

Research on the Perfection of Blocking Law under the Background of American Economic Sanctions

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Abstract: *In recent years, the United States has been expanding the scope of its economic sanctions. The objects of sanctions not only include trade behaviors involving U.S. entities and specific U.S. connection points, but also major transactions between third countries without trade control factors. Since 2018, the US has targeted China with economic sanctions, including a large number of Chinese entities on its export control list, and comprehensively tightened its export policy to China. Under the background of comprehensive competition between China and the US, we have issued relevant laws and regulations to perfect our anti-sanction legal system. However, there are still some problems in the construction of block law, such as the fuzzy scope of extraterritorial jurisdiction, the lack of standards for judging the application of block law, the lack of procedural provisions, and the inability to connect with the domestic civil litigation mechanism. Through the analysis of relevant foreign laws, we should improve our anti-sanction legal system by appropriately expanding the area of extraterritorial jurisdiction, establishing the list of laws blocking, increasing the procedural provisions of subject report and confidentiality, specifying the specific provisions of immunity and remedy, and revising the extraterritorial jurisdiction rules of the Civil Procedure Law, etc.*

Keywords: *Secondary sanctions, Countermeasures, List of blocking laws, Exemption standard, Extra-territorial jurisdiction, Recognition and enforcement*

1. Introduction

With the continuous development of the international economy, the economic sanctions of various countries are gradually increasing. According to the Export Administration Regulations of the United States, the economic boycott of the United States includes three categories, including: first-level sanctions, that is, the boycotting organization directly bans and the boycotted organization's trade boycott; Secondary sanctions, that is, boycotts that prohibit the boycotting organization from dealing with the boycotted organization's counterpart; Triple sanctions, which are boycotts in which the boycotting side bans the other side from dealing with "blacklisted" entities. The United States has expanded the scope of sanctions in its Export Administration Regulations and Export Control Reform Act, the target of the sanctions is not only trade activities involving U.S. entities or specific U.S. connection points, but also major transactions between third countries that do not have trade control elements. Since 2018, the US has targeted China with economic sanctions, including a large number of Chinese entities on its export control list, and comprehensively tightened its export policy to China. In 2020, the United States has formulated specific sanctions programs against specific Chinese enterprises and specific regions in China, and China has become the focus of its export control and sanctions. In order to deal with the secondary sanctions of the United States, China has promulgated many laws and regulations including the Measures for Blocking Foreign Laws and Measures Improperly Applied Externally (hereinafter referred to as the "Measures for Blocking") to improve the legal system of anti-sanctions. However, there are problems such as the sanctioned behavior, the unclear scope of the subject of obligations, and the lack of relief system. The countermeasures at the legal level need to be improved urgently[1-3].

2. Analysis of blocking method and specific measures

Blocking law is the general term of normative documents that prevent foreign laws and measures from taking effect within the territory of a country in case of jurisdictional conflicts. In history, countries issued laws and regulations to counter the extraterritorial application of the US antitrust law, which became the prototype of blocking law. Later, with the large-scale application of international

economic sanctions, countries issued blocking laws one after another and widely applied in economic fields such as resisting extraterritorial sanctions. By prohibiting domestic subjects from observing foreign laws and measures that may damage their sovereign security or major interests, and giving domestic subjects the right to file lawsuits against decisions and measures that damage their legitimate interests, domestic subjects are bound not to recognize, observe or implement foreign laws and measures, and the extraterritorial effect of foreign laws is blocked.

In 2020, China introduced countermeasures such as "Blocking Measures" to counter the expanding secondary sanctions of the United States. At the international level, the United States and other countries have escalated economic sanctions against China, constantly provoking a trade war, blocking China's trade chain, violating relevant international treaties and basic norms of international relations, and causing difficulties for Chinese enterprises in foreign trade. Seriously affect our economic development. At the level of domestic demand, China has repeatedly implemented countermeasures to entities importing individuals from relevant countries through administrative channels. However, due to the lack of legal support, China faces many difficulties in practical implementation and international political negotiations. Therefore, it is urgent to build a legal system of anti - foreign sanctions[4-9].

The existing blocking legal norms in China can be divided into the broad sense of blocking law and the narrow sense of blocking law. The broad sense of blocking law refers to the legal norms that have the effect of blocking the extraterritorial application of foreign laws, such as the Anti-Unfair Competition Law and the Export Control Law of the People's Republic of China. In a narrow sense, blocking law refers to normative documents that clearly prohibit compliance with foreign laws and measures with extraterritorial effect, such as Anti-Foreign Sanctions Law and Measures for Blocking Improper Extraterritorial Application of Foreign Laws and Measures issued by the Ministry of Commerce. The Blocking Measures and the Anti-Foreign Sanctions Law promulgated by our country are both narrow blocking laws. However, the Measures of Interdiction only stipulate the non-implementation and non-compliance of foreign laws and measures, while the Law on Anti-Foreign Sanctions stipulates countermeasures for compliance with foreign laws and measures, that is, countermeasures for compliance with foreign acts. This is the main difference between the Measures of Interdiction and the Law on Anti-Foreign Sanctions, and the Measures of Interdiction is the basic document of the Law on Anti-Foreign Sanctions. Concrete provisions concerning the scope of application of blocking measures, subject of obligations, relief procedures and specific measures play an important supplementary role to the Anti-Foreign Sanctions Law. The improvement of Blocking Measures is essential to the construction of the anti-sanctions legal system. This paper discusses the specific provisions and improvement measures of "Blocking Measures".

3. Blocking the defects of the legal system

3.1. The scope of subjects subject to jurisdiction is unclear

The blocking law stipulates that enterprises or individuals shall not comply with foreign laws and measures that pose a threat to their own economy or national interests, including that the object of the blocking law shall be "enterprises or individuals". Different countries have different provisions on the object of the blocking law, which relates to the compliance obligations of enterprises and whether the state has jurisdiction. For the applicable objects of China's blocking law, according to Article 5 of the Blocking Measures issued by the Ministry of Commerce [" Chinese citizens, legal persons or other organizations in situations where foreign laws and measures prohibit or restrict their normal economic, trade and related activities with a third country (region), its citizens, legal persons or other organizations, The competent commercial department of The State Council shall truthfully report the relevant information to the competent commercial department of The State Council within 30 days. If the reporter requests confidentiality, the competent commercial department of The State Council and its staff shall keep confidentiality for him/her. "] And Article 9 [" Where a organization complies with the foreign laws and measures within the scope of the injunction and infringes upon the lawful rights and interests of a Chinese citizen, legal person or other organization, the Chinese citizen, legal person or other organization may bring a suit in a people's court in accordance with law to demand compensation from the organization concerned, except where the organization is exempted from the provisions of Article 8 of these Measures. "] It stipulates that Chinese citizens, legal persons or other organizations shall truthfully report their international trade activities with a third country (region), its citizens, legal persons or other organizations if they are prohibited or restricted by foreign laws and measures. Therefore, the subject subject under the Measures of Interdiction and the subject subject of obligations

in China are "Chinese citizens, legal persons or other organizations"[10-12].

According to the principle of jurisdiction combining the personal principle and the territorial principle adopted by China in foreign civil and commercial matters, "Chinese citizen" refers to citizens in China, and there is no clear explanation on whether Chinese citizens outside China and foreign citizens inside China have the obligation to abide by the Blocking Measures. What interpretation principles should be followed for the interpretation of "legal person"? Does it mean a legal person in China or a legal person registered in China? Is it binding on legal persons registered in China outside the People's Republic of China and foreign legal persons in China? "Other organizations" belongs to the provision. Does it include foreign unincorporated organizations in China? Although it provides for the obligations of subject of Blockade Measures in our country, the scope of the subject of Blockade Measures is not clearly regulated, which is not conducive to the implementation of Blockade Measures.

3.2. The scope of blocking foreign laws is vague

In terms of which foreign laws and measures are prohibited to be observed or implemented in China's Law of Interdiction, Article 2 of China's Interdiction Measures [applies to the extraterritorial application of foreign laws and measures in violation of international law and basic norms governing international relations] Circumstances that unduly prohibit or restrict normal economic, trade and related activities of Chinese citizens, legal persons or other organizations with a third country (region) and its citizens, legal persons or other organizations.] Article 7 [If the working mechanism, after assessment, confirms the existence of improper extraterritorial application of relevant foreign laws and measures, it may decide that the competent department of commerce under The State Council shall issue an injunction not to recognize, implement or observe relevant foreign laws and measures] stipulates that the object of blocking law is "foreign laws and measures that improperly prohibit or restrict economic and trade exchanges". The Interdiction Measures provide a principle for the judgment of "improper prohibition or restriction", Article 6 of the Measures of Interdiction stipulates the criterion of judgment as "whether it violates international law and basic norms governing international relations, the possible impact on China's national sovereignty, security and development interests, the possible impact on the legitimate rights and interests of Chinese citizens, legal persons or other organizations, or other factors that should be taken into account". This conforms to the legality requirements of the UN for intervention measures by sovereign states. It has increased the discretionary power in law enforcement process and is more beneficial to protecting the legal rights and interests of our country and citizens.

But at the same time, because too general provisions cannot provide specific law enforcement basis for law enforcement agencies, enterprises are also faced with the risk of punishment from foreign governments when they do not comply with or implement foreign laws and measures identified as "improperly prohibited or restricted". For example, the United States requires enterprises to submit explicit "mandatory requirements" rather than possible mandatory measures. If the examination is not enough to reach the mandatory level, the defense reasons of the parties cannot be established, and the parties will be punished both at home and abroad. Therefore, the identification standard is too general to provide sufficient defense reasons for the enterprises. It is also unfavorable to absorb foreign investment and the overall development of our economy. On the contrary, if setting too high and too strict compliance obligations, it will not only burden enterprises with excessive compliance costs, but also cause the closure of domestic international trade market. Therefore, how to explain the scope of blocking obligations will be an important part of the improvement of blocking law in our country[13-16].

3.3. Lack of relief mechanism

The blocking Law protects the country by prohibiting domestic subjects to abide by and implement foreign laws and measures. In order to protect the normal economic transactions of Chinese citizens, legal persons or other organizations and safeguard the legitimate interests of enterprises, relevant blocking laws are formulated. However, the implementation of the List of Unreliable Entities, Blocking Measures and Anti-Foreign Sanctions Law, It will make the enterprise have the risk of triggering the third-level sanctions of the United States and be subject to the economic sanctions of the United States. However, if a company fails to comply with the law, it will be subject to economic penalties. In response to this "dilemma", the Ministry of Commerce of China has provided relief measures for enterprises in the Measures of Blockage, namely, Article 8 and Article 11 of the Measures of Blockage stipulate that Chinese citizens, legal persons or other organizations may apply for exemption when they

have to comply with foreign laws or measures, fail to comply with relevant provisions of Chinese laws and provide support when they suffer heavy losses.

It follows that we have a "no enforcement" exception, namely the enforcement immunity mechanism and the State support policy. However, regarding the conditions for applying for exemption and support, the scope of exemption and support, and the evidence that enterprises should submit, whether relevant financial institutions can apply for exemption higher than the compliance requirements of foreign laws after the issuance and implementation of relevant bans under the Blocking Measures, or whether they can obtain the blocking exemption, Whether it can continue to implement its internal compliance policies with compliance requirements higher than those stipulated by relevant laws has not been specified. And a sound relief mechanism can not only prevent domestic private subjects from suffering losses and maintain stable economic development at home and abroad, but also make the exception provisions more clear, reduce the arbitrariness of the law, and prevent the abuse of judicial relief.

3.4. Difficulties in extraterritorial recognition and enforcement of judgments

When foreign laws or measures damage our national interests or national sovereignty and security, the state issues an injunction to prohibit the parties from abiding by foreign laws or measures. For the resulting losses, the relevant subjects can be sued for compensation to protect the legitimate rights and interests of domestic subjects, but the subjects to be pursued are generally foreign subjects, which involves extraterritorial jurisdiction and recognition and enforcement of domestic judgments. How to get the recognition and execution of domestic judgments by foreign sovereign states and how to deal with extraterritorial jurisdiction in the international community are the problems that academic circles have been solving.

As a domestic law, it is difficult for the Blocking Measures to be recognized and implemented at the international level. In addition, the nature of blocking the extraterritorial effect of foreign laws makes it even more difficult for it to be recognized and implemented by foreign governments. The effectiveness of laws lies in the implementation. Admittedly, the purpose of the "Blocking Measures" is more to increase diplomatic bargaining chips. However, with the development of the international community, foreign governments have higher requirements for "coercive" and need to reach the level of "punishment". This means that in addition to the perfection of the law itself, the interdiction measures are indispensable for the law to be effective. At present, both the Blocking Measures and the Anti-Foreign Sanctions Law are faced with the problem of how to take effect in the international community. Through implementation and continuous practice in the international community, we can improve our anti-foreign sanctions legal system[17-20].

4. Improve the anti-foreign sanctions system

4.1. Limiting the scope of subject under jurisdiction: combining the principle of personal and the principle of territoriality

Throughout the provisions of the blocking laws in various countries, the subject of the jurisdiction is generally "national citizens and organizations", and the main constraint is the domestic entity, but there are different interpretations on the specific scope.

Article 11 of The Blocking Statute of European Union uses the concept of EU personnel ("EU operators") to refer to its applicable objects. In terms of the scope of subject under jurisdiction, the Blocking Statute of European Union adopts "the principle of jurisdiction combining the principle of person and the principle of territory" for natural persons. That any natural person constituting a "resident" in the EU is subject to the Act of Interruption; The adoption of the "domicile principle" for legal persons means that legal persons registered within the EU are covered by the Blocking Act, excluding foreign legal persons in the EU. It also made an exception for "foreign shipping companies under the actual control of their own citizens" to be subject to the Interdiction Act. For foreign unincorporated organisations in the EU, the Guidance Note Questions and Answers: adoption of update of the Blocking Statute), Section IV, question 21 provides that a branch of a foreign company in the European Union is not required to comply with the relevant obligations of the Blocking Statute as it does not have the status of an independent legal person under European Union law. This would exclude foreign firms that set up shop in the EU from the reach of the blocking law. As for the subject of jurisdiction, the anti-boycott Law of the United States provides a broader scope. According to Section

760.1 (b) of the Export Administration Regulations, overseas subsidiaries and branches of American companies and foreign subsidiaries and branches in the United States are required to undertake anti-boycott obligations, and the scope of blocking obligations is very extensive. According to the provisions of the Export Administration Regulations of the United States, foreign entities need to undertake broader compliance obligations, which helps the United States to implement its economic policies within its own scope, protect its own economic interests, ensure the unity of national policies, and strengthen its economic protection.

According to the legislative experiences of these countries and China's general in international law "the principle of belonging to persons and the principle of dependency" jurisdiction principles, Chinese citizens, legal persons and foreign citizens and legal persons in China should be subject to the jurisdiction of blocking law and assume the duties of blocking law, so as to better maintain the steady economic order of our internal, guarantee the fair competition between enterprises. We should assume responsibility and become the subject of obligation for the loss caused by our country. However, for the foreign unincorporated organizations in China, China should be inclined to the American-style expansion interpretation, including the unincorporated organizations into the scope of interpretation of the subject under jurisdiction. Although an unincorporated organization within the territory of China does not have the status of an independent legal person, does not have independent property, and cannot independently assume responsibilities to the outside world, it shall, however, be liable for its economic acts and economic losses resulting therefrom. If non-legal person organizations abide by foreign laws and violate the interests of our nation and citizens in our territory, but they do not assume legal responsibility because they do not have the legal person status, it will cause our economic and legal order chaos, which is unfavorable to the implementation of blocking law. Therefore, unjuridical organizations should be brought into the jurisdiction of blocking law. For enterprises, the principle of registration place shall be adopted and resident enterprises shall be included in the jurisdiction of "Blocking Measures". For non-resident enterprises, according to whether they have institutions or places in our territory, if they have institutions or places, they shall abide by the provisions of "Blocking Measures"; for non-resident enterprises without institutions or residences at the same time, jurisdiction shall not be given. There are institutions, domiciles that have fixed assets in our territory are advantageous to our management, while our compulsory measures can also take effect to them, so that our country can be executed, there are not empty compulsory measures but cannot be executed.

4.2. Reasonably define the scope of "compliance": combine the general provisions with the list of blocking laws

The identification standard of "improper prohibition or restriction" stipulated in Article 6 of the Blocking Law plays a leading role in the implementation of the overall blocking law, but too general provisions will cause excessive compliance costs for enterprises, which is not conducive to the construction of a transparent, fair and unified foreign investment environment. As for the scope of laws and regulations to which a national subject is subject, Article 4 of The Blocking Statute states that "no foreign decision (including court decisions, arbitral decisions) made pursuant to any law or decree of extraterritorial jurisdiction or specific provisions set forth in this Act shall be invalid in the territory of the European Union." It follows that no administrative, judicial or other decision or any enforcement measure taken by a third State Government on the basis of a foreign law with extraterritorial effect set out in the Schedule to the EU Interdiction Act shall have effect in the territory of the European Union. The European Union lists the documents that cannot have legal effect in the form of attachments to the scope of the blocking law, without giving a general description. In this way, the law enforcement agencies can be provided with a clear basis for law enforcement, and the enterprises can be more clear about the national economic policies and make better development strategies for the enterprises. However, with the constant changes of laws and regulations in various countries, the lack of principled provisions will inevitably make the blocking list inflexible. If the blocking list is not updated in time, it will lag behind the changes in the international economic situation, which is also not conducive to the protection of enterprises and national interests.

Under section 3 (1) of the Foreign Extraterritorial Measures Act of Canada "If, in the opinion of the Attorney General of Canada, The Attorney General of Canada may, by order, prohibit or limit acts by courts of other countries which have or are about to have a material adverse effect on Canada's international trade and national sovereignty or which are committed under the foreign trade laws set forth in the Schedule ", Therefore, the provisions on blocking acts in Canada's Foreign Extraterritorial Measures Law are "having a significant impact on international trade and national sovereignty" or "blocking list", which ensures the flexibility of legal provisions through "having a significant impact on

international trade and national sovereignty". Meanwhile, the "blocking list" is set to ensure the operability of the blocking system, providing guidance for the law enforcement practice of blocking laws. There is a probable relationship between the two factors. As long as one of the factors is satisfied, the effect of foreign laws can be blocked to ensure the authority of the blocking law. The mode of "general provisions + blocking list" adopted by Canada defines the restricted objects of the blocking law.

The legislative experience of European Union and Canada can provide reference for the interpretation of the blockade law. On the basis of the provision of Article 6 of the Blockade Law, the "list of unreliable laws" can be formulated to provide judgment basis for the "improper prohibition or restriction", and the laws that cause undue restriction to our citizens, legal persons or other organizations can be included in it to provide compliance guidance for our legal practice and enterprises. It is convenient for Chinese enterprises to carry out compliance planning, reduce the cost of compliance of Chinese enterprises and strengthen the legal support for enterprises to defend against foreign governments. For details on whether to combine the List of Unreliable Entities, add the listed enterprises in the block area, so as to further expand the block scope of our country. The trade measures taken by enterprises are essentially guided by their own laws and regulations. The "List of unreliable laws" has already included relevant foreign laws into the scope of China's blocking laws, which has already achieved the purpose of protecting the legitimate rights and interests of the country, citizens and enterprises. If enterprises are included into the scope of blocking, an over-generalized blocking system will be formed, resulting in international economic blocking. Not conducive to the economic exchanges between international enterprises.

4.3. Lack of exemption standard: establish the judgment standard of "minimum compliance principle + serious loss"

From the practice of similar relief abroad, the United States and the European Union have their own priorities. Under the US anti-boycott law, there is a waiver application mechanism to ensure that Americans are not legally punished by the local government when the boycotting organization conducts international trade. The standard for applying for an exemption under the US anti-boycott law is the "minimum compliance principle": an exemption may be granted if a company has to comply with a boycott rule, but it should do as much as possible not to comply with other relevant obligations that are detrimental to the interests of the country (minimizing the harm to the interests of the country). For example, exempted goods or services may not be re-exported to other countries and may be traded only within the boycotting country; No evidence, etc., shall be submitted to the proceedings involving this case. In addition, Article 5 of the EU Blocking Act stipulates that EU personnel are allowed to apply for exceptional authorization to comply with the extraterritorial laws listed in the Act when failure to comply with the jurisdiction of extraterritorial laws may lead to serious loss of their interests or the interests of the EU. The Interdiction Act provides for EU personnel to apply to the European Commission for exceptional authority or exemption, in cases where serious damage is likely to occur. As to what constitutes "serious loss", the European Commission makes clear in the Applicable Standards Act that it can judge from the following aspects: whether the applicant's protected rights are limited; Whether the applicant is facing an administrative or judicial investigation for legal violations; Whether the applicant was able to take steps to avoid or mitigate the damage; Whether the applicant will suffer significant financial or profit loss; Whether the individual rights of the applicant would be materially impeded; Will it affect the humanitarian, security, free movement of goods, people, services and capital within the EU? The European Union defines "serious loss" as the application standard for immunity, so as to distinguish whether a private subject meets the requirements for immunity. In the United States, the "principle of minimum compliance" is the principle that a private subject should follow when applying for immunity, including that it should comply with the laws of obtaining immunity as little as possible after submitting and receiving the application. These two kinds of laws can be used as references for our country. We can set the conditions for obtaining immunity applications as "serious impairment" and require enterprises to follow the "principle of minimum compliance" after receiving immunity. That is, when failure by our citizens, legal persons or other organizations to comply with extraterritorial jurisdiction results in serious losses of their interests or our national interests, they may be exempt from the provisions of our interdiction law, but the interests of other citizens, legal persons and the State shall be infringed as little as possible. In conclusion, our country can learn from the experience of European Union and the United States law, establish and improve the exemption mechanism which has suffered serious damage as the standard and the principle of "minimum compliance", make better use of the experience of the international community, and protect the interests of domestic enterprises by establishing the exemption mechanism.

4.4. Signing international agreements and building a diversified settlement mechanism

Facing the increasingly severe economic sanctions and unilateralism, our country needs not only to perfect the construction of internal anti-sanction laws, but also to strengthen communication and cooperation with the international community to create a favorable international political environment for implementing the blockade law and economic development.

In the economic aspect, the construction of multiple economic payment mode. The United States can realize its economic sanctions mainly through the control status of the US dollar. It can abandon the US clearing system, develop RMB into a hard currency, promote the internationalization of RMB, reduce the participation of American products in international transactions, develop regional economic integration and gradually break away from the control of the US dollar, and create a diversified international economic pattern. We will develop and improve supporting measures for the RMB cross-border payment system.

In the area of international treaties, regional agreements were promoted. In the face of the economic sanctions of the United States, all countries have actively introduced relevant laws and regulations, such as Russia's Law on Countering Unfriendly Foreign Behavior and Canada's Law on Measures beyond Foreign Territory. Countries enact laws to protect their own economic interests and national sovereignty. The laws promulgated by sovereign states have legal effect, but the correlation between the blocking laws enacted by sovereign states is weak, and the laws enacted by countries according to their own sovereignty are difficult to be recognized by other sovereign states and can hardly play a blocking role in the international community. Economic confrontation through the establishment of regional alliance can better play the effect of the blocking law. By advocating the signing of multilateral international agreements, reaching consensus on the scope of blocking and other contents, actively using the Convention on the Recognition and Enforcement of Foreign Judgments to practice the blocking treaty and promote the establishment of international blocking agreements.

5. Conclusion

Both Chinese market players and foreign market players should give full play to the blocking effect of China's Blocking Measures on the improper application of foreign laws and measures, so as to protect legitimate commercial interests. This is in line with the long-term interests of all market participants and is also the original intention of China's Blocking Measures legislation. To this end, once relevant foreign laws and measures are issued, Chinese and foreign market players should try their best to coordinate and make full use of the reporting, exemption application and litigation mechanisms of China's Blocking Measures as well as the corresponding licensing and exemption mechanisms under relevant foreign laws or measures on the basis of complying with relevant laws and regulations. Seize the opportunity to persuade the relevant foreign authorities to allow the transaction to proceed, or jointly explore solutions to minimize the overall loss. For Chinese market players, the law grants many rights, such as applying for exemption and filing lawsuits, which undoubtedly protects relevant Chinese market players, but does not mean that they can carry out any commercial activities without any scruples. China's blocking legislation is still in the stage of construction and improvement, and the abuse of judicial remedies will seriously damage commercial relations. Therefore, relevant Chinese market players still need to strengthen their own compliance construction, so as to avoid falling into the scope of relevant foreign laws and measures.

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