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Between A Rock and A Hard Place: Unreliable Entity List vis-à-vis The U.S. Entity List

Abstract

The U.S. Entity List creates a legal conundrum for high-tech firms seeking to operate with some targeted Chinese companies. At the heart of the problem is the incongruity between the U.S. and China perspectives on national security in their pursuit of global technological superiority. The conflict of law arises inevitably as a multinational company (MNC) attempts to comply with both U.S. law and the Chinese Unreliable Entity List (UEL) system. The firms are thus placed in a proverbial rock and hard place. For the sake of remedies, it is essential to ascertain whether compliance with laws of the blacklisted firm’s home state would be considered as a “non-commercial consideration”, and further recognised as a valid defence.

Introduction

As unilateralism and protectionism are on the rise, the multilateral trading system is facing severe challenges.\(^1\) China is developing increased influence in global internet governance.\(^2\) It pushes ambitiously China’s proposition of internet governance toward becoming an international consensus.\(^3\) In accordance with a plausible theory of Thucydides Trap, the two powers between the U.S. and China would engage in an inevitable fight for global technological superiority.\(^4\) It is alleged that Huawei is engaged in activities that are contrary to U.S. national security or foreign policy interest. The U.S. Department of Commerce (DoC) added Huawei to the “Entity List” on 15 May 2019, effectively banning Huawei from receiving any exports of technology or software subject to U.S. jurisdiction.\(^5\) In response, China is establishing an unreliable entity list (UEL) in order to target firms that damage the interests of Chinese companies. As the Chinese Ministry of Commerce (MOFCOM) provided 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.”\(^6\)

The proposed UEL increases tensions between the two countries that are already engaged in a trade war. The UEL system would force U.S. entities to start navigating an increasingly complex minefield to avoid the growing animus between the two powers.\(^7\)

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\(^1\) Charlotte Gao, ‘Eye for An Eye: China to Establish ‘Unreliable Entity List’ The Diplomat (1 June 2019)
\(^2\) Sarah Cook, ‘Tech Firms Are Boosting China’s Cyber Power’ The Diplomat (25 September 2018)
\(^4\) Nouriel Roubini, ‘The Global Consequences of a Sino-American Cold War’ Project Syndicate (20 May 2019)
\(^6\) Nan Zhong, Xiaojin Ren and Si Ma, ‘China Hits US with Blacklist in Trade Move’ China Daily (1 June 2019)
It seems that foreign companies are about to be caught in the crossfire. The challenge is to be addressed with four sections below. Part I looks at the UEL system, China’s version of “Entity List”, which is based on principles enshrined primarily in Anti-Monopoly Law (AML) and the National Security Law (NSL). Given the current focus of retaliatory government policies on banning the flow of technology-related goods, Part II analyses a dilemma where a foreign company would face between a rock and a hard place. The challenging conflict of law issues should be integrated into those companies’ global governance regimes across jurisdictions. Part III explores viable remedies for am NNC, and seeks to ascertain whether a plausible exception of “non-commercial consideration” constitutes an affirmative defence. It further investigates whether a remedy is viable via administrative reconsideration or administrative litigation. Part IV discusses how to break the deadlock from the perspective of targeted companies. A long-standing ongoing debate is whether it is sustainable for China to achieve its strategic goals by leveraging the Chinese market access. Arguably, the creation of the UEL system might be counterproductive during China’s pursuing for tech supremacy. In the paper’s concluding remark, it is highlighted that the tension would not end until a comprehensive resolution is reached through far beyond purely legal approaches.

A. The US Entity List vis-à-vis China’s Unreliable Entities List

Tech firms whose work with dual-use technology come under the U.S. governmental scrutinisation. Entity List is a blacklist of businesses the U.S. considers a threat to its strategic interests, which is maintained by the U.S. 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 by a BIS license. China’s UEL system is aimed at combating unilateralism, protectionism and discriminatory actions meant to block supplies to Chinese enterprises. This represents a tit-for-tat escalation of the current trade war after the U.S. blacklisted Huawei.

1. The U.S. Entity List

An Entity List requires that a blacklisted Chinese company to apply for special permission to buy American components and technology. This means U.S. exporters require special U.S. government permission to sell designated components and technologies to such entities. It can be used to block activities contrary to U.S. national security and foreign policy. The system has been stipulated by the Export Administration Regulations (EAR), which takes its

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12 Sue-Lin Wong and Nian Liu, ‘China Threatens to Blacklist ’Non-Reliable’ Foreign Companies’ Financial Times (31 May 2019)
authority from the Export Control Reform Act of 2018.\textsuperscript{15} Entities that handle U.S. origin goods are prohibited from supplying such goods, and any other items that are subject to the EAR to Huawei.

\textit{(a) Mitigation of National Security Risks behind the Entity List}

The creation of the Entity List has amplified the extraterritorial reach of America’s geo-economic strategy.\textsuperscript{16} It is aimed 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.\textsuperscript{17} While the EAR provides an illustrative, but unexhaustive, list of activities that could be considered contrary to the public interests,\textsuperscript{18} any ruling will be assessed on a case-by-case basis. 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 (CCP) for espionage.\textsuperscript{19} 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. In principle, an entity can continue to deal with Huawei, so long as they do that without exceeding \textit{de minimis} levels of the U.S. components or using technology controlled on the ground of national security purposes.\textsuperscript{20} However, blurring of distinctions between export controls and sanctions law, the Entity List has had enormous implications on suppliers’ ability to engage in the development of new products and technology for Huawei.\textsuperscript{21}

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

On 15 May 2019, the Trump administration issued Executive Order 13873 on \textit{Securing the Information and Communications Technology and Services Supply Chain} (EO 2019).\textsuperscript{22} The rationale is to prevent espionage activity and to protect U.S. critical national infrastructure (CNI). Although the EO 2019 does not identify any particular entity, it is widely interpreted to target Huawei, an elephant of the room. The EO 2019 defines that:

[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

\textsuperscript{15} Export Control Reform Act became law in August 2018 as part of the John S. McCain National Defence Authorisation Act for Fiscal Year 2019.
\textsuperscript{17} Charlotte Gao, ‘Eye for An Eye: China to Establish ‘Unreliable Entity List’” The Diplomat (1 June 2019)
\textsuperscript{18} The Export Administration Regulations (EAR) 15 C.F.R. §730 et seq.
\textsuperscript{19} Lindsay Maizland and Andrew Chatzky, ‘Huawei: China’s Controversial Tech Giant’ (Washington DC, The Council on Foreign Relations, 12 June 2019)
\textsuperscript{20} ‘US Bans Exports to Huawei and Announces Broader Transaction Review Program’ Freshfields Bruckhaus Deringer Briefing (20 May 2019)
\textsuperscript{21} Marianne Schneider-Petsinger, James Crabtree, et al., ‘US–China Strategic Competition the Quest for Global Technological Leadership’ (Chatham House, The Royal Institute of International Affairs, November 2019) 
\textsuperscript{22} The 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.
to the national security of the United States or security and safety of United States persons.”

This definition provides the U.S. enforcement agencies with considerable leeway to determine who could be a foreign adversary. Meanwhile, it represents 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. Particular attention should be paid to their global supply chains and international growth strategies.

2. Unreliable Entity Lists (UELs)

The Chinese Ministry of Commerce (MOFCOM) proposed China’s own Unreliable Entities List (UEL) on 31 May 2019. It appears to be a response to the addition of Huawei to the U.S. Entity List. The UEL seems to mirror the U.S. Entity List, with a less ambiguous nomenclature and purpose. MOFCOM held that the creation of its own UEL aimed at combating “unilateralism, trade protectionism, and discriminatory actions” meant to block supplies to Chinese enterprises. A company on the UEL will be subject to any necessary legal and administrative measures that MOFCOM imposes, meanwhile the public will be advised to be cautious to avoid risks associated with the designated foreign entities.

(a) Cause of Action

The UEL will include entities that fail to abide by market rules and discriminate against Chinese companies for non-commercial purposes. Any firm obeying the U.S. ban on supplying hardware or software to Huawei could be labelled as an unreliable entity. Notably, individuals acting on behalf of non-compliant companies could personally be punished with inclusion on the UEL. In this vein, foreign individuals may also be listed as unreliable entities, although any penalty that restricts personal freedom can only be created by law. According to MOFCOM, four standards will be taken into account to determine whether a foreign entity or individual should be listed as an “Unreliable Entity”, including:

“(i) where there it is boycotting, cutting off supplies to Chinese companies or taken other specific discriminatory actions against Chinese companies;

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23 EO 2019 s3(b)
27 Charlotte Gao, ‘Eye for An Eye: China to Establish ‘Unreliable Entity List’ The Diplomat (1 June 2019)
29 Sue-Lin Wong and Nian Liu, ‘China Threatens to Blacklist ‘Non-Reliable’ Foreign Companies’ Financial Times (31 May 2019)
30 ‘What We Know About China’s ‘Unreliable Entities’ Blacklist’ Bloomberg (4 June 2019)
whether these actions are taken for non-commercial purposes, in violation of market rules or in breach of contractual obligations;

(iii) whether these actions cause material damage to the legitimate interests of Chinese companies and relevant industrial sectors; and

(iv) whether these actions constitute a threat or potential threat to China’s national security.”

The sanctions under the UEL system may apply to both the underlying foreign entities and their subsidiaries based in China. This move aims to deter those companies, to some extent, from with US export control laws against Huawei.33

(b) Penalties and Consequences under the UEL

There is currently no clarity on the possible consequences for the blacklisted entities. They may face such market access sanctions as bans or restrictions on trade, investment, regulatory permits and licenses.34 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.35 The ban could mean substantial losses of some foreign MNCs which rely heavily on revenues from China.36 Similar to the U.S. Entity List with provisions of the license requirement,37 companies that end up on 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.38 This has already been proposed in the draft of China’s Export Control Law (ECL).39 Those blacklisted firms are required to request government permission, which is often denied though. Their ability to conduct businesses may be suspended indefinitely. In addition, simply being added to the UEL may result in negative publicity as well as pecuniary losses in the Chinese market and cause the blacklisted person to incur huge costs to defend against the listing.40 The reputation can be tarnished in the China market as well. The UEL serves the purpose of a warning list to inform the public of potential risks involved in dealing with the listed entities. Chinese counterparts to the listed entities will likely even be ordered to cease transaction with the latter.41 The blacklisted company may also have to hand sensitive information over to Chinese regulators, which would put its intellectual property at risk.42

32 Feng Gao (MOFCOM Spokesman), ‘China’s Introduction of”Unreliable Entities List” Regime’ (Beijing, MOFCOM, 31 May 2019)
34 Nian Liu and Sue-Lin Wong, ‘China Threatens to Blacklist ‘Non-Reliable’ Foreign Companies’ Financial Times (31 May 2019)
35 Cong Wang and Hongpei Zhang, ‘China’s ‘unreliable entity list’ imminent’ Global Times (22 August 2019)
37 Part 744 of the Export Administration Regulations (EAR), 15 C.F.R. § 730 et seq.
39 Chinese Export Control Law Articles 21, 22, 23
The actions by both China and the U.S. have caused further trade tension and threatened to pull apart the supply chains currently linking the two powers.\(^\text{43}\) China’s reaction is widely seen as a countermeasure in the context of the broader trade dispute. The creation of UEL is a tit-for-tat step toward retaliating against the U.S. for denying vital American technology to Chinese companies.\(^\text{44}\) It represents a latest response to the U.S.’ long-arm jurisdiction, which refers to its use of extraterritorial sanctions against Chinese companies.\(^\text{45}\)

**B. Statutory Ground of the Unreliable Entity Lists (UELs)**

The UEL will be based on principles underlying China’s Foreign Trade Law (FTL2016), Anti-Monopoly Law (AML2008), and National Security Law (NSL 2015)\(^\text{46}\), and among others.\(^\text{47}\) Apart from the penalties for "abuse of dominant position" pursuant to AML 2008, another possibility is the launch of a "national security review" mechanism. The legal basis may be found in both the NSL 2015 and the FTL 2016. The actions taken against the blacklisted entities are to be determined pursuant to the above framework, according to which MOFCOM will take legal and administrative measures to undertake investigations.

1. **The UEL Embraces the Anti-Monopoly Law (AML 2008)**

Trade and export controls in one country may conflict with competition laws in another jurisdiction.\(^\text{48}\) Article 17 under AML 2008 is most likely to be applied as a potential provision that MOFCOM could use to justify its blacklisting of foreign entities. Failure to comply with continuing supply could result in a foreign MNC’s inability to conduct business in China. Some dominant companies refusing to deal with Chinese entities for non-commercial reasons can breach AML 2008 as well. It is essential to analyse whether the conduct eliminates and restricts competition in the relevant market, and further to evaluate the balance of anti-competitive effects and pro-competitive effects.\(^\text{49}\)

(a) **Transaction Test**

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\(^\text{43}\) Sue-Lin Wong and Nian Liu, ‘China threatens to blacklist ‘non-reliable’ foreign companies’ *Financial Times* (31 May 2019)


\(^\text{46}\) The National Security Law was adopted at the 15th Session of the Standing Committee of the 12th National People’s Congress (NPC) of the People’s Republic of China on 1 July 2015, which came into force on the same day.

\(^\text{47}\) Art. 7 of the Foreign Trade Law (FTL 2016) provides in general terms that if a foreign country or region adopts prohibitive, restrictive or similar measures on a discriminatory basis against China in trade, China may take corresponding counteractions against such country or region. Art. 59 of the National Security Law (NSL 2015) provides that the State, in order to prevent and mitigate national security risks, shall establish a national security review and supervision system and conduct national security reviews on foreign investment, specific articles, key technologies, products and services relating to network information technologies, infrastructure construction products and other important transactions and activities that impact or may potentially impact national security.


The “refusal to deal” and “imposing unreasonable trading conditions” provide ammunition to the State Administration for Market Regulation (SAMR), the Chinese antimonopoly authority,\(^5\) to deploy the UEL. They may also be the front line for the UEL, which prohibits abuse of dominant market position. AML 2008 prohibits companies from abusing a dominant market position through refusing to conduct transactions, or imposing discriminatory conditions against another company without legitimate purposes.\(^5\) The prerequisite for the application is that the business has a dominant market position.\(^5\) The concept of abuse of market dominance in the AML seem to be heavily relied on.\(^5\) During the review, the market share is used as an index for assessing market dominance.\(^5\) Any antimonopoly review should include the foreign entity’s China subsidiaries and affiliates.\(^5\) In case of a U.S. company ceasing to supply, cooperating with or refusing to negotiate new transactions with a Chinese firm, it can be considered as 'refusal to deal' under Article 17 by the SAMR. Another antitrust risk for a foreign company that cuts off trade would also be regarded as ‘imposing unreasonable trading conditions' under Article 17, if the entity requests its distributors not to supply products to or cease cooperation with a specific Chinese company.\(^5\)

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

During the past decades, both public and private actors have increasingly sought to apply the U.S. antitrust laws to conduct by foreign businesses that is deemed to have effects on the U.S. economy.\(^5\) Likewise, rule of reason is similarly applied to assess abuse of market dominance in China, weighing anticompetitive effects against the economic efficiencies.\(^5\) The analysis of competitive effects relies on various factors under the Chinese AML framework, which are reflective in the case of Eastman.\(^5\) SAMR’s Shanghai branch imposed an administrative penalty on Eastman for its abuse of market dominance on 29 April 2019.\(^5\) The enforcement agency employed the methodology of ‘critical loss analysis’ to draw the borderline for the relevant market,\(^5\) and also used Lerner Index to verify the market power of Eastman and

\(^{50}\) China's National People' Congress passed legislation to consolidate the existing three antitrust bodies into one on 17 March 2018. SAMR was officially established on 21 March 2018.

\(^{51}\) AML 2008 Art. 17 (3) (6)


\(^{53}\) Yang Zhan, ‘Unreliable Entity List Embraces Abuse of Dominance under the AML of the PRC’ China Law Vision (17 July 2019)

\(^{54}\) AML 2008 Art. 19 (1)


\(^{56}\) Yang Zhan, ‘Unreliable Entity List Embraces Abuse of Dominance under the AML of the PRC’ China Law Vision (17 July 2019)


\(^{61}\) Re. Eastman (SAMR, Shanghai Branch, 16 April 2019); US-based Eastman Chemical must pay a €3.2 million fine for abusing its dominance in the market for a type of alcohol used in latex paints.

restrictive effects in the relevant market. The SAMR decided to impose the penalty by analysing the damages that the abuse of dominance caused on the market, and emphasised that the anticompetitive effects overwhelmed the economic efficiency. The UEL would rely primarily on the Antimonopoly Law (AML 2008) especially in relation to foreign entities with a substantial market presence in China, which could be singled out for its discriminatory action against Chinese entities. As such, the premise for whether a foreign entity shall be added to the UEL depends largely upon whether a foreign entity abuses its market dominance against Chinese firms under the AML 2008 framework.

2. Countermeasures in Foreign Investment Law (FIL 2019), Foreign Trade Law (FTL 2016) and National Security Law (NSL 2015)

This UEL regime is used as a countermeasure against export control of foreign governments targeting specific Chinese companies. Article 40 of Foreign Investment Law (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 Foreign Trade Law 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 two provisions are directed against foreign governments, not specific companies. It remains unclear whether foreign entities should be treated as unreliable entities provided that they comply with their own domestic laws or EO 2019 to restrict trade and investment with China.

The establishment of a national security review mechanism is to regulate foreign business transactions, which are perceived with national security implications. Two general provisions help to address China's economic order, market and national security. The 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 the national security concerns from an institutional perspective that:

64 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)
65 AML 2008 Art. 17 (2)
66 On 15 March 2019, China’s National People’s Congress (NPC) passed the Foreign Investment Law of the People’s Republic of China, which will come into effect on 1 January 2020.
68 National Security Law 2015 Art. 19
“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 not clear how the application of the above provisions will impact upon the implementation of the UEL system. According to the NSL 2015, the National Development and Reform Commission (NDRC) takes a lead to create a National Technological Security Management List (NTSML) system, in order to mitigate more effectively national security risks. Both the UEL and NTSML schemes represent new conceptual approaches in the Chinese governance regime of national security. In practice, however, there is substantial challenge to set up a common standard, when determining whether an activity constitutes a threat to national security.

3. China’s Export Control Law (ECL).

The current export control framework is made up of a patchwork of various laws and regulations. China is still in the process of formulating its first Export Control Law (ECL), during which the dual-use items will be highlighted. China thus far does not have an “entity list” regime similar to that under the U.S. Export Control Regulations (ECR), which may restrict exports of Chinese origin products or technologies to specified foreign entities. However, the ECL has many of the salient features and characteristics of the U.S.’ export control regime, including its own blacklisting and licensing programs, which is similar to the proposed UEL. If enacted, the law may impose restrictions on transactions with UEL-designated entities, including prohibiting exports of Chinese-origin controlled items, revoking export licenses related to transactions with such entities and imposing a fine that amounts to five to ten times the value of the illegal gains for violation of the new law. The ECL Draft Law contains a ‘catch-all provision’, with which the Chinese authorities can extend the control to items not included in the control list, on a case-by-case basis for national security reasons. China’s UEL is likely to be connected to the ECL if it draws on the U.S. Entity List system under the EAR, which could be included in the ECL as well. Alternatively, the measures on the UEL are likely to take the form of administrative regulations rather than a statute. Regardless of the finalised form, the ECL will be a significant milestone in the evolvement of China’s international trade framework. The ECL Draft represents China’s first ever comprehensive legislation on export

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69 National Security Law 2015 Art. 59
70 ‘China to Establish National Security Management List System’ Xinhua (8 June 2019)
72 Ministry of Commerce (MOFCOM) released for public comment a draft of the Export Control Law (ECL) on 16 June 2017. A second draft of the Export Control Law was submitted to the Standing Committee of the National People’s Congress for a second review on 28 June 2020.
73 US Export Controls: International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR)
75 Export Control Law (Draft) Art. 56
76 Export Control Law (Draft) Art. 44; Jeanine Daou, Mark Schofield and Carlos Garcia, ‘Who’s in control? China’s Proposed Export Control Law’ Trade Intelligence Asia Pacific (June/July 2018)
controls. Upgrading China’s existing regime, the ECL draft law provides for the possibility of initiating retaliatory measures against countries which have subjected China to discriminatory export control measures.

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

The Unreliable Entities List (UEL) opens a door to retaliation against foreign entities that depend substantially on the Chinese market. Companies adhering to the U.S. sanctions might become open 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 competing sets of laws. They would increasingly risk accusations of either complicity in UELs or violations of the US Entity List system.

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

Companies with operations in both the U.S. and China are flung into a dilemma under the UEL, as they will need to navigate compliance with U.S. trade restrictions and China’s requirements of continued supply. U.S. firms are not going to violate the Entity List system, particularly in the current context of trade war where their actions are scrutinised. Nevertheless, ceasing operation may conceivably face possible legal consequences from China. Disregarding its home state laws, like the EO 2019, and continuing trading with China entities, they would consequently risk facing domestic penalties. Failure to comply with U.S. restrictions, where applicable, exposes 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. Such corporations may therefore find themselves between the proverbial rock and a hard place.

FedEx is compelled by the U.S. Department of Commerce (DoC) to act in ways that expose it to possible sanctions under the UEL system. Despite its heavy investment on compliance, FedEx has been caught between a rock and a hard place, which finds itself stuck in the middle between the U.S. and China and their ever-protracted trade war. Under the Export Control

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80 Zak Doffman, ‘China Threatens to Blacklist U.S. Firms Refusing to Supply Huawei’ Forbes (31 May 2019)
81 Kate Conger, ‘China Summons Tech Giants to Warn Against Cooperating with Trump Ban’ The New York Times (8 June 2019)
83 Eamon Barrett, ‘China Is Creating Its Own ‘Entity List’ to Avenge Huawei and Punish Foreign Firms’ Fortune (18 June 2019)
84 A company would face substantial penalties, say, criminal penalties of up to $1 million and civil penalties of $300,000 per violation.
Reform Act of 2018, FedEx must choose between operating under the threat of U.S. punishment and facing potential legal trouble from foreign governments. As FedEx claimed: "[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 China’s requirements of continued supply may result in an inability to conduct business in China. Continuing to operate breaches prohibitions contained in the Export Administration Regulations (EAR), which will be subject to threat of imminent enforcement actions. FedEx either restricts all shipments to Huawei entities, or carefully scrutinise each and every shipment anywhere in the world to ensure that the company is not aiding and abetting an export violation. In terms of the latter option, it is nearly realistically impossible. Its strategy is to obtain court rulings outlining its obligations under the U.S. law, although it remains uncertain whether it could be considered as a valid reason and affirmative defence thereafter. In terms of a possible application of the doctrine of foreign sovereign compulsion in China, neither perimeters nor precedents are in place at such a scenario for FedEx to make a reasonably well-informed decision to break the deadlock.

Blacklisting an entity would need to undergo the required legal procedures, including an investigation in which the interested parties will be given the right to defend themselves. Behind the proposed UEL is to revenge against those discriminatory measures imposed on Chinese companies for non-commercial purposes, foreign entities may assert a legitimate business purpose as a viable defence. This may include the compliance with laws of the target’s home state. To ensure the UEL system’s viability, guidelines should be provided for listed firms to defend themselves, or even apply for removal from the list. In terms of sequence, it is likely that the guide under the UEL regime would first be issued before the actual list comes out.

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

89 Export Administration Regulations (EAR) §736
94 ‘China Outlines Factors for Consideration in Listing Unreliable Foreign Entities’ China Daily (2 June 2019)
There is a need to consider the circumstances where foreign MNCs are compelled to implement discriminatory measures. A U.S. company could defend itself by arguing that it has to abide by American laws to discontinue the transaction. This proverbial situation raises an issue of whether adherence to the U.S. Executive Order (EO 2019) could constitute a valid reason, and be considered as justifiable by Chinese enforcement authorities. The Antimonopoly Law (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 the domestic law, such as the EO 2019, it may be a valid reason. In contrast, if the conduct carried out by a foreign entity exceeds the level required by the domestic law, it could not be a valid reason.

A blacklisted foreign MNC could consider whether it can invoke any of the aforementioned argument as valid reasons for its defence. Paradoxically, it may refer to MOFCOM’s mitigation limb of “non-commercial consideration”. At stake is whether a foreign entity’s passive compliance with its home state’s sanctions laws can constitutes a “non-commercial consideration”. If the domestic law, like the EO 2019, does not constitute a valid reason, the foreign entity will face a dilemma. Its conduct should therefore not be recognised as being for commercial purposes if the foreign entity adhered by laws of its home state. If MOFCOM determines 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. The risk may encourage foreign entities to apply for exemption from the sanctions in order to enable them to continue their transactions with Chinese companies.

Nevertheless, there are few precedents or parameters to support the above reasoning. The chance of success of this hypothetic defence remains uncertain. It is the Chinese enforcement authorities that have discretion in determining whether an exemption can be granted. It all comes down to how MOFCOM will interpret a prima facie justifiable variable of “non-commercial consideration”. It remains to be seen whether a refusal to supply Huawei so as to

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95 Yuanyou Yang, ‘Companies in the Crosshairs? China to Enact its own Export Controls’ China Business Review (7 August 2019)
96 Eamon Barrett, ‘China Is Creating Its Own ‘Entity List’ to Avenge Huawei and Punish Foreign Firms’ Fortune (18 June 2019)
97 AML 2008 Art. 17 (3) and (4)
98 Christopher Yoo, Thomas Fetzer, et al., ‘Due Process in Antitrust Enforcement Through the Lens of Comparative Law’ (2020) Faculty Scholarship at Penn Law 2160
101 Feng Gao (MOFCOM Spokesman), ‘China’s Introduction of “Unreliable Entities List” Regime’ (Beijing, MOFCOM, 31 May 2019)
102 Feng Gao (MOFCOM Spokesman), ‘China’s Introduction of “Unreliable Entities List” Regime’ (Beijing, MOFCOM, 31 May 2019)
comply with the U.S. law could constitute adequate grounds for a U.S. firm not to be added to the UEL. Plausibly, it would be self-contradictory if the defence could be accepted by MOFCOM. Otherwise, the exclusion of those foreign entities would defeat a rationale for introducing the UEL under the trade war.

3. Administrative Reconsideration/Litigation

Foreign companies need to prepare for increased antitrust enforcement activities and consider taking proactive measures to gauge their exposure to a UEL designation. If included in the UEL, foreign MNCs may rebut the inclusion through participating in hearings. They may 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. In terms of the ex-ante listing, MOFCOM 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. Companies threatened to be listed in the UEL will need to tailor their conduct to avoid the consequence. In terms of the ex poste listing, the UEL will be subject to adjustment after the UEL publication, and the firm will be given the right to challenge their inclusion on the UEL.

An included firm would be removed from the UEL, if the remedial actions could be proved viable. Under the U.S. Administrative Procedure Act, an entity included in the Entity List is entitled to launch a lawsuit, if an action of the U.S. Department of Commerce (DoC) is arbitrary, capricious, or an abuse of discretion. Despite the right to appeal, there have been few lawsuits of such kind, because the U.S. DoC has ultimate discretion in determining whether an entity should be included in the Entity List. Rarely can a challenge succeed against the DoC’s decision. Similarly, the act of adding an entity to the UEL in China is theoretically remediable through administrative reconsideration or administrative litigation. The PRC Administrative Litigation Law provides for the setting of different types of administrative penalty. As a unilateral act within the statutory power, it is aimed to derogate from the entity’s right or to create additional obligations for the entity.

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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. 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 no further litigation proceedings are allowed. Thus, a foreign firm has a right to apply for administrative reconsideration, which directly examines specific administrative acts. Furthermore, the Administrative Procedure Law (APL 2017) provides a negative enumeration of the scope of administrative litigation. Given the lack of specifics, it still remains unclear whether administrative organs would have ultimate authority to determine on including an entity to the UEL. In theory, a decision to include an entity onto UEL is actionable as a specific administrative act. An entity may also initiate an administrative lawsuit, if it considers that SAMR or MOFCOM abuses its administrative power.

4. (Un)viable Paths?

As mentioned above, the doctrine of foreign sovereign compulsion is hardly applicable in China. There is paucity of reciprocity between the U.S. and China, let alone 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 “[U]nited States, historically, has not argued that foreign courts are bound to accept its characterisations or precluded from considering other relevant sources” when interpreting US law. Neither Chinese People’s Courts nor the enforcement agencies, like the SAMR, normally regard a foreign government’s characterisation of its own law as legally binding. They are likely to give little deference to U.S. authorities’ interpretation of American laws when U.S. companies are subject to investigations and litigation in China. After all, a strategic purpose of creating the UELs is to impose pressure on the U.S. public and private actors, forcing them to give up compliance with the Entity List system against Chinese companies. In this regard, the Chinese enforcement authorities would not recognise foreign sovereign compulsion as a valid reason, serving as a justifiable defence, regardless whether the U.S. firm is placed in a proverbial situation between a rock and a hard place. Both Administrative Reconsideration Law and Administrative Procedure Law are designed to address procedural flaws

114 PRC Administrative Reconsideration Law (ARL 2018) Art. 14
115 PRC Administrative Reconsideration Law (ARL 2018) Art. 27
117 PRC Administrative Procedure Law (APL 2017) Art. 13 (4)
118 PRC Administrative Procedure Law (APL 2017) Articles 8, 12
122 Ryan Woo and Yawen Chen, ‘China Publication of “Unreliable Entities List” Depends on Sino-U.S. Trade Talks’ Reuters (11 October 2019)
and/unlawful behaviours during the exercise of Chinese executive powers. Without wrongdoings, including abuse of powers, it will be nearly impossible to overturn the listing decisions made by MOFCOM or SAMR. There could be a breakthrough through referring to China’s constitution law, which is at the top of the China’s statutory hierarchy. It is noteworthy that the lack of judicial enforcement is a big setback of the Chinese Constitution Law.\footnote{Qianfan Zhang, ‘A Constitution without Constitutionalism? The Paths of Constitutional Developments in China’ (2010) 8 (4) International Journal of Constitutional Law 950, 976}

D. Break the Deadlock: Potential Paths to Resolution

The actions by both China and the U.S. could cause further trade tension and threaten to pull apart the supply chains currently linking the two economies.\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 from both sides have 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)} The UEL may create costly challenges for globally-sourced technology companies.\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 resulting price are shared by both the U.S. and China. Some MNCs will move to reorient their supply chains to decrease reliance on China.\footnote{Richard Waters, Kathrin Hille and Louise Lucas, ‘Huawei v the US: Trump Risks a Tech Cold War’ Financial Times (24 May 2019)} In the current confrontation between the two powers, it is vital that any longer-term rules should be developed in a peaceful manner in order to address the challenges. Punishing industry may not persuade the governments to change their positions.\footnote{Monan Zhang, ‘Friendly Foreign Firms Not Targeted by ‘List’ China Daily (11 June 2019)}

1. Leverage of Market Access

China plays a game of leverage of market access.\footnote{Kiran Stacey, ‘US Tech Groups Scour Supply Chains for China Risks ‘Financial Times (2 June 2019)} The UEL could restrict access to the Chinese market for foreign MNCs participating in boycotts or other measures against Chinese firms.\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)} China would have ample targets,\footnote{Alexandra Stevenson and Paul Mozur, ‘China Steps Up Trade War and Plans Blacklist of U.S. Firms’ The New York Times (31 May 2019)} if the UEL were to be used as a tit-for-tat tool against the U.S. tech firms, given most of which have a substantial presence in China. The UEL could also be regarded as a warning to Chinese firms to refrain from cooperating with the blacklisted ones.\footnote{Alexandra Stevenson and Paul Mozur, ‘China Steps Up Trade War and Plans Blacklist of U.S. Firms’ The New York Times (31 May 2019)} As a last resort, it serves as a bargaining chip to force the U.S. back to the negotiating table and remove Huawei from the Entities List.\footnote{Monan Zhang, ‘Friendly Foreign Firms Not Targeted by ‘List’ China Daily (11 June 2019)} China's UEL system would have similar effects to the EU’s Blocking Statute,\footnote{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.} which is used to counteract the application of
extraterritorial sanctions on domestic firms. The difference is that the latter forbids EU entities from complying with U.S. sanctions, while the former targets a U.S. entity specifically and directly. It is worthy to note that the move would potentially even impact upon affiliates of foreign companies within China. Foreign giants’ affiliates based in China will be subject to some unintended consequences, if the tit-for-tat retaliation is escalated. As such, there would be a double-win prospect if the two powers could promote further trade negotiations.

2. Is the UEL Counterproductive?

The UEL appears to mirror the U.S. Entity List. Nevertheless, the UEL may have nowhere close to the same effect, and it may not give the U.S. tech behemoths the same survival risks as those upon on Huawei. The UEL risks undermining foreign companies’ confidence about operating in China. An unintended consequence for China is that the UEL-driven approach would most likely hasten strategies by the U.S. technology firms to diversify their supply chains away from China. As the trade war escalates, a poll from the American Chamber of Commerce revealed that 40% of surveyed firms were considering moving manufacturing out of China to avoid future fallout. The implementation of UELs may be counterproductive, and even hurt China’s own interests more. This situation could become worse given the current China’s slow economy growth and foreign investors’ deteriorating confidence on China’s market. Forcing foreign MNCs out of China’s electronics supply chain could have a major impact on Chinese ones. Any measures under UEL to shut down U.S. tech firms’ operations in China could hurt Chinese longer-term tech upgrade. Enforcement actions may be taken against those foreign listed MNCs’ subsidiaries based in China for similar reasons. Cutting off these partners could lead to serious problems for China’s domestic markets. China has to respond against the U.S. Entity List in order to show that it cannot tolerate such an approach. It is worth noting that some recent reactions with the U.S.

136 EU’s updated Blocking Statute to Take Effect as Countermeasure to U.S. Re-imposed Sanctions against Iran’ Xinhua (6 August 2019)
139 Zak Doffman, ‘China Threatens to Blacklist U.S. Firms Refusing to Supply Huawei’ Forbes (31 May 2019)
140 Kevin Rudd, ‘To Deal, or Not to Deal: The U.S.–China Trade War Enters the End-Game’ (Asian Society Policy Institute, 9 September 2019) <https://asiasociety.org/policy-institute/to-deal-or-not-to-deal>
142 Eamon Barrett, ‘Manufacturers Are Considering Leaving China. But It Isn’t All Because of the Trade War’ Fortune (7 June 2019)
143 Eamon Barrett, ‘China Is Creating Its Own “Entity List” to Avenge Huawei and Punish Foreign Firms’ Fortune (18 June 2019)
145 Sarah Zheng and Wendy Wu, ‘Beijing to Blacklist “Unreliable” Foreign Entities that “Hurt Interests of Chinese Firms” South China Morning Post (31 May 2019)
sanctions have been fairly toothless.\textsuperscript{147} For instance, sanctioning Lockheed Martin for U.S. military sales does little damage to the firm.\textsuperscript{148} 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.”\textsuperscript{149} After all, the threat of an alliance against Chinese 5G tech dominance looms on the horizon.\textsuperscript{150} As such, using countermeasures via the UEL may work as short-term bargaining chips.\textsuperscript{151} Strategically, it will not be sustainable and viable in the longer run.

3. Break the Deadlock from Efforts by Target Entities

Impacts could be significant for targeted foreign companies, despite that contents and effects of the UEL remain to be finalised.\textsuperscript{152} Once the UEL system comes into force, it will raise potentially challenging issues involving extraterritorial operation of conflicting export control laws, which will have to be considered critically by MNCs with operations in both jurisdictions.\textsuperscript{153} Whether a foreign MNC should be added to the UEL will be reviewed on a case-by-case basis. They will need to navigate compliance with the U.S. export control and trade restrictions as well as China’s requirements of continued supply.\textsuperscript{154} A proverbial situation between a rock and a hard place necessitates an adjustment to business strategies or the need to find alternative sources of supply.\textsuperscript{155} While specific measures have not been put in place, foreign entities can refer to the U.S. Entity List in order to prepare themselves for compliance when the UEL is ultimately introduced.\textsuperscript{156} This is due largely to the similarities between UEL and the U.S. Entity List. Furthermore, MNCs should continue to pay close attention to any follow-up measures and policies in this scenario.

Conclusion

The unreliable entity list (UEL) is used, \textit{prima facie}, as a retaliatory weapon against the U.S. Entity List in the ongoing trade war. The retaliation could be counterproductive and would even accelerate the process of the U.S. tech firms’ diversification. It is difficult to predict the precise implications at this stage. The impact of the consequences remains to be seen in practice, since more information about the to-be-established mechanism is yet to come. It is

\textsuperscript{148} Chun Han Wong, ‘China Threatens to Sanction Lockheed Martin Over Taiwan Arms Deal’ \textit{The Wall Street Journal} (14 July 2020)
\textsuperscript{149} Veerle Nouwens and Raffaello Pantucci, ‘Huawei is No Way for British Strategy on China’ RUSI Commentary (London, RUSI, 17 July 2020) <https://rusi.org/commentary/huawei-no-way-british-strategy-china>
\textsuperscript{150} Veerle Nouwens and Raffaello Pantucci, ‘Huawei is No Way for British Strategy on China’ RUSI Commentary (London, RUSI, 17 July 2020) <https://rusi.org/commentary/huawei-no-way-british-strategy-china>
\textsuperscript{151} Zak Doffman, ‘China Threatens to Blacklist U.S. Firms Refusing to Supply Huawei’ \textit{Forbes} (31 May 2019)
\textsuperscript{154} Yuanyou Yang, ‘Companies in the Crosshairs? China to Enact its own Export Controls’ \textit{China Business Review} (7 August 2019)
\textsuperscript{155} Eamon Barrett, ‘China Is Creating Its Own ‘Entity List’ to Avenge Huawei and Punish Foreign Firms’ \textit{Fortune} (18 June 2019)
argued that the tension can be hardly addressed through merely the legal channel at a micro dimension. In view of the complexities, it is imperative that a global governance regime be established to regulate the competition for the tech supremacy in the digital era.