



# China's Blocking Rules: New trade-compliance dilemmas for third-country companies

## International Trade Alert

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On January 9, 2021, China's Ministry of Commerce (MOFCOM) issued the Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (the Blocking Rules).[1] The Blocking Rules establish a regulatory framework for neutralizing the adverse effects on Chinese parties and national interests of foreign laws and governmental measures with extraterritorial effect (particularly measures disrupting commercial relationships with third-countries), through "prohibition orders" nullifying challenged foreign measures and through private litigation by injured Chinese parties to recover damages.

### **Policymaking context**

The Blocking Rules respond to the increased use of "secondary" economic sanctions and export controls by the US which aim to prevent third-country firms from engaging in certain commercial conduct with specific Chinese companies and sectors.

During the "trade and technology" tensions between the US and China, the US government has increasingly relied on economic sanctions and export controls to constrain specific Chinese parties' access to foreign markets, supplies, and finance. Most US economic sanctions are "primary sanctions" which restrict US entities and individuals from conducting

transactions with sanctions targets or which freeze the US assets of sanctions targets. Similarly, US export controls generally focus on the export, disclosure, or transfer of controlled US-origin products and technology.

However, US sanctions and export controls can also apply extraterritorially to conduct outside the US of third-country parties. For example, “secondary sanctions” may be imposed on third-country parties for conducting significant business with primary sanctions targets under certain sanctions programs. US export controls extend to products manufactured in third countries by non-US companies incorporating more than *de minimis* controlled US content or using certain US-origin technology and equipment, requiring third-country manufacturers to comply with the restrictions and licensing requirements of US export controls.

On January 9, 2021, a MOFCOM spokesperson emphasized the Blocking Rules’ goal of counteracting foreign measures interfering with Chinese parties’ relationships with third countries: “Certain countries have promoted unilateralism for a long time. They have not only prohibited economic interactions between their own citizens and relevant countries, but also coerced enterprises and individuals from other countries to freeze economic and trade activities with relevant countries. These actions have violated the principles of international law such as sovereign equality, hindered international trade and cross-border capital flow, and undermined the international economic order, which have been opposed by the international community.”[2]

MOFCOM released the Blocking Rules amid a volley of new trade and investment restrictions targeting Chinese companies from the outgoing Trump Administration, as the incoming Biden Administration was preparing to assume direction of US sanctions and export control policy. Concurrently, MOFCOM released an unofficial English translation, underscoring the message to foreign governments.

The Blocking Measures also reflect MOFCOM’s pivotal role in coordinating Chinese policy with respect to international sanctions and export controls. The September 2020 release of the Unreliable Entity List Provisions established a formal mechanism imposing economic sanctions on foreign parties for conduct harmful to Chinese national interests. Sanctionable conduct conspicuously includes “suspending normal transactions with” or “applying discriminatory measures against” a Chinese “enterprise, other organization, individual” which “violates normal market transaction principles and causes serious damage to the legitimate rights or interests” of the Chinese party. [3]

Similarly, the October 2020 promulgation of the Export Control Law overhauled China’s decentralized export control regime and authorized Chinese counterparts to the US “entity list” identifying foreign parties to which US exports may be restricted on security or foreign policy grounds.[4] MOFCOM coordinates the inter-departmental mechanisms administering the sanctions and export control measures. The Blocking Measures also follow the appointment of Wang Wentao as Minister of Commerce on December 26, 2020.

Many elements of the new Blocking Rules appear to derive from the European Union’s Blocking Statute, which was originally enacted to shield European companies from the adverse effects of US secondary sanctions on European companies involved with Cuba and Iran.[5] Beyond significant differences in the scope and structure of the new Blocking Rules and the EU Blocking Statute, however, China is differently situated. First, it has concerns that its own nationals may themselves be “third country” parties subject to secondary sanctions for dealings with primary sanctions targets (for example, sanctioned parties in Iran and North Korea). Next, China has more immediate concerns that extraterritorial application of US sanctions or export controls may prevent parties in other third countries from continuing to do business with primary targets in China.

As a result of the apparent speed with which the Blocking Rules were drafted, many key issues remain to be resolved through implementation.

## **Key provisions**

### ***Purpose and scope of applicability***

The stated purpose of the Blocking Rules is “counteracting the impact on China caused by unjustified extra-territorial application of foreign legislation and other measures, safeguarding national sovereignty, security and development interests, and protecting the legitimate rights and interests of citizens, legal persons and other organizations of China.”[6]

The Blocking Rules apply in situations “where the extra-territorial application of foreign legislation and other measures in violation of international law and the basic principles of international relations, unjustifiably prohibits or restricts the citizens, legal persons or other organizations of China from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations.”[7]

Significantly, the Blocking Rules do not apply to any “extraterritorial application of foreign legislation and other measures as provided for in treaties or international agreements to which China is a party.”[8] This exception, however, appears to be limited to conventional international law, as opposed to custom and other sources of international law.

### ***Policy statements***

The Blocking Rules include a formal policy statement asserting that “the Chinese Government pursues an independent foreign policy, adheres to the basic principles of international relations, including mutual respect for sovereignty, non-interference in each other’s internal affairs, and equality and mutual benefit, abides by the international treaties and agreements to which China is a party, and fulfils its international obligations.”[9]

The Blocking Rules also affirm the Chinese government’s general policies of providing guidance and support to Chinese parties harmed by the unjustified extra-territorial application of foreign legislation and other measures, and its prerogative to “take necessary counter-measures based on actual circumstances and needs.” [10]

### ***Working mechanism***

The Blocking Rules call for the establishment of an inter-departmental “working mechanism” to administer the blocking rules and to be chaired by MOFCOM.[11]

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[1] Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures, MOFCOM’s order No.1 in 2021(《阻断外国法律与措施不当域外适用办法》(商务部令2021年第1号)) (promulgated by the Ministry of Commerce on January 9, 2021 with immediate effect), available at these links: <http://www.mofcom.gov.cn/article/b/c/202101/20210103029710.shtml> (in Chinese), <http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml> (the official English translation).

[2] Head of MOFCOM’s Department of Treaty and Law Answered Questions from the Press on the Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures (商务部条约法律司负责人就《阻断外国法律与措施不当域外适用办法》答记者问) (MOFCOM Press Release) (Source:<http://www.mofcom.gov.cn/article/news/202101/20210103029779.shtml>)

[3] UEL Provisions, Art. 2.

[4] Zhonghua Renmin Gongheguo Chukou Guanzhi Fa (《中华人民共和国出口管制法》) [Export Control Law of the People’s Republic of China] (promulgated by the Standing Committee of the National People’s Congress, Oct. 17, 2020, effective Dec. 1, 2020) (in Chinese).

[5] 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.

[6] Blocking Rules, Art. 1.

[7] *Id.*, Art. 2.

[8] *Id.*

[9] *Id.*, Art. 3.

[10] *Id.*

[11] See Blocking Rules, Art. 4.

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