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Between a Rock and a Hard Place under China’s Anti-Sanction Law 2021: The Game-Theoretical Perspective

Abstract

The Chinese Anti-Sanction Law (ASL 2021) has for the first time created a legal basis for sanctioning specific foreign entities for conduct inconsistent with China’s core interests and policies. Those involved in implementing foreign sanction measures can be put on an anti-sanctions list and may be denied entry into China or be expelled from the country. The escalated confrontations are part of a broader global trend of tightening export controls, sanctions and foreign investment controls on national security or public interest grounds. At the heart of the problem is the incongruity between the U.S. and Chinese perspectives on distinct values such as human rights, national security and other public policies. The conflict of law arises inevitably as a multinational company (MNC) attempts to comply with both U.S. law and ASL 2021. The law creates a legal conundrum for foreign MNCs, which are placed in a proverbial rock-and-hard-place situation. Using in-depth analyses of China’s evolving sanctions regime, it is essential to explore resolutions to mitigate the escalated tension and break the deadlock. It is therefore necessary for foreign entities to navigate a delicate balancing act between compliance with U.S. laws and China’s requirements for continued transactions.

Introduction

As unilateralism and protectionism are on the rise, the multilateral trading system is facing severe challenges.¹ In accordance with the plausible theory of Thucydides’ Trap, the U.S. and China would engage in an inevitable war for global technological superiority.² It is alleged that Huawei is engaged in activities that are contrary to U.S. national security and foreign policy interest. The U.S. Department of Commerce (DoC) added Huawei to the Entity List on 15 May 2019, banning Huawei from receiving any exports of technology or software from entities subject to U.S. jurisdiction.³ In response, China has established an unreliable entity list (UEL) in order to target firms that damage the interests of Chinese companies. As the Chinese Ministry of Commerce (MOFCOM) said that:

“the UEL is used to identify foreign entities which have blockaded, cut off supplies to, and discriminated against Chinese entities based on non-commercial considerations and which have resulted in damage to China’s related industries or have threatened or potentially harmed China’s national security.”⁴

On 19 September 2020, a MOFCOM Regulation was issued one day after the U.S. sought to ban Chinese-owned apps WeChat and TikTok.⁵ The regulation constitutes the basis of a more comprehensive tit-for-tat strategy by the Chinese government in response to a series of U.S. executive orders and statutory sanctions. On 9 January 2021, the issuance of the rules on

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¹ Charlotte Gao, ‘Eye for An Eye: China to Establish “Unreliable Entity List”’ The Diplomat (1 June 2019)
² Nouriel Roubini, ‘The Global Consequences of a Sino-American Cold War’ Project Syndicate (20 May 2019)
⁴ Nan Zhong, Xiaojin Ren and Si Ma, ‘China Hits US with Blacklist in Trade Move’ China Daily (1 June 2019)
Counteracting Unjustified Extraterritorial Application of Foreign Legislation (CUEA Rules) was another major step taken by MOFCOM to tackle cross-border sanction issues aimed at protecting China’s national security and national interests. This move paved the way for the enaction of the Anti-Sanction Law (ASL 2021), which escalated the U.S.–China confrontation from ministerial regulations to a national legislative level. ASL 2021 increases tensions between the two countries, which are already engaged in a trade war. Foreign entities are likely to be caught in the crossfire while attempting to delicately balance compliance requirements under conflicting bodies of law. They will be forced to start navigating an increasingly complex minefield to avoid the growing animus between the two powers.

The challenge is to be addressed in five sections below. Part I looks at the blocking mechanism via the MOFCOM Regulation, China’s version of the Entity List, which is based on principles enshrined primarily in the Anti-Monopoly Law (AML) and the National Security Law (NSL). Part II analyses a dilemma where a foreign company would be caught between a rock and a hard place, given the current focus of retaliatory government policies on banning the flow of technology-related goods. The challenging conflict of law issues should be integrated into those companies’ global governance regimes across jurisdictions. Part III focuses on China’s newly passed ASL 2021, and provides further in-depth analysis about the mechanics of China’s evolving sanctions regime. It explores how China has transformed from a reluctant participant to a sanction club member. Part IV explores viable remedies for a multinational company (MNC), and seeks to ascertain whether a potential exception to “non-commercial consideration” constitutes an affirmative defence. It further investigates whether a remedy is viable through administrative reconsideration or administrative litigation. Part V discusses how to break the deadlock from the perspective of targeted companies. A long-standing ongoing debate remains as to whether it is sustainable for China to achieve its strategic goals by leveraging the Chinese market access. Arguably, the creation of the blocking mechanism may be counterproductive during China’s pursuance of tech supremacy. In the paper’s concluding remark, it is highlighted that the tension will not end until a multipronged resolution is reached through far beyond purely legal approaches.

A. The U.S. Entity List vis-à-vis China’s Evolving Blocking Mechanism

The U.S. has been increasingly scrutinising Chinese firms involved with dual-purpose technology. The Entity List is a blacklist of businesses the U.S. considers a threat to its strategic interests, which is maintained by the DoC’s Bureau of Industry and Security (BIS). As a result of the Entity List designation under the Export Administration Regulations (EAR), no supplier may export, re-export, or transfer any items subject to Huawei unless authorised

6. MOFCOM Order No. 1 of 2021 on Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (Beijing, MOFCOM, 9 January 2021)
7. ASL 2021 was passed in the 29th Session of the 13th National People’s Congress Standing Committee on 10 June 2021, and came into effect on the same day.
11. The Export Administration Regulations 15 C.F.R. §730 et seq.
by a BIS license. In response, China’s UEL is aimed at combating unilateralism, protectionism and discriminatory actions meant to block supplies to Chinese entities. This represents a tit-for-tat escalation of the current trade war after the U.S. blacklisted Huawei.

1. The U.S. Entity List

The U.S. intends to use sanctions to pressure parties outside U.S. jurisdiction to act in line with U.S. policy goals. The Entity List requires that a blacklisted Chinese company apply for special permission to buy American components and technology. Likewise, U.S. exporters require the same licence to sell them to listed entities. It can be used to block activities contrary to U.S. national security and foreign policy. The system has been stipulated by the EAR, which derives its authority from the Export Control Reform Act of 2018. Entities that handle goods of U.S. origin are prohibited from supplying such goods, and any other items that are subject to the EAR, to Huawei.

(a) Mitigation of National Security Risks behind the Entity List

The creation of the Entity List has amplified the extraterritorial reach of the U.S.’ geo-economic strategy. It seeks to prevent U.S. technology from being used by foreign-owned entities in ways that potentially undermine U.S. national security or foreign policy interests. While the EAR provides an illustrative, but non-exhaustive, list of activities that could be considered contrary to the public interest, any ruling will be assessed on a case-by-case basis. The measures are detrimental to the operations of Chinese firms, some of which have already been labelled as national security threats by governments around the world. That Huawei was placed on the Entity List is largely due to an allegation that the firm has direct ties to the Chinese Communist Party, allowing for the Chinese government to use its infrastructure for espionage purposes. In principle, an entity can continue to deal with Huawei, so long as they do that without exceeding the de minimis levels of the U.S. components or using technology controlled on the grounds of national security. However, with the blurring of distinctions between export controls and sanctions law, the Entity List has

12 BIS, ‘Temporary General License Final Rule’, effective 20 May 2019, 84 FR 23468
13 Sue-Lin Wong and Nian Liu, ‘China Threatens to Blacklist “Non-Reliable” Foreign Companies’ Financial Times (31 May 2019)
<https://www.chathamhouse.org/expert/comment/struggle-managing-trump>
18 Charlotte Gao, ‘Eye for An Eye: China to Establish “Unreliable Entity List”’ The Diplomat (1 June 2019)
19 The Export Administration Regulations 15 C.F.R. §730 et seq.
<https://www.cfr.org/backgrounder/huawei-chinas-controversial-tech-giant>
had enormous implications for suppliers’ ability to engage with the development of new products and technology for Huawei.\(^{22}\)

\(\text{(b) Broad Discretion to Interpret the Scope of the Entity List System}\)

On 15 May 2019, the Trump administration issued Executive Order 13873 on *Securing the Information and Communications Technology and Services Supply Chain* (EO 2019).\(^{23}\) The rationale is to prevent espionage activity and to protect U.S. critical national infrastructure (CNI). Although EO 2019 does not identify any particular entity, it is widely interpreted to target Huawei, an elephant in the room.\(^{24}\) EO 2019 defines a “foreign adversary” as:

“any foreign government or foreign non-government person engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States persons”.\(^{25}\)

This definition provides U.S. enforcement agencies with considerable leeway to determine who could be a foreign adversary.\(^{26}\) Meanwhile, it is a challenge to discern the scope of activities that are deemed to pose a national security threat. Companies that do business related to Huawei should ensure their compliance programmes are sufficient to reasonably mitigate risks.\(^{27}\) Particular attention should be paid to their global supply chains and cross-border governance strategies.\(^{28}\)

2. **UELs Regime: The MOFCOM Regulation**

The Chinese MOFCOM proposed China’s own UEL on 31 May 2019, which is plausibly in response to the addition of Huawei to the U.S. Entity List. The UEL seems to mirror the U.S. Entity List, with less ambiguous nomenclature and purpose.\(^{29}\) On 19 September 2020, a MOFCOM Regulation was issued to handle mandates of the UEL system with immediate effect.\(^{30}\) MOFCOM held that the creation of its own UEL aimed at combating “unilateralism, trade protectionism, and discriminatory actions” meant to block supplies to Chinese

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\(^{23}\) EO 2019 prohibits U.S. persons from acquiring, importing or dealing in information and communications technology or services developed, manufactured or supplied by any company owned by, controlled by or subject to the jurisdiction of a foreign adversary of the U.S.


\(^{25}\) Executive Order 13873 on *Securing the Information and Communications Technology and Services Supply Chain* (EO 2019) s3(b)


\(^{30}\) MOFCOM, ‘Regulations on the Unreliable Entity List’ (MOFCOM Order No. 4, 19 September 2020); MOFCOM Regulation Art. 14
enterprises. A company on the UEL will be subject to any necessary legal and administrative measures that the Working Mechanism imposes, meanwhile the public will be advised to be cautious to avoid risks associated with the designated foreign entities.

(a) Framework under the Blocking Mechanism

The regulations on UEL (hereinafter referred to as the MOFCOM Regulation or the Blocking Mechanism) sets out a framework for imposing restrictions on foreign entities, which are considered as:

i. “endangering the national sovereignty, security, or development interests of China”;  
ii. “suspending or terminating normal transactions with Chinese enterprises, organisations, individuals, in violation of normal market transaction principles, and thus seriously harming the legitimate rights and interests of Chinese entities.”

The phrase “endangering national security” is stated as grounds to be included on both the UEL and China’s Export Control Law (ECL 2020). The first part has potentially broad scope, far beyond national security, while the second part is intended to neutralise foreign governments’ sanctions and export control measures. Foreign entities that interfere in China’s internal affairs may run the risk of being placed on the UEL, even though the regulation does not define what constitutes harm to the specified national interests and Chinese entities’ lawful rights. Some key terms, such as “normal market transaction principles”, are not defined in the MOFCOM Regulation, nor have they been conceptualised in other Chinese laws.

Foreign entities will be targeted if they discriminate against Chinese businesses. The UEL will include entities that fail to abide by market rules and discriminate against Chinese companies for non-commercial purposes. Comparably, the EU adopts Blocking Statutes to protect European businesses against the effects of the extraterritorial application of legislation adopted by a third country. It is unclear as to whether the conduct needs to satisfy both the national interest endangerment test and the individual serious harm test. More controversially, it is unclear how the defence of “foreign sovereign compulsion” by a U.S. or third-country firm would be valid under the MOFCOM Regulation. The guidance does not clarify whether the compliance with foreign laws or government orders would be exempt from the violation of “market-based principles”. It remains uncertain whether foreign entities’ compliance with U.S. sanctions law would be deemed discrimination. It is worth noting that China has long considered compliance with U.S. sanctions and export controls to be a violation

31 Charlotte Gao, ‘Eye for An Eye: China to Establish “Unreliable Entity List”’ The Diplomat (1 June 2019)  
32 MOFCOM Regulation Art. 10  
33 MOFCOM Regulation Art. 9  
34 MOFCOM Regulation Art. 2  
35 ECL 2020 Articles 18 (2), 32, 43  
36 Barbara Lippert and Volker Perthes (eds.), Strategic Rivalry between United States and China Causes, Trajectories, and Implications for Europe (Berlin, German Institute for International and Security Affairs, 4 April 2019) 1-51  
37 Sue-Lin Wong and Nian Liu, ‘China Threatens to Blacklist “Non-Reliable” Foreign Companies’ Financial Times (31 May 2019)  
of its sovereignty. Any firm obeying the U.S. ban on supplying to Huawei could be labelled an unreliable entity. The principle of “foreign sovereign compulsion” is not clearly addressed under the current regulation. At least, there are no exceptions affirmatively provided in the targeted violations.

(b) Cause of Action

The MOFCOM Regulation contains broad criteria that have raised concerns that foreign entities may run considerable risks based on their compliance with foreign sanctions. When determining whether a foreign entity should be placed on the UEL, the Working Mechanism will consider a variety of factors:

i. “the degree of harm to China’s national sovereignty, security, and development interests”;

ii. “the degree of damage to the legitimate rights and interests of Chinese enterprises, organisations, or individuals”;

iii. “whether the foreign entity is in compliance with internationally accepted economic and trade rules”; and

iv. “other factors that should be considered.”

Some principles are provided to ascertain circumstances where a foreign entity would be considered to run afoul of “internationally recognised economic and trade rules”. The MOFCOM Regulation includes a catch-all provision, leaving it open for the Working Mechanism to exercise its discretion in determining what constitutes “other factors” for the purposes of the provision. The catch-all provision under Article 7 can be broadly interpreted, which empowers the Working Mechanism to take any other necessary measures under Chinese Foreign Investment Law (FIL), the NSL and so on. A decision based on the above findings may highlight potential risks of transacting with the foreign entity in question and may provide a cure period for the entity to make rectifications.

(c) Penalties and Consequences under the UEL

The Working Mechanism may impose one or more of the following restrictions or penalties on foreign entities included on the UEL, which include:

i. “restricting or prohibiting the foreign entity from engaging in import or export activities related to China”;

ii. “restricting or prohibiting the foreign entity from investment in China”;

iii. “entry bans or restrictions on personnel or transportation related to the foreign entity”;

39 Mikko Huotari, ‘Beyond Investment Screening: Expanding Europe’s Toolbox to Address Economic Risks from Chinese State Capitalism’ (Berlin, Mercator Institute for China Studies, 2019) 1-48
40 MOFCOM Regulation Art. 2
41 MOFCOM Regulation Art. 7
42 MOFCOM Regulation Art. 3
43 MOFCOM Regulation Art. 7 (4)
44 The Foreign Investment Law of the People's Republic of China was adopted by the National People's Congress on 15 March 2019 and came into effect on 1 January 2020.
45 The National Security Law of the People's Republic of China was issued on 1 July 2015 with immediate effect.
46 MOFCOM Regulation Art. 9
iv. “restricting or revoking the work permit or qualifications for visiting or residency of personnel related to the foreign entity”;
v. “fines corresponding to the seriousness of the situation”; and
vi. “other necessary measures.”

The above provisions authorize a broad spectrum of sanctions on designated foreign entities. These measures will be implemented by the Working Mechanism involving MOFCOM and other ministries in line with their respective scopes of authority. Foreign entities may face such market access sanctions as bans or restrictions on trade, investment, and licenses. Punitive measures could include hefty penalties, cancellation of business licenses that are compulsory to do business in China, and a temporary or permanent ban from the Chinese market. The ban could mean substantial losses for some foreign MNCs which rely heavily on revenues from China. Notably, individuals acting on behalf of non-compliant companies could personally be punished with inclusion on the UEL. In this vein, foreign individuals may be listed as unreliable entities, although any penalty that restricts personal freedom can only be created by law.

It is not clear as to whether and how the MOFCOM Regulation would apply to the existing Chinese subsidiaries of a listed foreign entity. It does not mention whether the listed foreign entity’s previous transactions are subjected to retroactive review, as the Committee on Foreign Investment in the United States (CFIUS) does. For instance, it remains vague as to whether a sanction would extend to those listed foreign entities’ existing investments based in China. The Regulation does not explain how fines are calculated and, more specifically, whether the fine would be calculated based on revenue generated in China only or on a global basis. Furthermore, the open-ended Article 10 (6) would afford the Working Mechanism more latitude to apply additional sanctions, or even extraterritorial enforcement actions.

(d) Institutional Design, Remedial Regimes and Defence Procedures

The issuance of the MOFCOM Regulation is a tit-for-tat step toward retaliating against the U.S. for denying vital U.S. technology to Chinese companies. The inter-ministerial Working Mechanism is housed within MOFCOM, differing from the CFIUS, which is an interagency committee chaired by the U.S. Secretary of the Treasury. The institutional design indicates MOFCOM’s leading role in administering the UEL.

47 MOFCOM Regulation Art. 10
48 Nian Liu and Sue-Lin Wong, ‘China Threatens to Blacklist “Non-Reliable” Foreign Companies’ Financial Times (31 May 2019)
49 Cong Wang and Hongpei Zhang, ‘China’s “unreliable entity list” imminent’ Global Times (22 August 2019)
51 MOFCOM Regulation Art. 10 (3)
53 CRS, ‘The Committee on Foreign Investment in the United States (CFIUS)” (Washington DC, Congressional Research Service (CRS) RL 33388, 3 July 2018
56 MOFCOM Regulation Art. 4
Under the U.S. Entity List regime, the blacklisting of an entity would need to follow required legal procedures, including an investigation in which the interested parties will be given the right to defend themselves.\(^57\) Behind the MOFCOM Regulation is the desire to retaliate against the discriminatory measures imposed on Chinese companies for non-commercial purposes, which foreign entities may assert as a viable defence.\(^58\) The Working Mechanism launches an investigation either *ex officio* or based on reports from relevant stakeholders,\(^59\) which include Chinese firms adversely impacted by foreign restrictive measures. The Working Mechanism has the authority to, *ex officio*, delist the foreign entity from the UEL based on the actual circumstances, where the listed entity rectifies and eliminates the consequences of its actions within the specified grace period.\(^60\) For the sake of due process, the MOFCOM Regulation provides a multistage process for the Working Mechanism to determine whether a foreign entity should be listed or delisted. A targeted foreign entity may argue that some allegations do not fit the criteria for listing through the submission of a defence during the investigation stage.\(^61\) The Working Mechanism may decide to suspend or terminate the investigation.\(^62\) This implies that sanctions take effect only when the offending behaviour continues when a grace period has expired. It is not clear whether the listed entity has the right to file for administrative reconsideration or, if applicable, file an administrative lawsuit, to petition against a decision by the Working Mechanism under Article 10. If permitted, the Regulation does not indicate whether a successful petition would suspend the decision.

Similar to approaches under the U.S. Entity List, a special licensing procedure allows a Chinese entity to continue transacting with the listed foreign ones upon approval.\(^63\) Companies that end up on the UEL are subject to various licensing requirements for the export, re-export and transfer of certain items into China, effectively restricting their dealings with Chinese businesses.\(^64\) In addition to the less formal instruments of “coercive diplomacy”, China has established the regulatory basis for rolling out the UEL.\(^65\) These provisions lay out the general framework for the Working Mechanism to carry out its mandate.

### 3. CUEA Rules


\(^{58}\) MOFCOM Regulation Art. 6 (1)

\(^{59}\) MOFCOM Regulation Art. 5

\(^{60}\) MOFCOM Regulation Art. 13

\(^{61}\) MOFCOM Regulation Art. 6 (1)

\(^{62}\) MOFCOM Regulation Art. 6 (2)

\(^{63}\) MOFCOM Regulation Art. 12; Part 744 of the Export Administration Regulations 15 C.F.R. §730 et seq.

\(^{64}\) Bureau of Industry and Security, Department of Commerce, ‘Addition of Entities to the Entity List’ *Federal Register* (16 May 2019)

In January 2021, MOFCOM issued the CUEA Rules.\(^{66}\) The CUEA Rules allow the Chinese authorities to punish foreign MNCs for complying with foreign sanctions. Chinese citizens or firms can sue for compensation in the People’s Court if they are hurt economically by a company’s adherence to foreign laws.\(^{67}\) Subsidiaries of foreign MNCs incorporated in China are regarded as Chinese persons and must comply with these rules. The CUEA Rules establish the first sanctions-blocking regime in China to counteract the impact of foreign sanctions. It is a major step taken by MOFCOM to tackle cross-border sanction issues aimed at protecting China’s national security and national interests. Before the enactment of China’s ASL 2021,\(^ {68}\) both the MOFCOM Regulation and the CUEA Rules demonstrate MOFCOM’s pivotal role in coordinating Chinese policy with respect to foreign sanctions and export controls. With the enactment of ASL 2021, which will be discussed in the third part of this study, an interagency mechanism will be established under the chair by the State Council, which means that the escalation level has been lifted to the highest organ of China’s administration.\(^ {69}\)

### B. Statutory Ground of the Chinese Blocking Mechanism

The UEL regime will be based on principles underlying a variety of Chinese laws, such as China’s Foreign Trade Law (FTL 2016), AML 2008 and NSL 2015\(^ {70}\) among others.\(^ {71}\) Apart from the penalties for “abuse of dominant position” pursuant to AML 2008, China has also launched a “national security review” mechanism.\(^ {72}\) The legal basis may be found in both NSL 2015 and FTL 2016. The actions taken against the blacklisted entities are to be determined in the above framework, according to which the Working Mechanism will take legal and administrative measures to undertake investigations.

1. **The UEL Regime Embraces AML 2008**

Trade and export controls in one country may conflict with competition laws in another jurisdiction.\(^ {73}\) Article 17 under AML 2008 is most likely to be applied as a potential provision that the Working Mechanism could use to justify its blacklisting of foreign entities. Failure to comply with continuing supply could result in the suspension of foreign MNCs’ permission to conduct business in China. Some dominant companies refusing to deal with Chinese entities for non-commercial reasons can breach AML 2008. It is essential to analyse whether a foreign MNCs’ behaviour eliminates and restricts competition in the relevant market, and further to evaluate the balance of anticompetitive effects and pro-competitive effects.\(^ {74}\)

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\(^{66}\) MOFCOM Order No. 1 of 2021 on Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (Beijing, MOFCOM, 9 January 2021)

\(^{67}\) CUEA Rules Art. 9

\(^{68}\) ASL 2021 was passed in the 29th Session of the 13th National People’s Congress Standing Committee on 10 June 2021, and came into effect on the same day.

\(^{69}\) ASL 2021 Art. 4

\(^{70}\) The National Security Law was adopted at the 15th Session of the Standing Committee of the 12th National People's Congress of the People's Republic of China on 1 July 2015, and came into force on the same day.

\(^{71}\) FTL 2016 Art. 7; NSL 2015 Art. 59

\(^{72}\) Aaron Baum, ‘Investment Screening for Developing Asia’ (2020) 15 (1) Yale Journal of International Affairs 57, 77

\(^{73}\) James Atwood, ‘Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels’ (1987) 50 (3) Law and Contemporary Problems 153, 164

(a) Transaction Test

The phrase “suspending or terminating normal transactions” provides ammunition to the State Administration for Market Regulation (SAMR), the Chinese anti-monopoly authority, which could also be the front line for the UEL. AML 2008 prohibits companies from abusing a dominant market position through refusing to conduct transactions, or imposing discriminatory conditions on another company without legitimate purposes. This is “in violation of normal market transaction principles”. The prerequisite for the application is that the business has a dominant market position. The concept of abuse of market dominance seems to be heavily relied upon in the AML, while justifying the implementation of the MOFCOM Regulation. During the review, the market share is used as an index for assessing market dominance. Any anti-monopoly review should include the foreign entity’s Chinese subsidiaries and affiliates. In the case of a U.S. company suspending normal transactions with a Chinese firm, it can be considered a “refusal to deal” under Article 17 by the SAMR. It would be considered an unreliable entity if it imposes unreasonable trading conditions without valid commercial reasons. Such corporate behaviours fall squarely within the arena of the MOFCOM Regulation.

(b) Effect Test: Weighing of Competitive Effects – Rule of Reason

During the past few decades, both public and private actors have increasingly sought to apply U.S. antitrust laws to conduct by foreign businesses that is deemed to have effects on the U.S. economy. In a similar manner, the rule of reason is applied to assess abuse of market dominance in China, weighing anticompetitive effects against economic efficiencies. The analysis of competitive effects refers to various factors under the Chinese AML framework, of which the Eastman case is an example. The SAMR’s Shanghai branch imposed an administrative penalty on Eastman for its abuse of market dominance on 29 April 2019. The enforcement agency employed the methodology of “critical loss analysis” to draw the borderline for the relevant market, and also used the Lerner index to verify the market dominance.
power of Eastman and restrictive effects in the relevant market. The SAMR decided to impose the penalty by analysing the damage that the abuse of dominance caused to the market, and emphasised that the anticompetitive effects overwhelmed economic efficiency. The Working Mechanism would rely primarily on AML 2008 especially in relation to foreign entities with a substantial market presence in China, which could be singled out for their discriminatory action against Chinese entities. As such, the premise for whether a foreign entity should be added to the UEL depends largely upon whether it abusesees market dominance under AML 2008.

2. China’s Export Control Law (ECL 2020)

China’s blocking mechanism is likely to be connected to ECL 2020 if it draws on the U.S. Entity List system under the EAR. ECL 2020 has many of the salient features and characteristics of the U.S.’ export control regime, including its own licensing programme which is similar to that under the MOFCOM Regulation. The law imposes restrictions on transactions with UEL-designated entities, prohibiting exports of Chinese-origin controlled items, revoking export licenses and imposing a fine that amounts to five to ten times the value of the illegal gains. The MOFCOM Regulation does not specify legal consequences in cases of violation of the license requirement. However, ECL 2020 provides the UEL regime with a corresponding legal basis for export control penalties, which might be more stringent than the existing legal framework. The entities will be suspended for rectification or even have their export qualification revoked in the case of a serious scenario. ECL 2020 provides that: “exporters violating the regulations and doing business with importers and end-users on the Control List may be given a warning, ordered to stop illegal activities, required to remit the illegal income, and issued a fine of up to 20 times the illegal business amount.” In addition, ECL 2020 contains a “catch-all provision” as well, with which the Chinese authorities can extend control to items not included in the control list, on a case-by-case basis, to address national security concerns. Furthermore, ECL 2020 is extraterritorial in scope, allowing China to hold individuals or entities outside China liable if they are deemed to endanger China’s national security.

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88 Cheng Liu, Audrey Yumeng Li and Jeff Liu, ‘Navigating through Merger Control Review in China – Challenges for U.S. Companies during a Time of Uncertainty’ Competition Policy International (8 July 2019)
89 AML 2008 Art. 17 (2)
90 The Standing Committee of China’s National People’s Congress passed the Export Control Law of the People’s Republic of China (ECL 2020), which took effect on 1 December 2020.
91 ECL 2020 Articles 12, 13, 14
92 ECL 2020 Art. 34
93 ECL 2020 Articles 12, 13, 14
94 ECL 2020 Art. 38
95 ECL 2020 Art. 37
96 ECL 2020 Art. 46
97 ECL 2020 Art. 44
ECL 2020 constitutes China’s first framework for restricting exports of dual-use and technology goods for national security reasons. The law marks a significant milestone in the evolvement of China’s international trade framework, and represents China’s first ever comprehensive and unified export control regime. It provides for the possibility of initiating retaliatory measures against countries which have subjected China to discriminatory export control measures.

3. Countermeasures in Other Legislation

This UEL regime is used as a countermeasure against the export controls of foreign governments targeting specific Chinese companies. Article 40 of FIL 2019 provides that China may take corresponding countermeasures if a foreign country uses discriminatory measures against China, prohibiting or restricting investments. Similarly, Article 7 of China’s FTL 2016 provides that:

“[China] shall have the right to adopt corresponding measures against any country or region to counter their bans, restrictions or other similar discriminatory measures which are imposed in connection with trade involving [China].”

Both provisions are directed against foreign governments, not specific companies. As aforesaid, it remains unclear whether foreign entities should be treated as unreliable entities if they comply with their own domestic laws or executive orders to restrict trade with and investment in China. Similarly, NSL 2015 provides that:

“The State shall safeguard national basic economic system and socialist market economic order, improve systems and mechanisms to prevent and resolve economic security risks.”

The law also seeks to address national security concerns from an institutional perspective:

“The State shall establish a review and regulation system and mechanism for State security, and shall carry out State security review of foreign investment, specific items and key technologies and network information technology products and services that affect or may affect State security.”

It is aimed at regulating foreign business transactions, which are perceived with national security implications. The information as to how the application of the above provisions will impact the implementation of the MOFCOM Regulation is vague. According to NSL 2015, the National Development and Reform Commission will take a lead to create a National Technological Security Management List (NTSML) system, in order to mitigate national security risks more effectively. Both the UEL and NTSML schemes represent new conceptual approaches in the Chinese national security governance regime. In practice,

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100 On 15 March 2019, China’s National People’s Congress passed the Foreign Investment Law of the People’s Republic of China, which came into effect on 1 January 2020.
101 National Security Law 2015 Art. 19
102 National Security Law 2015 Art. 59
104 ‘China to Establish National Security Management List System’ Xinhua (8 June 2019)
however, there is a substantial challenge in setting up a common standard for determining whether an activity constitutes a threat to national security.\textsuperscript{105}

C. China’s ASL 2021

The ASL was passed in the wake of the U.S. and EU countries slapping sanctions on China over allegations of human rights violations. The Biden government has been attempting to forge a common front to push back against China’s economic abuses and coercion. More specifically, ASL 2021 came in response to the U.S.’ expansion of a blacklist of companies in which U.S. entities cannot invest, which includes major telecom firms such as China Mobile. The law provides a cause of action against organisations and individuals which comply with foreign sanctions against Chinese entities.\textsuperscript{106} Those involved in implementing discriminatory measures against China could be put on an anti-sanctions list.\textsuperscript{107} Countermeasures include “refusal to issue visas, denial of entry, deportation... and sealing, seizing, and freezing property of individuals or businesses that adhere to foreign sanctions against Chinese businesses or officials.”\textsuperscript{108} All of these measures threaten loss of market access.

1. Codification of Tit-for-Tat Rules

ASL 2021 builds on earlier measures including the MOFCOM Regulation and CUEA Rules, which prevent entities from complying with foreign sanctions targeting China. Previous sanctions were fragmented and without sufficient legal basis, and normally took the form of administrative regulations rather than a statute. In an apparent move to legalise its tit-for-tat retaliation against punitive actions taken by foreign countries, in essence ASL 2021 codifies the measures China has already taken.\textsuperscript{109} The law formalises the basis for previous informal or regulatory measures and elevates them to the level of a statute. It goes beyond the scope of the CUEA Rules, which are intended to block the extraterritorial effect of sanctions issued by foreign parties banning third-country parties from transacting with Chinese entities. The law allows the People’s Court to punish companies that comply with foreign laws that damage China’s national interests, under which Chinese entities can bring lawsuits for injunctive relief and damages.\textsuperscript{110} This approach echoes Article 9 of the CUEA Rules. It is worth noting that the CUEA Rules only impact third-country parties caught up in the extraterritorial effect of the sanctions against China. ASL 2021 directly targets and retaliates against the primary parties that sanction China. The listing of foreign entities, as well as the imposition of countermeasures, is final.\textsuperscript{111} The law lacks an express provision for listed parties to file suits under the Administrative Litigation Law against an erroneous listing decision. It remains uncertain as to whether parties adversely impacted by countermeasures will have recourse to judicial review.

2. Symbol Declaration Vis-à-Vis Credible Threats

\textsuperscript{106} ASL 2021 Art. 12  
\textsuperscript{107} ASL 2021 Art. 4  
\textsuperscript{108} ASL 2021 Art. 6  
\textsuperscript{109} Shannon Tiezzi, ‘China Passes New Law on “Countering Foreign Sanctions”’ Diplomat (11 June 2021)  
\textsuperscript{110} ASL 2021 Art. 12  
\textsuperscript{111} ASL 2021 Articles 7, 8
China used to consider sanctions to be instruments of Western imperialism and a violation of sovereignty. ASL 2021 marks a material escalation in the longstanding Chinese rhetoric threatening countermeasures against foreign sanctions. The law is reflective of an escalated confrontation between China and the Western powers and the resulting counterbalances pose a Considerable challenge to U.S. sanction supremacy. It remains to be seen whether ASL 2021 is a symbolic tool or capable of playing the role of deterrent against foreign sanctions.

**(a) Landmark Transition: From a Reluctant Participant to a Sanction Club Member**

As a reluctant participant in the sanctions game, China had previously preferred unofficial economic retaliation that allowed for plausible deniability. Those informal measures not only helped to minimise diplomatic fallout, but also achieved China’s strategic leverage. ECL 2020 stipulated that China could take reciprocal measures against foreign countries which abuse its export control measures to endanger Chinese national security and interests. The CUEA Rules provide China with necessary countermeasures. ASL 2021 is aimed at increasing the costs to entities who take undesired actions. The law has similarities to the EU Blocking Statutes, that is, a reporting obligation and a prohibition on complying with U.S. extraterritorial restrictions, potentially leaving entities in an irreconcilable situation between respecting the U.S. measure or the Chinese law. Some foreign entities could be put on an anti-sanctions list, having to choose sides between the world’s two superpowers. In theory, through use of deterrents, China is seeking to weakens the U.S.’ long-standing role as pre-eminent standard setter, and undermine U.S. dominance of global governance regimes.

**(b) ASL 2021: A Paper Tiger or Credible Deterrence Weapon?**

ASL 2021 provides a wide-ranging legal framework to retaliate against sanctions imposed by foreign governments. It epitomises China’s transition to weaponising its economy for foreign policy leverage and to deter foreign sanctions. On the one hand, the law is ostensibly framed as entirely reactive and defensive corresponding countermeasures in response to what China refers to as hegemony and power politics. On the other hand, sanctions power derives from the country’s ability to credibly deny access to a sought-after economy. Financially, the Chinese renminbi accounts for less than two per cent of international transactions. Its capital controls are one impediment to its international expansion. This will compromise China’s sanction capability and dilute its credibility as a deterrent.

Even so, repercussions should not be ignored. ASL 2021 creates far-reaching potential risks due largely to its extraterritorial scope and a seemingly unbounded catch-all provision. The law grants Chinese authorities extensive discretion. The tough countermeasures will put

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113 Andrew Rennemo, ‘How China Joined the Sanctions Game’ *The Diplomat* (8 February 2021)
114 ECL 2020 Art. 48
115 CUEA Rules Art. 12
116 Andrew Rennemo, ‘How China Joined the Sanctions Game’ *The Diplomat* (8 February 2021)
118 ASL 2021 Art. 6 (4)
foreign MNCs that follow U.S. sanctions in legal jeopardy. The law will create potentially irreconcilable compliance challenges for companies that are subject to both foreign legislation and ASL 2021. Furthermore, this legislative move will cause enormous harm to the fabric of international trade law. ASL 2021 will worsen China’s relations with Western economies and complicate foreign MNCs’ operations in China. Much will hinge on how Chinese authorities interpret the vague terms of the new law.

D. Between a Rock and a Hard Place: Can a U.S. Firm Comply with Competing Obligations?

ASL 2021 opens a door to retaliation against foreign entities that rely substantially on the Chinese market. Companies adhering to the U.S. sanctions might become exposed to reciprocal Chinese sanctions themselves. Those entities which have business dealings with Huawei may find themselves in a precarious position as they try to balance compliance with two conflicting sets of laws. They will increasingly risk accusations of either complicity in the Chinese ASL 2021 or violations of U.S. law.

1. Caught in the Middle in Compliance with Conflicting Laws: The Case of FedEx

Companies with operations in both the U.S. and China are facing a dilemma under ASL 2021, as they have to navigate compliance with two conflicting laws. They intend to avoid violating the law, particularly in the current context of trade war where their actions are scrutinised. Ceasing operation may conceivably face possible legal consequences from China. Disregarding their home state legal and regulatory framework, like EO 2019, and continuing to trade with Chinese entities, U.S. firms would risk domestic penalties. Where applicable, failure to comply with U.S. sanctions could expose the companies to potential criminal or civil fines, the most draconian of which is to lose export privileges and the ability to procure U.S. goods.

FedEx is compelled by the U.S. DoC to act in ways that expose it to possible sanctions under the UEL system. Despite its heavy investment in compliance, FedEx has been caught between a rock and a hard place, and finds itself stuck in the middle between the two conflicting obligations. Under the Export Control Reform Act of 2018, FedEx must choose between operating under the threat of U.S. punishment and facing potential legal trouble from the Chinese government. As FedEx claimed:

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119 Zak Doffman, ‘China Threatens to Blacklist U.S. Firms Refusing to Supply Huawei’ Forbes (31 May 2019)
120 Kate Conger, ‘China Summons Tech Giants to Warn Against Cooperating with Trump Ban’ The New York Times (8 June 2019)
121 For instance, civil penalties could be up to US$500,000 per violation under the International Traffic in Arms Regulations (ITAR) and up to US$250,000 per violation under the EAR and under The Office of Foreign Assets Control (OFAC) sanctions.
“[C]ontinue to operate under threat of imminent enforcement actions or cease operations that may conceivably lead to enforcement and face possible legal consequences from customers and foreign governments.”

Failure to comply with the MOFCOM Regulation may result in an inability to conduct business in China. Continuing to breach the prohibitions contained in the U.S. EAR will subject it to the threat of imminent enforcement actions. FedEx must either restrict all shipments to Huawei entities or carefully scrutinise each shipment anywhere in the world to ensure that the company is not aiding and abetting an export violation. The latter option is realistically nearly impossible. FedEx’s strategy is to obtain court rulings outlining its obligations under U.S. law. These are, however, arguably unlikely to be considered an affirmative defence. With regards to the possible application of the doctrine of foreign sovereign compulsion in China, neither perimeters nor precedents are in place for FedEx to make a reasonably well-informed decision in order to break the deadlock.

2. The Validity of Defence of Non-Commercial Consideration: Proactive Initiative vs Passive Compliance

There is a need to consider the circumstances in which foreign MNCs are compelled to implement discriminatory measures. A U.S. company could defend itself by arguing that it has to abide by U.S. laws and discontinue the transaction. This situation raises the issue of whether adherence to EO 2019 could constitute a valid reason and be considered justifiable by the Working Mechanism. AML 2008 distinguishes between two kinds of breaches, one of which is undertaken “without a valid reason” highlighted under Article 17. While AML does not regard fault as a key determinant of a defence, a distinction can be drawn between whether the action is based on the entity’s own initiative or its passive obedience. In terms of abusing a market-dominant position, passive actions are perceived as less damaging to market competition than active ones. If a foreign entity passively implements discriminatory measures within the limits required by its domestic law, it may be considered a valid reason. In contrast, if the conduct of a foreign entity exceeds the level required by the domestic law, it cannot be a valid reason, and should not be recognised as compliance with “internationally accepted economic and trade rules”.

A blacklisted foreign entity could consider whether it can invoke any of the aforementioned arguments as valid reasons for its defence. Paradoxically, it may refer to MOFCOM’s

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126 Export Administration Regulations §736
128 Mikko Huotari, ‘Beyond Investment Screening: Expanding Europe’s Toolbox to Address Economic Risks from Chinese State Capitalism’ (Berlin, Mercator Institute for China Studies, 2019) 1-48
130 Eamon Barrett, ‘China Is Creating Its Own “Entity List” to Avenge Huawei and Punish Foreign Firms’ Fortune (18 June 2019)
131 AML 2008 Art. 17 (3) and (4)
132 Christopher Yoo, Thomas Fetzer, et al., ‘Due Process in Antitrust Enforcement Through the Lens of Comparative Law’ (2020) Faculty Scholarship at Penn Law 2160
134 MOFCOM Regulation Art. 7 (3)
mitigation limb of “non-commercial consideration”\textsuperscript{135} At stake is whether a foreign entity’s passive compliance with its home state’s sanctions laws can constitute a “violation of normal market transaction principles” under the MOFCOM Regulation.\textsuperscript{136} If compliance with a foreign entity’s home state law or regulation, like EO 2019, does not constitute a valid reason, it will face a dilemma. If the Chinese Working Mechanism decides that the law of the entity’s home state is discriminatory and poses a threat to China’s national security, the company’s reasonable efforts to maintain business with Chinese companies could be an important factor in evaluating the validity of the defence.\textsuperscript{137} These uncertainties may encourage foreign entities to apply for exemption from the Chinese blocking mechanism in order to enable them to continue their normal transactions.\textsuperscript{138}

Nevertheless, there are few precedents or parameters to support the above reasoning. The chances of success with this hypothetical defence are slim. It is the Working Mechanism that has discretion in determining whether an exemption can be granted. It all comes down to how the Working Mechanism will interpret a\textit{ prima facie} justifiable variable of “normal market transaction principles”. It remains to be seen whether a refusal to supply Huawei so as to comply with U.S. law could constitute adequate grounds for an exemption. Paradoxically, it would be self-contradictory if this defence could be accepted by the Working Mechanism. Otherwise, the exclusion of those foreign entities would defeat the rationale for introducing the MOFCOM Regulation and ASL 2021 under the trade war.

3. Administrative Reconsideration/Litigation

Foreign entities need to prepare for increased sanction risks and consider taking proactive measures to gauge their potential risk of a UEL/anti-sanction designation. If included in the UEL, they may rebut the inclusion through participating in hearings.\textsuperscript{139} They could make efficient use of administrative procedures to defend their position during an investigation. It remains unclear whether this will occur prior to the listing or as an off-ramp for delisting.\textsuperscript{140} In terms of the\textit{ ex ante} listing, the Working Mechanism is expected to conduct a pre-listing investigation before placing any entity onto the UEL, which gives targeted entities an opportunity to assert affirmative defences.\textsuperscript{141} They will need to tailor their conduct to avoid the consequences.\textsuperscript{142} In terms of the\textit{ ex post} listing, the UEL will be subject to adjustment after the Working Mechanism’s official announcement, and the firm will be given the right to challenge their inclusion on the UEL.

\textsuperscript{135} Feng Gao (MOFCOM Spokesman), ‘China’s Introduction of “Unreliable Entities List” Regime’ (Beijing, MOFCOM, 31 May 2019)
\textsuperscript{136} MOFCOM Regulation Art. 2
\textsuperscript{137} Feng Gao (MOFCOM Spokesman), ‘China’s Introduction of “Unreliable Entities List” Regime’ (Beijing, MOFCOM, 31 May 2019)
\textsuperscript{141} MOFCOM Regulation Articles 5, 6
\textsuperscript{142} MOFCOM Regulation Articles 6, 8
A listed foreign entity would be removed from the UEL if the remedial actions could be proved viable.\textsuperscript{143} Under the U.S. Administrative Procedure Act, an entity included on the Entity List is entitled to launch a lawsuit, if an action of the DoC is arbitrary, capricious or an abuse of discretion.\textsuperscript{144} Despite the right to appeal, there have been few such lawsuits, because the U.S. DoC has ultimate discretion in determining whether an entity should be included on the Entity List. Rarely can a challenge succeed against the DoC’s decision. Similarly, the inclusion of a foreign entity on the UEL/anti-sanction list in China is theoretically remediable through administrative reconsideration or administrative litigation.\textsuperscript{145} The Chinese Administrative Litigation Law provides for the setting of different types of administrative penalty.\textsuperscript{146} As a unilateral act within the statutory power, it aims to derogate from the entity’s right or to create additional obligations for the entity.\textsuperscript{147}

In addition, the Administrative Reconsideration Law (ARL 2018) provides that an entity may apply to a government department for administrative reconsideration if it does not intend to accept a specific administrative act.\textsuperscript{148} When refusing to accept a decision made after administrative reconsideration, the applicant may bring an administrative lawsuit before a people’s court, or apply to the State Council for arbitration, which shall give a final ruling on the issue and following which no further litigation proceedings are allowed.\textsuperscript{149} Thus, a foreign firm has the right to apply for administrative reconsideration, which examines specific administrative acts.\textsuperscript{150} Furthermore, the Administrative Procedure Law (APL 2017) provides a negative enumeration of the scope of administrative litigation.\textsuperscript{151} Given the lack of specifics, it is not clear whether administrative organs would have the ultimate authority to make a final decision.\textsuperscript{152} In theory, a decision to include an entity on the UEL/anti-sanction list is actionable as a specific administrative act. An entity may also initiate an administrative lawsuit, if it considers that the Working Mechanism has abused its administrative power.\textsuperscript{153} Given the Working Mechanism’s wide discretion, seeking relief through administrative reconsideration or litigation may not be an effective strategy.\textsuperscript{154}

4. Would World Trade Organisation (WTO) Law be Viable?

\textsuperscript{143} MOFCOM Art. 13
\textsuperscript{144} US Administrative Procedure Act 5 U.S.C. ch. 5, subch. I §500 et seq.
\textsuperscript{147} Wei Cui, Jie Cheng and Dominika Wiesne, ‘Judicial Review of Government Actions in China’ (2019) 117 (1) China Perspectives 29, 38
\textsuperscript{149} PRC ARL 2018 Art. 14
\textsuperscript{150} PRC ARL 2018 Art. 27
\textsuperscript{151} PRC APL 2017 Art. 13
\textsuperscript{152} PRC APL 2017 Art. 13 (4)
\textsuperscript{153} PRC APL 2017 Articles 8, 12
There is inadequate international law to address national security issues in this arena.\textsuperscript{155} Focusing on national laws appears ill-suited to resolving such unilateral sanctions. The greatest cost would be a splintering of the global trading system, since the line between justice and trade negotiations has become blurred.\textsuperscript{156} Cybersecurity requires observed international norms and a shared responsibility among states.\textsuperscript{157} An innovative legal response is greatly needed to counter this threat. Article XXI of the General Agreement on Tariffs and Trade is known as the National Security Exception. The exception is an anomaly, a unique provision in international trade law that grants the member states freedom to avoid trade rules to protect national security.\textsuperscript{158} It is debatable whether a WTO member’s invocation of a national security exception could be successfully challenged. Despite a recent landmark invocation of the security clause in WTO litigation,\textsuperscript{159} it is essential to develop jurisprudence in the intersection between technological advances and national security concerns.\textsuperscript{160} Notably, any such decisions would be closely related to a state’s sovereignty.\textsuperscript{161}

Unilaterally imposing discriminatory measures on Huawei seemingly violates the U.S. WTO commitments to the rule of law in international trade.\textsuperscript{162} As Unwala and Burdette observed: “the unilateral imposition of U.S. sanctions would have less global legitimacy at the outset than if they were imposed pursuant to authorisation by the Dispute Settlement Body of the WTO.”\textsuperscript{163}

\begin{footnotesize}
\begin{enumerate}
\item[156] ‘How to Handle Huawei’ The Economist (31 January 2019)
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Theoretically, applying trade sanctions to foreign nationals would be doable under the WTO framework. Unilateral trade sanctions would require an exception to justify them. WTO law permits members to impose trade restrictions for the sake of national security without obligating them to demonstrate that their rationale conforms with some agreed-upon definition of national security. It is argued that the U.S. may impose sanctions on foreign entities in this regard. If this reasoning is tenable, would the logic be applicable to China’s application of ASL 2021? If so, China’s discriminatory treatment of foreign ICT companies under its national security laws could be defended as national security imperatives. However, such an exceptional clause should be exercised in good faith. The recent sanctions represent not only a major adjustment in potential U.S. policy toward China, but also how to reshape the increasingly fraught digital nexus of national security. What makes the present matter so fraught is that security-based rationales for protection have been invoked so rarely. As Meltzer argued, it is worth exploring the promotion of a platform outside of the WTO to address a broad range of issues concerning security, given the current chaotic situation in the WTO. At stake is the development of a global trade law in the context of technological advances and national security concerns. In theory, compliance is in China’s national interest and part of its desire to be viewed as a responsible global player. This involves multilateral authorised sanctions to coerce national compliance.

Furthermore, the doctrine of foreign sovereign compulsion is hardly applicable in China. There is a paucity of reciprocity between the U.S. and China, without even taking into consideration the non-precedential tradition in the Chinese judicial system. In terms of the principle of reciprocity, the U.S. Supreme Court in the Vitamin C case held that:

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164 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Art. 73, “Security Exceptions”, allows a nation to take any action that it feels is “necessary for the protection of its essential security interests.”
166 Dan Blumenthal, ‘How to Win a Cyberwar with China’ Foreign Policy (February 2013)
171 David Fidler, ‘Economic Cyber Espionage and International Law: Controversies Involving Government Acquisition of Trade Secrets through Cyber Technologies (2013) 17 (10) Insights 1
“[U]nited States, historically, has not argued that foreign courts are bound to accept
its characterisations or precluded from considering other relevant sources when

Neither the Chinese People’s Courts nor the Working Mechanism normally regard a foreign
government’s characterisation of its own law as legally binding. They are likely to pay little
deferece to U.S. authorities’ interpretation of U.S. laws when U.S. companies are subject to
2021 is to impose pressure on the U.S. government and private actors, forcing them to give
up compliance with their sanctions against Chinese entities.\footnote{Ryan Woo and Yawen Chen, ‘China Publication of “Unreliable Entities List” Depends on Sino-U.S. Trade Talks’ Reuters (11 October 2019)} In this vein, the Chinese
Working Mechanism would not recognise foreign sovereign compulsion as a valid reason,
serving as a justifiable defence, regardless of whether the U.S. firm is placed in the proverbial
situation between a rock and a hard place. Both ARL and APL are designed to address
procedural flaws and unlawful behaviour during the exercise of Chinese executive powers. It
would be nearly impossible to overturn listing decisions. There could be a breakthrough
through referring to China’s Constitution law, which is at the top of China’s statutory
hierarchy. It is noteworthy that the lack of judicial enforcement is a big setback of the Chinese

E. Break the Deadlock: Potential Paths to Resolution

The actions by both China and the U.S. may cause further trade tension and threaten to pull
apart vulnerable global supply chains.\footnote{Ana Swanson and Keith Bradsher, ‘Trade Dispute Between U.S. and China Deepens as Beijing Retaliates’ The New York Times (13 May 2019)} The bans leave multinational tech companies
scrambling to mitigate the disruption to their complex global supply chains.\footnote{George Warnock and Ken DeWoskin, ‘Letter from China: The Trade War’s Silicon Standoff’ The Wall Street Journal (9 July 2019)} ASL 2021 may create costly challenges for globally sourced MNCs, some of which will move to reorient their
global supply chains to decrease reliance on China.\footnote{‘China Threatens Sweeping Blacklist of Firms After Huawei Ban’ Bloomberg (31 May 2019)} In the current confrontation between
the two powers, it is vital that any longer-term rules should be developed in a sustainable
manner in order to address the challenges. Punishing industry may not persuade the
governments to change their positions.\footnote{Nick Turner, Hena Schommer and Wendy Wysong, ‘Sanctions with Chinese Characteristics: PRC Government Threatens to Brand “Unreliable” Foreign Companies’ Corporate Compliance Insights (17 June 2019)}

1. Leverage of Market Access

China plays a game of leverage of market access, which is primarily used to penalise conduct
detrimental to Chinese national interests. Foreign entities’ access to the Chinese market could
be restricted due to their participation in sanction measures against China.\footnote{Lin Zhu and Yoko Kubota, ‘After U.S. Blacklisting of Huawei, China Plans “Unreliable” Foreigners List’ The Wall Street Journal (31 May 2019)} The strategy of

\footnotetext{176}{Ryan Woo and Yawen Chen, ‘China Publication of “Unreliable Entities List” Depends on Sino-U.S. Trade Talks’ Reuters (11 October 2019)}
\footnotetext{178}{Ana Swanson and Keith Bradsher, ‘Trade Dispute Between U.S. and China Deepens as Beijing Retaliates’ The New York Times (13 May 2019)}
\footnotetext{179}{George Warnock and Ken DeWoskin, ‘Letter from China: The Trade War’s Silicon Standoff’ The Wall Street Journal (9 July 2019)}
\footnotetext{180}{‘China Threatens Sweeping Blacklist of Firms After Huawei Ban’ Bloomberg (31 May 2019)}
economic pressure assumes that threatening market loss will compel powerful companies to lobby their home governments in a pro-China fashion.\textsuperscript{183} China would have ample targets,\textsuperscript{184} since most U.S. high-tech firms have a substantial presence in China. Given the current confrontations between the two powers, it may only be a matter of time before they are sanctioned under ASL 2021. In this regard, the newly enacted law can be regarded as a warning to firms to refrain from transactions with the blacklisted entities. As a last resort, it serves as a bargaining chip to force the U.S. back to the negotiating table and to remove the listed Chinese firms from the Entity List.\textsuperscript{185} ASL 2021 would have similar effects to the EU’s Blocking Statute,\textsuperscript{186} which is used to counteract the application of extraterritorial sanctions on its domestic firms.\textsuperscript{187} Furthermore, ASL 2021 appears to have an extraterritorial effect, which allows the Working Mechanism to impose sanctions on a target that breaches the law outside China. The difference is that the Blocking Statute forbids EU entities from complying with U.S. sanctions, while ASL 2021 targets a foreign entity specifically and directly. It is worth noting that the move will potentially impact affiliates of foreign companies within China. Foreign giants’ affiliates based in China will be subject to some unintended consequences, since the tit-for-tat retaliation has been escalated. As such, there will be a double-win prospect if the two powers can promote further trade negotiations to avoid these repercussions.

2. Is ASL 2021 Counterproductive?

ASL 2021 plausibly provides China with a new tool to sanction any country which cooperates with U.S. and/or EU sanctions against China, which might disrupt global supply chains. However, the implementation of ASL 2021 may be counterproductive, and even hurt China’s own interests more. The system appears to mirror the EU’s Blocking Statute. Nevertheless, the Chinese blocking mechanism has nowhere close to the same effect, and it may not subject U.S. tech behemoths to the same survival risks as those placed upon Huawei.\textsuperscript{188} ASL 2021 risks undermining foreign companies’ confidence in operating in China, and making them feel they may be used as sacrificial pawns in a game of major powers.

(a) Macro: Geopolitical Environment

ASL 2021 seems ostensibly to make countries choose who to side with on sanctions: the U.S., the EU or China. Counteractively, it has catalysed the development of a common transatlantic approach to China on issues like trade, human rights and national security. The European Parliament has recently decided to freeze the ratification process of the Comprehensive Agreement on Investment, because China has refused to withdraw sanctions on EU

\textsuperscript{183} James Reilly, ‘China’s Unilateral Sanctions’ (2012) 35 (4) The Washington Quarterly 121, 133
\textsuperscript{184} Alexandra Stevenson and Paul Mozur, ‘China Steps Up Trade War and Plans Blacklist of U.S. Firms’ The New York Times (31 May 2019)
\textsuperscript{186} Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.
\textsuperscript{188} Zak Doffman, ‘China Threatens to Blacklist U.S. Firms Refusing to Supply Huawei’ Forbes (31 May 2019)
parliamentarians and diplomats. The G7 Summit 2021 is considered to challenge the rise of Chinese influence around the world, and it seeks a unified position over China. The elephant in the room during the G7 Summit is to offer a “values-driven, high-standard and transparent” partnership, so as to weaken China’s ambition regarding global leadership. Finding ways to deflect the blows from China’s response is likely the most demanding part of the G7 Summit. The U.S.-backed “Build Back Better World” (B3W) plans to be a high-quality alternative to China’s Belt Road Initiative (BRI), and could be used to mobilise private-sector capital in areas such as digital technology. This will offer a real alternative to China’s all-too-enticing BRI of infrastructure construction and investment across Africa and Eurasia. The B3W initiatives have far-reaching potential, symbolising the potential resilience of global democratic alliances. The strategic moves would ostensibly dilute and deter the threats from China. It, however, remains to be seen whether the proposed institutions can really reshape the global governance and ultimately prove their capacity against potential ASL 2021’s repercussions.

(b) Micro: Will ASL 2021 catalyse decoupling in global supply chains?

China’s reaction through the enaction of ASL 2021 is widely seen as a countermeasure in the context of the broader trade dispute, and considerably increases the risk of decoupling in the high-tech sectors. It represents the latest response to the U.S.’ long-arm jurisdiction, which refers to its use of extraterritorial sanctions against Chinese companies. An unintended consequence for China is that ASL 2021 would likely hasten strategies by foreign MNCs to diversify their supply chains away from China. As the trade war escalates, a poll from the U.S. Chamber of Commerce revealed that 40% of surveyed firms were considering moving manufacturing out of China to avoid future fallout. This situation could become worse given the current foreign investors’ deteriorating confidence in China’s market. Forcing foreign MNCs out of China’s electronics supply chain could have a major impact on Chinese high-tech champion companies. Any measures under ASL 2021 to shut down U.S. tech firms’ operations in China could hurt Chinese longer-term tech upgrades.

189 Stuart Lau, ‘European Parliament Votes to “Freeze” Investment Deal until China Lifts Sanctions’ Politico (20 May 2021)
192 George Parker, Jasmine Cameron-Chileshe, et al., ‘G7 Set to Agree “Green Belt and Road” Plan to Counter China’s Influence’ Financial Times (13 June 2021)
193 Sigmar Gabriel, ‘What Europe Must Do’ Project Syndicate (30 April 2021)
195 Eamon Barrett, ‘Manufacturers Are Considering Leaving China. But It Isn’t All Because of the Trade War’ Fortune (7 June 2019)
197 Sarah Zheng and Wendy Wu, ‘Beijing to Blacklist “Unreliable” Foreign Entities that “Hurt Interests of Chinese Firms”’ South China Morning Post (31 May 2019)
Chinese authorities may take action against foreign listed MNCs’ subsidiaries based in China, which could lead to serious problems for China’s economic growth. In order to maintain sovereign and diplomatic integrity, China has to respond reciprocally in order to show that it cannot tolerate such sanctions. It is worth noting that some recent reactions to the U.S. sanctions have been fairly toothless.\(^1\) For instance, sanctioning Lockheed Martin for U.S. military sales does little damage to the firm.\(^2\) As some commentators noted: “it would be unwise for China to lash out too severely, given it could see more doors close, particularly as it remains on the road to post-pandemic economic recovery.”\(^3\) After all, the threat of an alliance against Chinese 5G tech dominance looms on the horizon.\(^4\) As such, using countermeasures may work as short-term bargaining chips.\(^5\) Strategically, it will not be sustainable and viable in the long run. After all, China has been struggling to cultivate a reputation as a responsible member of the international economic system.

3. Breaking the Deadlock with Efforts by Target Entities

ASL 2021 and the underlying trade tensions require a delicate balancing act between compliance with U.S. trade laws and China’s requirements for continued transactions. Such entities that are subject to the jurisdictions of both the U.S. and China should take precautionary measures to the extent possible to avoid being caught in the crossfire. The impact may be significant for targeted foreign companies. The law will raise potentially challenging issues involving extraterritorial operation subject to conflicting export control laws, which will have to be considered critically by MNCs with operations in both jurisdictions.\(^6\) Whether a foreign entity should be added to the anti-sanction list will be reviewed on a case-by-case basis. It is essential for them to evaluate their potential exposure and manage potential conflicting legal obligations ex ante. Foreign entities should assess whether their conduct could violate the law. Given the increasingly complex regulatory landscape, MNCs seeking to comply with unilateral sanctions need to undertake a risk assessment that considers offsetting risks. They will need to navigate compliance with the conflicting obligations caused by the U.S. ‘Entity List regime and the Chinese blocking mechanism. The proverbial situation of being caught between a rock and a hard place necessitates MNCs’ adjustment of business strategies or the need to find alternative sources of supply.\(^7\) During the decoupling trend, MNCs may face enormous dilemmas while handling potential conflict-of-law situations. Furthermore, they should continue to pay close attention to any follow-up judicial interpretations in this scenario. After all, prevention is better than defence. Foreign MNCs need to remain agile in order to respond to political sensitivities,


\(^{2}\) Chun Han Wong, ‘China Threatens to Sanction Lockheed Martin Over Taiwan Arms Deal’ The Wall Street Journal (14 July 2020)


\(^{5}\) Zak Doffman, ‘China Threatens to Blacklist U.S. Firms Refusing to Supply Huawei’ Forbes (31 May 2019)


\(^{7}\) Eamon Barrett, ‘China Is Creating Its Own “Entity List” to Avenge Huawei and Punish Foreign Firms’ Fortune (18 June 2019)
complicated diplomatic relations and an inconsistent regulatory environment, while maintaining access to the world’s two largest economies.

**Conclusion**

Chinese countermeasures ratchet up the tension between compliance with foreign sanctions regimes and compliance with Chinese law and regulations. ASL 2021 was passed amid growing tensions between the U.S. and China, and raises compliance challenges and potential conflict-of-laws issues for foreign entities with China-related operations. The law provides China with a legal framework for economic sanctions, which is purportedly meant to combat unilateralism, trade protectionism and supply interruptions to Chinese firms. It complicates foreign entities’ compliance efforts to mitigate their legal and regulatory risks. Foreign entities may find themselves put in the crossfire, and exposed to conflicting obligations. Foreign MNCs should work out strategic and adequate compliance programmes to comply with their domestic laws while balancing the risks arising from China’s blocking mechanism. The law, equipped with the latest tit-for-tat countermeasures, legitimises China’s retaliation against foreign entities, although it is used, *prima facie*, as a retaliatory weapon against the U.S. Entity List in the ongoing trade war.

ASL 2021 shares certain similarities with the U.S. economic sanctions and export controls regime as well as the EU’s Blocking Statute, since they are list-based regimes with licensing and delisting mechanisms. As a Chinese version of the Blocking Statute against foreign sanctions, the ASL 2021 is primarily considered to be a countermeasure to the U.S.’ escalating sanctions and export control restrictions on Chinese firms. The retaliation could however be counterproductive and might even accelerate the process of U.S. tech firms’ diversification. It is hard to predict the precise implications at this initial stage. Enormous as they may be though, how ASL 2021 will be interpreted matters as well. The blocking mechanism does not offer specific guidance or definitions for many of its provisions. The language used in ASL 2021 enables Chinese authorities to have wide discretion. How the law will be implemented and applied is subject to the corresponding implementation of rules and judicial interpretation. This means that the Chinese government seeks to maintain substantial flexibility in interpretation and enforcement of the Blocking Mechanism. The impact of the consequences remains to be seen in the future implementation. It is arguable that the tension can hardly be addressed through merely the legal channel at a micro level. In view of these complexities, it is imperative that a global governance regime be established to alleviate the confrontations and break the deadlock.