

China Enacts the Anti-Foreign Sanctions Law

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1. Background

On 10 June 2021, China's Standing Committee of the National People's Congress (hereinafter "NPC") issued "Anti-Foreign Sanctions Law of the People's Republic of China" (hereinafter "CAFSL"), which entered into force on the date of the promulgation. This is a reaction in response to the current tension between China and some western countries, in particular, the US and the EU that have imposed a series of sanctions on Chinese officials and entities. For example, in August 2020, the Trump administration imposed sanctions on 11 individuals for undermining Hong Kong's autonomy and restricting the freedom of expression or assembly of the citizens of Hong Kong. In June 2021, President Biden issued Executive Order 14032 to amend the ban on US persons purchasing securities of certain Chinese companies. In March 2021, the EU imposed unilateral sanctions on relevant Chinese individuals and entity, based on the human rights issues in Xinjiang. China has responded by imposing counter sanctions, which were issued by the Ministry of Foreign Affairs as administrative orders. The Anti-Foreign Sanctions Law provides the legal basis for China's further action and counter measures. This law was enacted after only two readings rather than the normal three demonstrating China's urgent need to defend itself against a growing risk of foreign hostile measures.

2. The main content

Competent Authority: All relevant departments under the State Council have been authorized to involve issuing the anti-sanction list and anti-sanction measures (Art. 4 and Art. 5). The "Ministry of Foreign Affairs" and "other relevant departments under the State Council" are authorized to issue orders of announcement (Art. 9). Reviewing from the current practice of China's response to foreign sanctions, the Ministry of Foreign Affairs has always issued sanctions lists against foreign individuals and organizations, so it is likely that the China's Ministry of Foreign Affairs will still lead the movement of announcing and

countering the foreign sanctions. However, other departments now also have the authority to sanction relevant individuals and entities. This provides flexibility if the foreign sanctions relate to a particular issue that is administrated by the particular department and when it is more efficient or appropriate for the particular department to handle it directly.

Targeted measures: Circumstances under which China shall have the right to take corresponding anti-sanction measures are as follows: (1) a foreign country violates international law and basic norms of international relations; (2) contains or suppresses China on various pretexts or in accordance with its own laws; (3) adopts discriminatory, restrictive measures against any Chinese citizen or organization; (4) meddles in China's internal affair (Art. 3). The CAFSL does not expressly specify whether the circumstances should be satisfied simultaneously or separately. From the perspective of legislative intent, it is obvious that the full text of the CAFSL is intended to broaden the legal authority for taking anti-sanctions measures in China, so it may not require the fulfillment of all four conditions.

It does not clarify the specific meanings of "violates international law and the basic norms of international relations", "contains or suppresses", and "meddles in China's internal affairs", which vary in different states and jurisdictions. But considering the sanctions issued by China and answers by the NPC spokesman, the key targeted circumstances are meddling China's internal affairs. It is reasonable to assume that these circumstances, mainly aimed at unilateral sanctions suppressing China under the pretexts of so-called sea-based, epidemic-based, democracy-based and human rights-based issues in Xinjiang, Tibet, Hong Kong and Taiwan. Therefore, other issues may not be included.

Art. 3 aims against the sanctions imposed by foreign states, for example the US and the EU. But from the text of the law, the concept of "sanctions" is not used, instead the concept of "discriminatory, restrictive measures" is adopted, which is very vague and broad. Discriminatory restrictive measures can be interpreted as foreign unilateral sanctions directly targeting Chinese individuals and organizations, which are the so-called "primary sanctions", different from the "secondary sanctions" restricting Chinese parties from engaging in normal economic, trade and related activities with directly sanctions third state's parties. In a press conference, the NPC spokesman stated that "the main purpose of the CAFSL is to fight back, counter and oppose the unilateral sanctions against China

imposed by foreign states.” It should only apply to tackle the primary sanctions against China.

Targeted entities: The targeted entities of the anti-sanction list and anti-sanction measures are vague and broad. The targeted entities of anti-sanctions list include individuals and organizations that are directly involved in the development, decision-making, and implementation of the discriminatory restrictive measures (Art. 4). What means involvement in the development or decision-making or implementation is ambiguous. And the indirect involvement is even vaguer, which may broaden the scope of the list. Besides, following entities may also be targeted: (1) spouses and immediate family members of targeted individuals; (2) senior executives or actual controllers of targeted organizations; (3) organizations where targeted individuals serve as senior executives; (4) organizations that are actually controlled by targeted entities or whose formation and operation are participated in by targeted entities (Art. 5).

Anti-sanction measures: The relevant departments may take four categories of anti-sanction measures: (1) travel ban, meaning that entry into China will not be allowed and deportation will be applied; (2) freezing order, namely, all types of property in China shall be seized, frozen or detained; (3) prohibited transaction, which means entities within the territory of China will not be allowed to carry out transactions or other business activities with the sanctioned entities; (4) the other necessary measures, which may include measures like “arms embargoes” or “targeted sanctions” (Art. 6). Former three anti-sanction measures have been taken by the Ministry of Foreign Affairs in practice. For example, on 26 March 2021, China decided to sanction relevant UK individuals and entities by prohibiting them from entering the mainland, Hong Kong and Macao of China, freezing their property in China, and prohibiting Chinese citizens and institutions from doing business with them.

Relevant procedure: The decisions made by the competent authorities shall be final and not subject to judicial review (Art. 7). The counterparty shall not file an administrative lawsuit against anti-sanction measures and other administrative decisions. The counterparty can change the circumstance causing anti-sanction measures, and request the relevant department for the modification and cancellation of anti-sanction measures. If any change in the circumstances based on which anti-sanction measures are taken happens, the competent authorities may suspend, change or cancel the relevant anti-sanction measures (Art. 8). The

transparency requirement stipulates the relevant orders shall be announced (Art. 9).

A coordination mechanism for the anti-foreign sanctions work shall be established by the state to coordinate the relevant work. Coordination and cooperation, and information sharing among various departments shall be strengthened. Determination and implementation of the relevant anti-sanction measures shall be based on their respective functions and division of tasks and responsibilities (Art. 10).

Legal consequences of violation: There are two types of legal consequences for violating the obligation of “implementation of the anti-sanction measures”. Entities in the territory of China will be restricted or prohibited from carrying out relevant activities (Art. 11). Any entities, including foreign states’ parties, will be held legally liable (Art. 14).

Besides, a party suffering from the discriminatory, restrictive measures may be entitled to bring a civil action against the entities that comply with the foreign discriminatory measures against China (Art. 12). The defendant, in theory, includes any entities in the world, even entities that are the nationals or residents of the country imposing sanctions against China. It is curious how this can be enforced in reality. In particular, if a foreign entity has no connections with China, it is hard for a Chinese court to claim jurisdiction, and even taking jurisdiction, enforcing judgments abroad can also be difficult, if not impossible. Because enforcement jurisdiction must be territorial, without assets and reputation in China, a foreign party may disregard the Chinese anti-sanction measure.

3. Impact of the CAFSL

The CAFSL is a higher-level legislation in the Chinese legal system than the relevant departmental rules, such as the Chinese Blocking Rules and “unreliable entity list”. It is a much more powerful legal tool than former departmental rules as it directly retaliates against the primary sanction on China. It provides a legal basis and fills a legal gap. However, it may not be good news for international businesses that operate in both the US and China. Those companies may have to choose between complying with US sanctions or Chinese laws, which may probably force some enterprises to make strategic decisions to accept the risk of penalty from one country, or even to give up the Chinese or US market. The

CAFSL is vaguely drafted and likely to create unpredictable results to the commercial transaction and other interests. The application and enforcement of the CAFSL and Chinese subsequent rules and regulations may give detailed interpretations to clarify relevant issues to help parties comply with the CAFSL. However, to China, the CAFSL serves a political purpose, which is more important than the normal functioning of a law. It is a political declaration of China's determination to fight back. Therefore, the most important matter for Chinese law-makers is not to concern too much of the detailed rules and enforcement to provide predictability to international business, but to send the warning message to foreign countries. International businesses, at the same time, may find themselves in a no-win position and may frequently face the direct conflict of overriding mandatory regulations in China and the US. By placing international businesses in the dilemma may help to send the message and pressure back to the US that may urge the US policy-makers to reconsider their China policy. After all, the CAFSL is a counter-measure, which serves defensive purposes, and would not be triggered in the absence of sanctions against Chinese citizens and entities.