and they even have the authority to set specific enforcement rules under certain circumstances. The U.S. can also create super long-arm jurisdiction through transnational enforcement, asking the hands of other countries' law enforcement agencies to help the U.S. enforce extraterritorial jurisdiction. The U.S. government has signed extradition treaties with more than two-thirds of the world's countries, and the FBI has set up offices in 78 cities outside U.S. borders (Qi, 2020). At the judicial level, U.S. courts have continued to create new rules for the application of the minimum contacts doctrine, such as the effect standard and the conduct standard, infinitely magnifying the power of long-arm jurisdiction by depending its application on different cases.

### **China's Response to the Application of Long-Arm Jurisdiction in the Cross-Border Flow of Data by the United States**

Article 2 of the Data Security Act provides for China's extraterritorial data jurisdiction, but in the face of the invisible data field and the intricate international environment, to ensure that the extraterritorial application of China's domestic law can counterbalance the long-arm jurisdiction of the United States, China should build a legal system specifically for the extraterritorial application of domestic law also at three levels: legislation, law enforcement, and judiciary. In the field of cross-border data flow, China should form a counterweight to the United States and completely break the shackles of U.S. long-arm jurisdiction (Liao, 2019a).

#### **Legislation: Improve the Extraterritorial Application of China's Data Legislation**

It is suggested that China should improve the specific rules for extraterritorial application of the Data Security Law, and clarify its principles, standards, and legal responsibilities from the legislation.

First, unlike the unilateralism and hegemonic thinking of the United States, China should not only abide by the basic rules of international law and the principle of sovereign equality on data, but also uphold multilateralism and advocate the building of a community with a shared future for mankind. When exercising extraterritorial jurisdiction over the cross-border flow of data, it will be necessary to take the basic principles of international law

as the bottom line and the prohibitive rules of international law as the boundary. Due to the intangible characteristics of data, such as its non-territoriality, mobility, sharability, and repeatability, the scope of control over data often exceeded the scope of national jurisdiction over the territory and went beyond the physical boundaries of exercising national sovereignty (Sun & Zhang, 2015). Therefore, China should strike a balance between respecting the data sovereignty of other countries and exercising the extraterritorial jurisdiction of China's domestic law.

Second, China should abandon the effect standard and adhere to the criterion of real harm. All acts that infringe on national security, data sovereignty, public interests, and enterprises and individuals' legitimate rights and interests, should be subject to extraterritorial jurisdiction.

Finally, China should clarify the legal responsibility of the extraterritorial application of domestic law. In addition to criminal liability and civil liability, China should focus on the inclusion of administrative liability into the system of extraterritorial application of domestic law. It is recommended that measures such as fines and confiscations of illegal income should be clearly stipulated as a means to pursue the administrative level of legal responsibility, so that regulate extraterritorial acts that violated China's Data Security Law but did not yet suffice to commit crimes (Liao, 2019b).

#### **Law Enforcement: Establish a Chinese Model of Extraterritorial Data Enforcement Jurisdiction**

Law enforcement is an important link to determining whether the extraterritorial application of China's data law can be effectively implemented, and it is the antecedent procedural guarantee of extraterritorial data jurisdiction. China should establish a grand vision of extraterritorial law enforcement and build a Chinese model of extraterritorial data jurisdiction.

First of all, the behavior of China's extraterritorial enforcement agencies must strictly comply with the procedures and methods stipulated by relevant laws. Law enforcement agencies should execute extraterritorial jurisdiction based on the legal provisions with extraterritorial effect. Simultaneously, due to the discrete and instantaneous nature of data, China can give law enforcement agencies the right to exercise a certain degree of discretion under special circumstances, and they can appropriately expand the implementation of extraterritorial data jurisdiction to enhance the deterrent effect of China's domestic law.

Second, to determine the extraterritorial criminal jurisdiction of China's law enforcement agencies, China should not only adjust the judicial assistance and cooperative relationship with other countries, but also give law enforcement agencies the extraterritorial data-investigation authority on the basis of respecting data sovereignty and judicial sovereignty of other countries.

Finally, China should strengthen international law enforcement cooperation in the cross-border data flow. In the governance of cross-border data flow, it is difficult to sever the two links of in-country and out-of-country, and law enforcement agencies need to supervise and manage the in-country and out-of-country activities in a cooperative manner to reduce the conflict of jurisdictions during the law enforcement process. China can sign agreements of joint law enforcement with other countries to improve diversified cooperation to the maximum extent.

#### **Judicial: Give Full Play to the Functions of Our Courts**

China should not only expand the extraterritoriality of domestic laws from the legislation level, but also ensure their full implementation during the process of extraterritorial application in the judiciary, and the

construction of the judicial system should be the foundation and guarantee (Cai, 2018). China, as a major country of data generating and flowing, should proactively accumulate experience in the judicial practices of data governance. While the involvements of China's courts in the governance of cross-border data flow and the extraterritorial application of China's data law are both relatively low at present, therefore, during the process of building the legal system, China should pay due attention to the role positioning and function of the courts (Shanghai First Intermediate People's Court Project Group, 2021).

First, the reasonable exercise of judicial interpretation should be studied. Examining the judicial practices of the U.S. courts on long-arm jurisdiction can show the courts' direct interpretation of jurisprudence, statutes, and legislation to expand. It is for continuously enriching the rules of extraterritorial application of long-arm jurisdiction in the field of cross-border data flow, which has shaped the international jurisdiction of the U.S. over data. Although China's legal system is different from that of the United States and cannot give courts the power to make arbitrarily expanded interpretations or grant judges the authority to make judgments beyond the law, China's courts still have certain discretionary power within a reasonable range. The court can reasonably expand the extraterritorial jurisdiction of domestic law into the field of cross-border data flow through the Supreme People's Court in the form of judicial interpretation under the basic principles of international law and the actual circumstances of the case (Xiao & Jiao, 2020).

Second, prudent handling of extraterritorial jurisdictional conflicts should be considered. Countries around the world have been expanding their jurisdiction over extraterritorial data, and how to avoid conflicts of jurisdictions between China courts and those of other countries becomes one of the main issues that need to be resolved in Chinese judicial practice. Due to the virtual properties of data and the characteristics of cross-border data flow, the absolute principle of territorial jurisdiction should be gradually given up. The view of the International Permanent Court on the scope of data jurisdiction can be quoted, where a country will be considered to have jurisdiction over data if the data receiving point are within this country, the data sending point is within this country, and the data are stored or flowed on a network or device within this country. In the case of China, as long as the extraterritorial data meet any one of the above conditions, it can be approved that China has jurisdiction over such extraterritorial data (Shao, 2020). China can adopt the principle of practical connection in the agreed jurisdiction clause of the Civil Procedure Law, while its enforcement of extraterritorial jurisdiction in the cross-border flow of data can be based on the principle of territorial jurisdiction and supplemented by the principle of practical connection.

Finally, the supporting infrastructure of extraterritorial jurisdiction should be improved. China should strengthen the review capacity of court adjudicators and build for the courts an extraterritorial law trial team that is proficient in the international rules of cross-border data flow. China should avoid the situation where the court relies excessively on the testimony of foreign legal experts during judicial proceedings.

### **Conclusion**

In the field of cross-border data flow, the U.S. has always regarded China as its biggest competitor and frequently launched sanctions against China companies to weaken their data advantages and development momentum. If China's cross-border data flow is subject to the long-arm jurisdiction of the United States, it will inevitably compromise the development of China's digital economy and data security. In the face of various

irrational sanctions by the U.S. during this data battle, China should accelerate the improvement of the relevant system of the Anti-Foreign Sanctions Act, and simultaneously establish a legal system for the extraterritorial application of China's data law. While effectively breaking the long-arm jurisdiction of the United States, China should also maintain cooperation with this country; because the interests of China and the United States have been deeply intertwined, excessive focus on confrontation will not only hinder the development of the digital economies of China and the United States, but also impact the international industrial landscape and the international cooperative situation. China and the United States should both give up the strategy of zero-sum game and share the responsibility of international governance of cross-border data flow.

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