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China Enacts Anti-Foreign Sanctions Law: Increasing Uncertainty for Companies with China Operations

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On June 10, 2021, the Standing Committee of the PRC National People's Congress promulgated the Anti-Foreign Sanctions Law (the "AFSL" or the "Law"),¹ which came into effect immediately.² Together with earlier-enacted Rules on Countering Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (the "Chinese Blocking Statute"),³ as well as the Regulations on the Unreliable Entity List (please see our prior alert [here](#))⁴ and various other rules and regulations, China has recently implemented a number of legal and regulatory measures to push back against what it views as the improper application of economic sanctions by the United States (U.S.), United Kingdom (U.K.), Canada, European Union (EU), and other ("Western") countries against Chinese government officials, government departments, and companies. Recent examples include the U.S.'s issuance of Executive Order 14032, restricting U.S. persons' dealings in the securities of companies designated by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC") as Chinese Military-Industrial Complex companies ("CMIC"), and additional recent Western sanctions on senior Chinese officials over various other issues.

The implementation of the AFSL, along with the Chinese Blocking Statute, creates uncertainty for companies doing business in economic sectors and geographies subject to disputes between China and these countries, and may deter Western policymakers from enacting more stringent sanctions on certain areas involving China than are already in place: the AFSL does not enact any new sanctions *per se*, but instead puts in place the legal infrastructure to enable the Chinese government to impose counter-measures in response to Western sanctions on Western companies when it sees fit, in any manner it chooses. As a result, Chinese authorities now have policymaking tools similar to those which Western policymakers have had for some time.

This state of affairs creates additional uncertainty for companies with China operations, and may deter foreign investments and redirect opportunities to companies who are willing to align themselves with PRC government initiatives. There also does not appear to be much that companies operating in sensitive sectors of the Chinese economy, or in China itself, can do to prepare themselves: the nature and extent of future Western sanctions and export controls on China, and any PRC government response under the AFSL or other authorities, are hard to predict. As a result, companies should monitor events closely, and be prepared to react to any measures that may be enacted by the PRC government under the AFSL in response to Western sanctions, or vice versa.

Key Provisions of the AFSL

The AFSL consists of 16 provisions, setting out the Law's basic principles, the procedures for imposing counter-sanction measures, and prohibitions against compliance with foreign sanctions against Chinese nationals and organizations.

The AFSL states that it is enacted to "preserve national sovereignty, security, and development interests . . ." and to protect Chinese nationals and organizations' "lawful rights and interests,"⁵ among other goals.

The Law empowers the PRC government to enact "corresponding counter-measures" if a foreign country, "in the name of various excuses or in accordance to its own law," and "in violation of international law and norms": (i) seeks to "contain or suppress" China; (ii) takes "discriminatory restrictive measures" against Chinese nationals or organizations; or (iii) "interferes" in China's internal affairs.⁶

Those "counter-measures" may be imposed on "persons or organizations that directly or indirectly participate in the drafting, decision-making, or implementation of the discriminatory restrictive measures."⁷ These entities are to be listed on a "Counter-Sanction List." Sanctionable parties may also include spouses and immediate family members of listed individuals, senior management personnel or actual controllers of listed organizations, organizations where listed individuals serve as senior management personnel, and organizations actually controlled, established, or operated by listed individuals or organizations.⁸

Notably, although AFSL's title and its provisions all refer to *anti/counter*-sanction measures, the imposition of such measures does not require the existence of a prior sanction adopted by a foreign country. Any actions deemed by the PRC government to "interfere" in China's internal affairs,⁹ or "implement, assist, or support acts that endanger China's sovereignty, security, or development interests"¹⁰ may trigger a counter-sanction under the AFSL, or other counter-measures under other laws, rules, or regulations.¹¹

Accordingly, this legislation is very broad and likely reflects the PRC government's *de facto* unfettered discretion to impose sanctions against non-Chinese individuals and entities, in areas of contention where it deems it is in its interest to do so.

The range of measures which the PRC government may impose is similarly broad. The Law empowers the "relevant authorities" under China's State Council to devise any sanctions or restrictive measures they deem appropriate.¹²

The authorities' decisions are final,¹³ and the Law provides no formal channel to appeal them. Unlike the Chinese Blocking Statute, the AFSL does not provide for any exemption application process, under which an entity may gain exemption from compliance with the Law and may therefore adhere to the foreign sanction at issue.¹⁴ Furthermore, the Chinese Blocking Statute allows relevant authorities to "provide necessary support based on specific situations" if any Chinese parties suffer material losses for not complying with a foreign sanction.¹⁵ The AFSL does not contain this governmental support mechanism.

Pursuant to the AFSL, organizations and individuals within Chinese territory are required to implement the counter-sanction measures against those on the Counter-Sanction List.¹⁶ Responsibility for punishing non-compliance is left vague, with the Law stating that violators should be subject to legal liability "pursuant to the law."¹⁷ The relevant authorities may also restrict or prohibit the violators from engaging in "relevant activities."¹⁸

The AFSL also bans “any organization or individual” from “implementing or assisting the implementation of a foreign country’s discriminatory restrictive measures against Chinese nationals or organizations.”¹⁹ Notably, unlike the Law’s requirement to implement counter-sanction measures, the ban against implementing foreign sanctions does not contain the reference “within Chinese territory.” Accordingly, any organization or individual, regardless of geographical location or nationality, is required to observe the prohibition. The Law also provides for a private right of action for Chinese parties to claim damages before Chinese courts against those who comply with the foreign measures to the Chinese parties’ disadvantage.²⁰

Conclusion

In summary, the Law appears to provide the PRC government with the legal basis to enact virtually any sanction, counter-sanction, or restrictive measure it deems appropriate in response to Western or other sanctions, against the companies or individuals involved in formulating, drafting, implementing, or even adhering to those sanctions, or most any other Western rule resulting from the current dispute between China and predominantly Western nations. The AFSL also seeks to adopt a global ban on foreign sanctions against Chinese parties. Companies doing business in sectors subject to non-Chinese sanctions may be faced with a choice whether to adhere to non-Chinese law and break Chinese law, or vice versa.

This potentially challenging conflict of laws between Western and Chinese legal regimes will increase uncertainty for companies with China operations, and may, over time, deter investment and growth by companies potentially subject to counter-measures under the new Law, and potentially more broadly. As a result, companies with China operations should monitor ongoing PRC-Western (especially U.S.) developments closely, and consider a potential action plan should the PRC government implement counter-measures under the AFSL, or if a foreign sanction against Chinese entities would affect the companies’ operations. If this progresses to a significant conflict, non-Chinese companies may need to make a decision about whether to embrace opportunities in China or adhere to legal sanctions imposed elsewhere.

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- ¹ Anti-Foreign Sanctions Law (《反外国制裁法》), promulgated and effective June 10, 2021, Standing Committee, National People's Congress of the People's Republic of China (available at <http://www.npc.gov.cn/npc/c30834/202106/d4a714d5813c4ad2ac54a5f0f78a5270.shtml>).
- ² AFSL, Art. 16.
- ³ Rules on Countering Unjustified Extraterritorial 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 at <http://www.mofcom.gov.cn/article/b/c/202101/20210103029710.shtml>).
- ⁴ 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 at <http://www.mofcom.gov.cn/article/b/fwzl/202009/20200903002593.shtml>).
- ⁵ AFSL, Art. 1.
- ⁶ AFSL, Art. 3.
- ⁷ AFSL, Art. 4.
- ⁸ AFSL, Art. 5.
- ⁹ AFSL, Art. 3.
- ¹⁰ AFSL, Arts. 3, 15.
- ¹¹ AFSL, Art. 13.
- ¹² AFSL, Art. 6. Available sanctions include: (i) visa application denial, denial of entry into Chinese territory, visa cancellation, or deportation; (ii) sealing, seizing, or freezing movable property, real property, and other assets within China; (iii) prohibitions on engaging in transactions or cooperation with listed parties; and (iv) "other necessary measures."
- ¹³ AFSL, Art. 7.
- ¹⁴ See Chinese Blocking Statute, Art. 8.
- ¹⁵ Chinese Blocking Statute, Art. 11.
- ¹⁶ AFSL, Art. 11(1).
- ¹⁷ AFSL, Art. 14.
- ¹⁸ AFSL, Art. 11(2).
- ¹⁹ AFSL, Art. 12(1).
- ²⁰ AFSL, Art. 12(2).