

China Promulgates New Anti-Foreign Sanctions Law

On June 10, 2021, China’s legislator, the Standing Committee of the National People’s Congress (the “SCNPC”), promulgated a new Anti-Foreign Sanctions Law (“Anti-Foreign Sanctions Law” or the “AFSL”).ⁱ The new law, which came into effect immediately, grants the Chinese government authority to impose counter-sanctions on foreign individuals and entities. Under the AFSL, individuals and organizations who have certain involvement in foreign sanctions imposed on Chinese persons may themselves be subject to Chinese sanctions. The AFSL is another step that China has taken to counter U.S. and EU’s escalating sanctions on Chinese officials and companies, following the Regulations on Unreliable Entity List in 2020ⁱⁱ and Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures (the “Blocking Rules”) adopted by the Chinese government earlier this year.ⁱⁱⁱ

As noted below, contrary to statements in certain media reports,^{iv} the AFSL is not forcing multinational companies to ignore U.S./EU-imposed sanctions by subjecting them to China’s own sanctions; but neither does it set out general principles with only symbolic value. The law provides an important framework for—and foreshadows—future regulations and enforcement actions in response to foreign sanctions on Chinese companies and individuals, which could have long-lasting impact on multinational companies doing business in China or with Chinese counterparties.

I. Key Aspects

Legislative Background

The legislative intent of the AFSL is instructive in interpreting how the law would likely be enforced, particularly as the AFSL’s provisions are intentionally broad and vague, leaving much discretion in specific enforcement actions. As stated by a representative of the SCNPC’s legal committee when the draft bill of the AFSL was under review and affirmed explicitly by the actual text of the law, the AFSL is focused on countering foreign countries’ actions that both aim at “interfering with China’s internal affairs” and use “discriminative measures” against Chinese individuals and organizations (the “Targeted Sanctions”).^v

In other words, the new law only targets foreign actions that single out certain Chinese individuals or Chinese entities with the political motivation of influencing what China perceives to be its internal affairs. For example, certain sanctions against third-country entities (such as North Korea and Iran) that apply not only to Chinese businesses but equally to businesses of other nationalities with no clear intent to target China, do not appear to be a concern of the AFSL and would likely not constitute Targeted Sanctions. This focused legislative intent significantly distinguishes the AFSL from blocking statutes adopted by other countries aimed to counter the effect of foreign sanctions more generally, such as the EU blocking statute, and the Blocking Rules adopted by the Chinese government earlier this year, which does not focus on the political motivation behind the foreign sanctions at issue. It also informs the scope of the new law’s application, as noted in further detail below.

The AFSL also notes the possibility that it could be expanded to apply to conduct beyond the Targeted Sanctions that otherwise “harm [China’s] sovereignty, security and development interests.”^{vi} While this could be interpreted extremely broadly, according to the representative of the SCNPC’s legal committee, what this provision originally contemplates appears to be the conduct of advocating and sponsoring separatist movements against China.^{vii}

Who Are Affected?

The AFSL would affect three categories of differently situated targets, each with different implications:

- (1) **individuals and organizations who “directly or indirectly *participate in the formulating, deciding and adopting of*” the Targeted Sanctions.**^{viii} These entities are the most direct targets of the new law and could be put on a “counter-measures [target] list” by the Chinese government and be subject to a series of counter-measures noted below. Typical examples of this category would be politicians who introduce the Targeted Sanctions and individuals or organizations that advocate for such Targeted Sanctions.
- (2) **individuals and organizations who “carry out or assist with carrying out” the Targeted Sanctions.**^{ix} This category appears to cover individuals and companies who did not participate in the initiation of the Targeted Sanctions but comply with them, such as multinational companies who decline to conduct business with certain Chinese individuals or companies in compliance with their home-jurisdictions’ Targeted Sanctions. Companies and individuals in this category would not be subjected to the “counter-measures,” but instead would be liable to Chinese individuals and organizations who suffered damages that are proven in civil litigation in a Chinese court.^x This is in fact not new, as a similar mechanism of allowing Chinese entities that suffer damages from someone else’s compliance with a foreign country’s extra-territorial sanctions to bring lawsuit in Chinese court was already provided in the Chinese Ministry of Commerce’s Blocking Rules adopted earlier this year.^{xi}
- (3) **individuals and organizations who fail to carry out or comply with the Chinese government’s counter-measures.**^{xii} This category of individuals and organizations would bear liabilities for violating the Chinese government’s counter-measures. For companies and individuals who are subject to the Chinese government’s enforcement jurisdiction, the consequences would include government-ordered “restrictions over or prohibition against” their related businesses.^{xiii} Further, there may be other “legal liabilities” that are not yet specifically provided in the AFSL^{xiv} but may be specified when the Chinese government adopts individual counter-measures. Given the nature of the counter-measures, which mostly deny entities on the target list access to China and services by Chinese entities (noted in detail below), it is unlikely that the counter-measures would require China-based businesses to violate mandatory laws of other jurisdictions. On the other hand, it is possible that China-based entities may not be able to provide services promised under pre-existing contracts with the entities on the target list, which may potentially implicate contractual liabilities if the contract does not provide for sanctions-based exemption from performance.

The Counter-Measure Target List & the Counter-Measures

As noted above, individuals and organizations who “directly or indirectly participate in the formulating, deciding and adopting” Targeted Sanctions may be listed on a counter-measure target list. Further, the AFSL also allows adding to the counter-measure target list the following affiliates of such individuals and organizations: (1) the spouses and immediate family members of listed individuals, (2) senior management personnel or actual controllers of listed entities, (3) the entities where the listed individuals serve as senior managers, and (4) the entities that are controlled, established, or operated by listed individuals or entities.^{xv}

Individuals and organizations on the counter-measure target list may be subjected to various sanctions, including denial of entry into China or deportation from China, freezing assets within China, being blocked from engaging in transactions/collaborations with individuals and organizations in China, and “other necessary measures.”^{xvi}

Various ministries of the Chinese government would have the authority to place someone on the counter-measure target list and impose specific sanctions on the targets. Their decisions would be final and not be subject to administrative or judicial review.^{xvii} But these governmental authorities may suspend, change

or terminate the counter-measures “if the circumstances upon which the counter-measure is based” change, leaving the possibility of negotiated resolution after a counter-measure is imposed.^{xviii}

II. Key Observations

The AFSL lays out the basic principle and legal framework for China’s measures against foreign sanctions. As demonstrated in the new law’s legislative background, it is intended more as a defensive mechanism (i.e. as reaction to certain foreign sanctions) than an offensive weapon (i.e. to proactively impose sanctions on foreign entities). Further, importantly, the new law makes a distinction between entities that take affirmative actions to contribute to the initiation of Targeted Sanctions and entities that merely comply with such sanctions, subjecting the former to the counter-measure target list with harsh penalties and the latter not to penalties but pre-existing, potential legal liabilities for damages actually caused by the entity at issue to affected Chinese individuals and organizations. However, the line between the two could be blurred. It remains to be seen how broadly the AFSL’s counter-measure mechanism would be adopted and what factors the specific Chinese government authorities would consider in imposing the counter-measures. For multinational companies, especially those with personnel, assets, and other business interests subject to the jurisdiction of Chinese authorities, there is now another constantly-evolving compliance regime that needs to be carefully evaluated and navigated.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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ⁱAnti-Foreign Sanctions Law of the People’s Republic of China (《中华人民共和国反外国制裁法》), issued and effective June 10, 2021, available at

<http://www.npc.gov.cn/npc/c30834/202106/d4a714d5813c4ad2ac54a5f0f78a5270.shtml>.

ⁱⁱ Regulations on Unreliable Entity List (Ministry of Commerce Decree No. 4 [2020]) (《不可靠实体清单规定》), 商务部令 2020 年第 4 号), issued and effective September 19, 2020, Ministry of Commerce of the People’s Republic of China, available in English at

<http://english.mofcom.gov.cn/article/policyrelease/questions/202009/20200903002580.shtml>.

ⁱⁱⁱ Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures (Ministry of Commerce Decree No. 1 [2021]) (《阻断外国法律与措施不当域外适用办法》, 商务部令 2021 年第 1 号), issued and effective January 9, 2021, Ministry of Commerce of the People's Republic of China, available in English at <http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml>.

^{iv} See, e.g., NARAYANAN SOMASUNDARAM, *China anti-sanctions law to put squeeze on foreign companies*, June 11, 2021, available at <https://asia.nikkei.com/Politics/China-anti-sanctions-law-to-put-squeeze-on-foreign-companies>.

^v See Notes on the Anti-Foreign Sanctions Law of the People's Republic of China (Draft) at the 28th Meeting of the Standing Committee of the 13th National People's Congress on April 26, 2021 (关于《中华人民共和国反外国制裁法(草案)》的说明——2021 年 4 月 26 日在第十三届全国人民代表大会常务委员会第二十八次会议上), April 26, 2021, Shen Chunyao, director of the Legislative Affairs Commission of the SCNPC, available at <http://www.npc.gov.cn/npc/c30834/202106/99804919249244e593383c9da4e39ddf.shtml>; see also Article 3 of the AFSL.

^{vi} See Article 13 of the AFSL.

^{vii} See Notes on the Anti-Foreign Sanctions Law of the People's Republic of China (Draft) at the 28th Meeting of the Standing Committee of the 13th National People's Congress on April 26, 2021, *supra* Note 5.

^{viii} See Article 4 of the AFSL.

^{ix} See Article 12 of the AFSL.

^x *Id.*

^{xi} See Quinn Emanuel, *China Promulgates Blocking Regulation Against Extra-Territorial Laws and Executive Actions*, January 12, 2021, available at <https://www.jdsupra.com/legalnews/china-promulgates-blocking-regulation-2111005/>.

^{xii} See Article 14 of the AFSL.

^{xiii} See Article 11 of the AFSL.

^{xiv} See Article 14 of the AFSL.

^{xv} See Article 5 of the AFSL.

^{xvi} See Article 6 of the AFSL.

^{xvii} See Article 7 of the AFSL; see also Notes on the Anti-Foreign Sanctions Law of the People's Republic of China (Draft) at the 28th Meeting of the Standing Committee of the 13th National People's Congress on April 26, 2021, *supra* Note 5.

^{xviii} See Article 8 of the AFSL.