ASIALLIANS

China Legal Update

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Legal News:

1. China Released Blocking Rules to Counteract US Long-arm Jurisdiction

On January 9, 2021, the PRC Ministry of Commerce (the "MOFCOM") announced the Rules on Blocking Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (the "Blocking Rules") with immediate effect.

This move is understood as China's hits back against long-arm jurisdiction of foreign legislations, in particular for U.S. export control laws, U.S. economic sanction laws, U.S. anti-foreign corruption laws, and U.S. anti-money laundering laws, etc. which impose heavy compliance burden and commercial activity restriction on Chinese citizens, enterprises and other organizations from engaging in normal economic and trade activities with a third nation (or region) or its citizens or entities. For example, a Chinese company encountered a restriction of keeping importing technical materials from a Japanese company due to a potential US sanction.

It is also stipulated that foreign invested enterprises operating in China are equally subject to the Blocking Rules as domestic Chinese enterprises. The Blocking Rules specially deserve attention from multinational companies engaging international trade or investment activities because the enterprises' compliance system and risk management might be significantly altered by the Blocking Rules.

Briefly, the blocking mechanism operates in this way:

1) Reporting Obligation: the concerned citizens, legal persons or other organizations (the "Chinese citizens or entities") shall report any potential unjustified foreign legislation and measures;

2) Evaluation of Reporting: the Working Mechanism (see our explanations below) decides whether the reported foreign legislation and measures have unjustified application while keeping the matter confidential if requested by the Chinese citizens or entities;

3) Releasing Prohibition Order: once deciding the unjustified application exists, the Working Mechanism issues a prohibition order, which requires the unjustified foreign legislation and measures not to be accepted, executed or observed;

4) Sanctions and Exemptions: the concerned Chinese citizens or entities may face sanction (warning, rectification notice or penalties) if they fail to report or to comply with the prohibition order;

If the Chinese citizens or entities have difficulties to abide by the Chinese Prohibition Order, they are also entitled to apply for an exemption that can enable them not to abide by the Chinese Prohibition Order.

5) Judicial Remedy: the Chinese citizens or entities also may seek for civil damages from transaction counterpart through legal proceedings in PRC court due to the unjustified application of foreign legislation and measures.

We comprehensively present the regime in Blocking Rules in the below table for your kind reference:

Subject	Rule	Note
Applicable Scope	The Blocking Rules address the situation where: • the extra-territorial application of ***foreign legislation and other measures*** that ***unjustifiably*** prohibits or restricts the Chinese citizens or entities from engaging in normal economic, trade and related activities with ***the third nation (or region) or its citizens or entities***.[1] However, the Blocking Rules shall not be applicable and will not affect the implementation of ***international treaties or international agreements*** to which China is a party.[2]	• The rule protects the interests of Chinese entities which include, Wholly Foreign Owned Enterprise, Joint Venture, Representative Office of multinational companies in China in addition to PRC domestic entities. • The rule protects the activities with the third nation, or its citizens or entities; therefore, if the foreign legislation merely impacts the commercial activities without the third state's involvement, then it is not within the scope. • The blocking scope includes "measures", and it indicates that the executive order signed by the U.S. president is subject to the Blocking Rules.
Working Mechanism	The Working Mechanism dealing with unjustified extraterritorial application of foreign legislation and measures is led by the department of commerce of the State Council (the "Commerce Department"), coordinated with the department of development of the State Council, and other relevant authorities.[3]	• In addition to the Ministry of Commerce, we also infer that the following authorities shall be involved as well: State Administration of Market Regulation, General Administration of Customs, and Ministry of Foreign Affairs, etc.
Report Obligation	The Chinese citizens or entities shall report the matter within ***30 days*** to the Commerce Department where their regular commercial activities with the third nation (or region) or its citizens or entities are unjustifiably prohibited or restricted by foreign legislation and measures.[4]	• The rule indicates that each enterprise bears the burden to prudently evaluate whether the foreign legislation and measures have unjustified application, and therefore trigger their report obligation.
Confidential Obligation on PRC Authorities	The matters reported shall be kept confidential by the Commerce Department and its staff members if so requested.[5] If a staff member fails the confidential obligation, he/she shall be punished; where a crime is constituted, he/she shall bear the criminal liability.[6]	• The punishment provided in the Blocking Rules is undefined and unspecified. This deficiency needs to be cured by any following implementation measures.
Unjustified Application	The Working Mechanism considers the following factors to decide whether there exists unjustified extra-territorial application of foreign legislation and measures: (1) whether international law or the basic principles of international relations are violated; (2) potential impact on China's national sovereignty, security and development interests; (3) potential impact on the legitimate rights and interests of the Chinese citizens or entities; (4) other factors that shall be taken into account.[7]	• The assessment standard indicates that the PRC authorities will have great discretion in making each of decisions and law enforcement. • Enterprises engaging international business are advised to robustly monitor the following decision made by the Working Mechanism and be wary of their transaction and operation to balance the possibility of exposure to Blocking Rules.
Prohibition Order	Where the Working Mechanism confirms that there exists unjustified extra-territorial application of foreign legislation and measures, it may decide that the Commerce Department issue a prohibition order that the relevant foreign legislation and measures are ***not accepted, not executed, and not observed***. The prohibition order may be suspended or withdrawn by the Working Mechanism based on actual circumstances.[8]	• Technically, the prohibition order is announcing the foreign rule is not qualified legal basis and prohibit concerned Chinese citizens or entities to comply with it; however, how the prohibition order actually works still need to be figured out in the future enforcement.
Exemption	The Chinese citizens or entities may apply for exemption from compliance with a prohibition order. Decisions on approving the application or not shall be made within 30 days from the date of acceptance of the application, except for emergency situation, by the Commerce Department.[9]	• The grant of exemption is also subject to PRC authorities' discretion from the view of text.
Judicial Remedy	There are two situations where the Chinese citizens or entities may launch legal proceeding and seek for damages in the front of PRC courts: (1) the Chinese citizens or entities are damaged by a party's compliance with the foreign legislation and measures which fall within the scope of prohibition order, except where such party at issue has secured an exemption from the said prohibition order; (2) the Chinese citizens or entities are damaged by a foreign judgment or ruling made in accordance with the foreign legislation which fall within the scope of the prohibition order (the damages is sought from the party who benefits from the said foreign judgment or ruling).[10] The Chinese citizens or entities are entitled to apply to PRC court for enforcement of effective judgment or ruling issued under the above two scenarios.	• The judicial remedy clause provides the damaged PRC parties an opportunity to recovery from the loss caused by foreign legislation and measures. It is unpredictable how the judicial remedy works to protect transaction security merely from the text. Enterprises are advised to pay attention to the cases to be launched. • In practice, enterprises tend to design some clauses in transaction documents to mitigate the risks, such as compliance clause, representations and warranties clauses, sanction clause. Enterprises are advised to seek professional legal advice on how to tailor these clauses according to the judicial remedy provided under Blocking Rules.
Government Support/ Countermeasures	The Chinese citizens or entities may enjoy the support from relevant government where they suffer huge losses due to non-compliance with the relevant foreign legislation and measures.[11] The Chinese Government may take necessary countermeasures against the unjustified foreign legislations and other measures based on actual conditions and needs.[12]	• An example of the loss suffered due to non-compliance is monetary fine imposed by foreign enforcement body. • Although not clearly mentioned in the Blocking Rules at all, we understand that the government support might include preferential tax policy, subsidy, etc.
Sanction	Where the Chinese citizens or entities fail to report or comply with prohibition order, they may face warning, rectification, or fine imposed by Commerce Department.[13]	• The sanction corresponds with the report obligation and non-compliance under prohibition order of Chinese citizens or entities.

Asiallians will keep a close eye on the implementation and practical metrics of the Blocking Rules and promptly update you in the subsequent newsletter.

(http://www.mofcom.gov.cn/article/zwgk/zcfb/202101/20210103029710.shtml

http://www.mofcom.gov.cn/article/news/202101/20210103029779.shtml)

2. China Released Foreign Investment Encouraged List 2020

On December 28, 2020, the National Development and Reform Commission (the "NDRC") and the MOFCOM released the Catalog of Industries for Encouraged Foreign Investment 2020 Edition (the "2020 Encouraged List") to replace the Catalog of Industries for Encouraged Foreign Investment 2019 Edition (the "2019 Encouraged List").

The 2020 Encouraged List are updated as follows has expanded compared with the 2019 version:

Implementation Date	Clarifications	Number of Items
July 30. 2019	2019 Encouraged List applied to the whole county	415
	2019 Encouraged List applied in 22 provinces[14]	693
January 1, 2021	2020 Encouraged List applied to the whole country	480 (added 65 items and revised 51 items)
	2020 Encouraged List applied in 22 provinces	755 items (added 62 items and revised 37 items)

It indicates more welcomed markets and more potential business opportunities for foreign investors in China.

Hereunder are a few outstanding examples:

Subject	Items added
High-end Manufacturing	• Manufacturing of artificial intelligence assisted medical equipment, high-end surgical instruments, physiotherapy and rehabilitation equipment and wearable intelligent health equipment, life support equipment for critical illness, mobile and remote diagnosis and treatment equipment, ECMO, monitors and PCR machines. • Development and manufacturing of minimally invasive surgical medical equipment: 3D imaging, electron microscopy systems, surgical robots, robotic arms, etc.
Food Manufacturing	• Development and production of vegetable protein bionic meat.
Modern Services	• High-end equipment maintenance, digital production line transformation and integration, professional maintenance and supply chain services. • Development and application services of online education, online medical treatment, and online office in the field of information services. • Research, development and application of 5G mobile communication technologies and blockchain technology. • Construction of logistics centers for the import and export of bulk commodities.
Central & Western Regions	• Production and Processing of new medical devices and materials for medical purpose, and research, development and production of protective products and equipment for epidemic prevention in Henan Province, Shaanxi Province, Guangxi Province and other provinces.

(https://www.ndrc.gov.cn/xwdt/xwfb/202012/t20201228_1260602.html)

3. Hainan Released Negative List 2020

On December 31, 2020, the NDRC and the MOFCOM rolled out the Special Administrative Measures for Foreign Investment Access in Hainan Free Trade Port 2020 edition (the "Hainan FTP Negative List 2020") which will take effect on February 1, 2021.

To attract foreign investors, the Hainan FTP Negative List 2020 further liberalizes and facilitates foreign investment comparing with Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones 2020 Edition which was rolled out on June 23, 2020 and took effect on July 23, 2020.

We summarize the outstanding changes for your reference:

Industry	Measures
Value-added telecom services	• Remove the foreign equity ratio (50% equity cap) in online data processing and transaction processing businesses. • Allow enterprises with entity registration and service facilities in the Hainan FTP to engage in internet data centers and content distribution network services throughout the FTP and internationally.
Education	• Allow foreign high-level universities of science, engineering, agriculture and medicine and vocational colleges to independently (remove the joint venture requirement) run schools in FTP.
Legal Services	• Allow foreign investment in some Hainan-related commercial non-litigation legal affairs
Consultation and Investigation	• Allow foreign investment in market research (remove the joint venture requirement), except for the radio and television listening and viewing surveys that must be controlled by the Chinese party. • Allow foreign investment in social surveys provided that the Chinese equity ratio is not less than 67% and the legal representative shall be a Chinese national.
Manufacturing	• Remove the restriction on foreign equity ratio in passenger car manufacturing. • Allow foreign investment to establish more than two joint ventures in China that produce similar vehicle products.
Mining	• Remove the prohibition on foreign investment in the exploration, mining and beneficiation of rare earths, radioactive minerals, and tungsten.

Asiallians will monitor the implementation of Hainan FTP Negative List 2020 and all other preferential policies released recently in Hainan FTP for foreign investment.

(https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/202012/t20201231_1261607.html)

Should you have any inquiry about the above legal news, please contact us at asiallians@asiallians.com. As always, Asiallians remains at your service and our teams are currently mobilized in all our offices in Mainland China, in Hong Kong and in Taipei.

1. Article 2 of the Blocking Rules

2. Article 15 of the Blocking Rules

3. Article 4 of the Blocking Rules

4. Article 5 of the Blocking Rules

5. Article 5 of the Blocking Rules

6. Article 14 of the Blocking Rules

7. Article 6 of the Blocking Rules

8. Article 7 of the Blocking Rules

9. Article 8 of the Blocking Rules

10. Article 9 of the Blocking Rules

11. Article 11 of the Blocking Rules

12. Article 12 of the Blocking Rules

13. Article 13 of the Blocking Rules

14. 22 provinces include the following:
Shaanxi, Inner Mongolia, Liaoning, Jilin, Heilongjiang, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, Hainan, Chongqing, Sichuan, Xinjiang, Xizang, Ningxia, Guizhou, Yunnan, Xizang, Shanxi, Gansu.
See:
http://asiallians.com/en/china-legal-update-legal-news-2019-average-monthly-salary-major-cities-released/