

The New PRC Anti-Foreign Sanctions Law

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On June 10, 2021, the 29th session of the Standing Committee of the 13th National People's Congress ("NPC") adopted China's new *Anti-Foreign Sanctions Law*,¹ which took immediate effect. The new law provides legal grounds for the Chinese government authorities and private individuals and entities to take countermeasures against "discriminatory restrictive" foreign sanctions.

Legislative Background

Since 2020, the Chinese government has launched a series of retaliatory measures against foreign measures targeting People's Republic of China (PRC) citizens or entities, including:

- *Ministry of Foreign Affairs (MOFA) Sanctions*: Between August 10, 2020 and May 26, 2021, MOFA announced retaliatory sanctions² against certain U.S. and EU parties in relation to their "interference with China's domestic affairs" in Xinjiang and Hong Kong. The sanctions measures mainly include denial of entry, asset freezes and prohibitions on PRC persons from dealing with sanctioned parties.
- *Rules on the List of Unreliable Entities*: The Ministry of Commerce (MOFCOM) issued the *Rules on the List of Unreliable Entities*³ on September 19, 2020. According to the provisions, a joint-agency working mechanism will establish and maintain an "unreliable entity list" targeting certain foreign entities with restrictive measures on in-bound investment, import and export activities, access to the public transportation system, work permits, PRC residential qualifications and potentially administrative fines as well.
- *Blocking Rules*: In January 2021, MOFCOM issued the *Rules on Counteracting Unjustified Extra-territorial Application of Foreign Laws and Measures*⁴ ("Blocking Rules"), in response to the increased use of economic sanctions and export controls against PRC entities and individuals. The Blocking Rules authorize MOFCOM to issue a blocking order against foreign laws with unjustified extraterritorial application on PRC entities and individuals.

In March 2021, the NPC Legislative Committee announced in a legislative plan that China will accelerate the legislation process to build a comprehensive anti-sanctions, anti-interference and counter-long-arm jurisdiction legal regime. The NPC subsequently passed the Anti-Foreign Sanctions Law in its second read on June 10,

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2021, and promulgated the new law the next day. According to China's general legislative practice, a draft law is usually reviewed three times before being subject to a vote. The accelerated legislative process of the Anti-Foreign Sanctions Law indicates the determination of the PRC government to establish comprehensive countermeasures against foreign interference in the areas of sanctions and export controls.

Key Provisions

- *Circumstances Where Countermeasures Are Authorized:* Article 3 of the Anti-Foreign Sanctions Law authorizes the promulgation of countermeasures against foreign "discriminatory restrictive measures" when such measures violate international laws and the basic norms of international relations, in accordance with its own laws to suppress China, or interfere with China's internal affairs. The term "discriminatory restrictive measures" is purposefully left undefined, which is not unusual in China's legislative practice.

In addition, Article 15 further provides that countermeasures may be issued against foreign entities or individuals that implement, assist or support actions that endanger China's sovereignty, security and development interests.

- *Creation of a Countermeasure List:* The new law empowers relevant administrative authorities to include individuals and entities that directly or indirectly participate in the formulation, decision and implementation of "discriminatory restrictive measures" on a Countermeasure List. Countermeasures against individuals on the list may be extended to their spouses, relatives and entities with which they are associated.
- *Authorized Countermeasures:* Article 6 authorizes the PRC administrative authorities to take different countermeasures against parties designated on the Countermeasure List, including denial of entry into the PRC territory (including Hong Kong and Macau), seizing and/or freezing property in China and prohibition or restriction of PRC persons from conducting business with designated parties. This represents the first time that asset freezes are explicitly authorized by law in China's anti-boycott legislation. There is a catch-all provision that authorizes other restrictive countermeasures as necessary.

Article 11 requires all PRC nationals and entities (including foreign entities' subsidiaries and representative offices registered in China) to comply with the promulgated countermeasures, including through a prohibition on dealing with any designated parties.

- *Designation Procedure:* Article 7 of the law provides that the decisions on the designation and the associated countermeasures will be the final decision, which means the designated parties cannot file for administrative reconsideration or appeal. Article 8 authorizes the relevant administrative authorities to suspend, change or cancel certain countermeasures. The law does not provide any mechanism for the designated parties to apply for exclusion or exemption from certain countermeasures.
- *Private Cause of Action:* Article 12 of the law prohibits individuals and entities from implementing or assisting to implement discriminatory restrictive foreign measures against PRC citizens or entities, who in turn have a cause of action in PRC courts against individuals and/or entities alleged to be violating the foregoing prohibition.

Given that the law took effect immediately upon promulgation, i.e., from June 11, 2021, the cause of action may have already arisen for certain PRC persons who suffer injury as a result of foreign sanctions. Article 12 does not specify whether the prohibition of complying with discriminatory restrictive foreign measures applies to foreign persons. However, given that Article 11 explicitly states that it applies only to PRC persons, it is likely that Article 12 applies to both PRC and foreign persons. Most commentators share this view.

Prospect of Future Legislative and Judicial Actions

Unlike the *Blocking Rules and Rules on the List of Unreliable Entities*, the Anti-Foreign Sanctions Law was promulgated by the NPC, the highest legislative body in the PRC. This enables relevant PRC administrative and government authorities, such as MOFCOM (with oversight for export control and sanctions), the General Administration of Customs (customs), the Ministry of Foreign Affairs (visa and entry requirements), the State Administration of Market Regulations (market conduct) and PRC courts, to promulgate implementing rules and take enforcement and other action consistent with the objectives of the Anti-Foreign Sanctions Law.

Possible Implications for the PRC Export Control Law

China released its first comprehensive *Export Control Law*⁵ on October 17, 2020, which took effect on December 1, 2020. The Export Control Law provides that where any country or region abuses export control measures to endanger China's national security and interests, China may take reciprocal measures against that country or region based on actual conditions. Article 13 of the Anti-Foreign Sanctions Law empowers the State Council and relevant government departments to enact administrative regulations and/or rules to take other countermeasures for acts that endanger the PRC's national sovereignty, security and development interests. The reciprocity principle under the Export Control Law can be viewed as the embodiment of countermeasures under the new law in the export control field.

The Export Control Law also stipulates in principle that the export operators shall establish and improve their internal compliance system. In April 2021, MOFCOM issued the *Guiding Opinions on Establishing Internal Compliance Mechanism for Export Control by Dual-use Items Export Operators*⁶ ("Guiding Opinions") to provide a nine-element guidance document on how to establish and improve internal compliance systems for the export operators. The Guiding Opinions are very similar to the eight-element export control compliance guidance promulgated by the U.S. Department of Commerce's Bureau of Industry and Security. The Guiding Opinions specifically recommend that the export operators conduct screening on whether the customers are included in PRC's control lists or the UN sanctions list.

In light of the Export Control Law, we also recommend that multinational companies operating in China or conducting business with Chinese counterparties start considering how to incorporate PRC export control compliance requirements into their existing global compliance program, including covering the PRC-designated parties in the end-use/end-user screening practice.

Companies should also develop savvy and bespoke compliance solutions to ensure simultaneous compliance with various applicable sanctions laws and sometimes seemingly contradictory blocking rules, such as U.S. sanctions and the new Chinese Anti-Foreign Sanctions Law.

¹ Anti-Foreign Sanctions Law of the People's Republic of China (《中华人民共和国反外国制裁法》) (in Chinese).

² MOFA Announces Sanctions on Relevant US and Canadian Individuals and Entity (March 27, 2021), MOFA Announces Sanctions on Relevant UK Individuals and Entities (March 26, 2021), MOFA Announces Sanctions on Relevant EU Entities and Personnel (March 22, 2021) and MOFA Announces Sanctions on Pompeo and Others (January 20, 2021).

³ Rules on the List of Unreliable Entities (《不可靠实体清单规定》).

⁴ Rules on Counteracting Unjustified Extra-territorial Application of Foreign Laws and Measures (《阻断外国法律与措施不当域外适用办法》).

⁵ Export Control Law of the People's Republic of China (《中华人民共和国出口管制法》) (in Chinese).

⁶ Guiding Opinions on Establishing Internal Compliance Mechanism for Export Control by Dual-use Items Export Operators (《关于两用物项出口经营者建立出口管制内部合规机制的指导意见》) (in Chinese).

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