ISSN 2706-6827 Vol. 5, Issue 13: 108-119, DOI: 10.25236/IJFS.2023.051318

Study on the Implementation Mechanism and Improvement of the Anti-Foreign Sanctions Act

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Abstract: *The international economic and political situation is complex and volatile, international security governance is facing many difficulties, and unilateral sanctions have become a normalized tool of competition among Western countries. Vigorously promoting the construction of a foreign-related rule of law system is a way to enhance China's "smart strength" in resisting undue sanctions.On June 10, 2021, China enacted the Anti-Foreign Sanctions Act, which has become an important part of the "toolbox" for building a foreign-related rule of law system. However, at the implementation level, there are still problems such as the authorities in charge of anti-foreign sanctions are not yet clear, the definition of discriminatory restrictive measures is unclear, and domestic private subjects are faced with the "dilemma of choice". For this reason, a special anti-sanctions agency should be set up to lead the countermeasures work, standardize the criteria for identifying discriminatory restrictive measures, and further set up a mechanism for exempting private subjects from licensing, so as to make up for the relevant loopholes in the Anti-Foreign Sanctions Act. In this way, the Act can realize its proper function, protect national security, sovereignty and development interests, and safeguard the international order centred on the Charter of the United Nations and the WTO agreements.*

Keywords: *anti-foreign sanctions law; unilateral sanctions; countermeasures*

1. Introduction

In recent years, the United States has targeted China as a strategic competitor, utilized hegemonism and unilateralism to suppress China, and frequently launched trade, technological, financial and legal wars against China, posing a serious threat to China's sovereign security and development interests. As of November 2022, a total of 378 entities and individuals have been listed by the Office of Foreign Assets Control of the U.S. Department of the Treasury ("OFAC"). In order to cope with the adverse impact of the U.S. unilateral sanctions, China has accelerated the construction of the rule of law relating to foreign affairs, and introduced laws and regulations one after another.The Anti-Foreign Sanctions Law promulgated on June 10, 2021 provides legislative safeguards to counter foreign sanctions, marking the gradual systematization of China's anti-sanctions legislation, which has aroused widespread concern in the academic community. Based on the study of the relevant provisions of the Anti-Foreign Sanctions Law, some scholars believe that the framework of the Law is distinctive, and that there is an urgent need to improve the rules and regulations to promote the implementation of anti-sanctions.[1] Some scholars focus on the legitimacy of foreign countermeasures practice and analyze it.[2] In view of this, this paper starts from the theoretical basis of the implementation of the Anti-Foreign Sanctions Act, combs through the real path of anti-sanctions implementation, focuses on analyzing the problems and causes behind the implementation process, and puts forward suggestions for the improvement of the implementation mechanism on this basis.

2. Rationale and core elements of the implementation of the Anti-Foreign Sanctions Act

In analyzing the implementation mechanism of the Anti-Foreign Sanctions Act, the theoretical basis of counter-sanctions as well as the core elements are the starting point of the study. International legitimacy is a strong basis for the implementation of counter-sanctions, and the core elements are important elements of counter-sanctions implementation.

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2.1. International legitimacy of the implementation of the Anti-Foreign Sanctions Act

The key to the international legitimacy of the implementation of the Anti-Foreign Sanctions Act is the determination of the legitimacy of "counter-sanctions". China's Anti-Foreign Sanctions Act does not directly define counter-sanctions, but article 3, paragraph 2, indirectly defines the type of sanctions to be responded to, namely, "acts by foreign States that violate international law and the basic norms of international relations". Although counter-sanctions are intended to be defensive measures against internationally wrongful acts, their substance still constitutes unilateral sanctions under international law. [3] The question of the legality of unilateral sanctions in the field of international law is still controversial. [4] Therefore, the legality of counter-sanctions should be discussed within the system of international law and analyzed from the perspectives of international treaty law and customary international law, respectively.

In terms of international treaty law, the treaties that may be touched upon in the process of countering foreign sanctions are mainly concentrated in the economic and trade fields, especially the series of treaties centered on the World Trade Organization (WTO). There are three main categories of anti-sanctions in China. The first category is the restriction of the admission of foreign citizens. Under international law, a country has no obligation to admit foreigners to enter and stay in its territory, which is itself a matter of national self-determination. The second and third categories of countermeasures involve restrictions on foreigners' property and cooperation in commercial transactions, which may be in conflict with WTO rules, including violation of the principles of treatment and trade liberalization. At the same time, usually if a country believes that the trade measures taken by another member country violates the trade measures of the WTO agreement and infringes its own rights, it should sue to the Dispute Settlement Body (DSB) according to the WTO agreement in the case of unsuccessful consultation between the two parties, i.e., it is not allowed to take counter-sanctions on its own. Most contemporary treaties, however, contain security exceptions, whereby a country has the right to self-determination in matters relating to national security. The legislative purpose of the Anti-Foreign Sanctions Act is to "safeguard national sovereignty, security and development interests", so it is clear that countermeasures taken under the Act are based on national security considerations. We can invoke the security exception clause to claim that the counter-sanctions are not in violation of treaty obligations.

Analyzed in terms of customary international law, counter-sanctions are related to counter-reporting and countermeasures in international law. Counter-sanctions are non-forceful measures taken in response to violations of international law and the basic norms of international relations by another State. Counter-reporting is the repetition by one State of similar acts of discourtesy, unfriendliness and unfairness by another State, including the imposition of prohibitions and restrictions on normal diplomatic and other contacts, embargoes and blockades of all kinds, or the withdrawal of voluntary assistance programs. According to the "lesser of two evils" approach to interpretation, a wrongful act is more internationally harmful than an unfriendly act, and a State may certainly engage in countermeasures. Countermeasures, on the other hand, are acts of suspension of the performance of an international obligation owed by an injured State to the responsible State in order to induce that State to comply with its obligations. The Draft Articles on Responsibility of States for Internationally Wrongful Acts set out the requirements for the lawful implementation of countermeasures, and our country may invoke countermeasures as a basis for lawfulness if this condition is met in the practice of countering foreign sanctions. According to the Law on Counteracting Foreign Sanctions, none of our countermeasures involve the use of force or the violation of fundamental international obligations. If the circumstances on which they are based change, the relevant departments of the State Council may suspend, change or cancel the countermeasures in question. It can be seen that China's countermeasures meet the requirements of non-force, temporary and reversible. As for proportionality, it is necessary to examine whether the principle of proportionality has been met in concrete implementation.

2.2. Core Elements of Anti-Foreign Sanctions Act Implementation

The Anti-Foreign Sanctions Act has improved the country's foreign-related legal system and achieved legal compliance. Its contents are worth analyzing, especially the provisions relating to the implementation of counter-sanctions, in order to clarify the relevant core elements.

The application of counter-sanctions presupposes unilateral sanctions adopted by foreign States. Article 2 of the Charter of the United Nations establishes the principles of sovereign equality and non-interference in internal affairs, which provide the weaker States with a legal basis for defending

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their sovereignty, opposing hegemony and restraining the powerful. [5] Counter-sanctions are literally interpreted as countering the sanctions of another country, so there must be a country that sanctions first and counter-sanctions second. According to paragraph 2 of article 3 of the Anti-Foreign Sanctions Act, when a foreign country violates international law and the basic norms of international relations by imposing containment and suppression on our country, or by taking discriminatory and restrictive measures against our citizens and organizations, and interfering in our internal affairs, our country has the right to take corresponding countermeasures. In terms of content analysis, the subjects of undue sanctions against China are foreign countries. In terms of the targets of sanctions, there are two levels: first, containment and suppression or interference in the internal affairs of China; and second, the imposition of discriminatory restrictive measures against Chinese citizens and organizations.

Two categories of persons are clearly defined in terms of those to whom counter-sanctions are to be applied. First, individuals and organizations that are directly or indirectly involved in the formulation, decision or implementation of the discriminatory restrictive measures mentioned above. The phrase "directly or indirectly" covers all participants in the process of foreign sanctions against China, from the formation to the implementation of the measures, who are all foreign promoters. Second, individuals or organizations that are not included in the countermeasures list but are closely related to the targets of countermeasures in the first category. This includes spouses and immediate family members, senior executives or de facto controllers, and related organizations. The Anti-Foreign Sanctions Act draws to some extent on the U.S. OFAC's "50% SDN List Rule." It should be noted that the inclusion of the first category of persons in the countermeasures list does not automatically subject their related parties to sanctions. The broadening of the list of persons subject to countermeasures is intended to exert pressure on the foreign promoter.

Countermeasures of the "3+N" type can be taken against the subjects subjected to countermeasures as mentioned above. China has fully absorbed several models of UN Security Council sanctions, US OFAC sanctions and EU sanctions, and the law clearly stipulates three types of measures, including "other necessary measures" as a backstop. The first is a travel ban, which restricts the entry of foreigners into the country or expels them from the country. The second is an asset freeze, which includes the seizure, attachment and freezing of property in the country. The third is a ban on transactions, which restricts our entities from engaging in transactions and cooperation with the target of sanctions. According to current international practice, "other necessary measures" may include arms embargoes, bans on financial services and reductions in aid. The relevant departments of the State Council may decide to adopt one or more of these measures in accordance with their division of responsibilities and in the light of the actual situation. The countermeasures in question may also be suspended, altered or canceled when the circumstances under which they were taken change.

3. Clarifying Realistic Paths for Implementation of the Anti-Foreign Sanctions Act

At present, our country has already engaged in countermeasures practice on many occasions, and the path of counter-sanctions is characterized by distinctive features. Analyzed horizontally, in order to safeguard national interests and the rights and interests of individuals, China has not only counteracted improper sanctions externally, but also blocked the improper application of foreign discriminatory restrictive measures in its own country internally. Vertically, in the process of concrete implementation, it is coordinated by the anti-foreign sanctions coordination mechanism, realizing the compound effect of the State Council's multi-departmental linkage. Countermeasures decisions made on this basis are final, but may be changed in the light of the actual situation.

3.1. Horizontal: two-way path of "external countermeasures + internal interdiction"

The Anti-Foreign Sanctions Act both counters foreign organizations and individuals and restricts and prohibits relevant actors within the country from complying with the rules on foreign sanctions. In terms of foreign countermeasures, China has adopted a smart sanctions model rather than comprehensive sanctions, and countermeasures are targeted at individuals or organizations that violate international law and the basic norms of international relations or impose discriminatory restrictive measures. [6] From March 2020 to November 2022, China has implemented 28 countermeasures. Among them, the countermeasure practices implemented before the introduction of the Anti-Foreign Sanctions Act totaled 19 times, and the countermeasure practices implemented after its introduction totaled 9 times. This shows that the Anti-Foreign Sanctions Act has, to a certain extent, had the effect of "preventing sanctions by sanctions" and "deterring sanctions by sanctions". China's main

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countermeasures can be categorized into four main types: the first type is sanctions that curb China's economic development. For example, the United States based on the 2020 Omnibus Continuing Appropriations Act and the National Defense Authorization Act for Fiscal Year 2020 to restrict the development of Huawei's 5G communications technology and suppress China's high-tech industry. The second category is sanctions that interfere with China's territorial security. The U.S. passed the Hong Kong Autonomy Act, the South China Sea and East China Sea Sanctions Act of 2019, and the Taipei Act, etc., and has repeatedly sent government officials to visit Hong Kong and Taiwan in an attempt to stir up domestic territorial conflicts. The third category is sanctions against Chinese individuals and entities under the pretext of human rights issues. The U.S., Canada, the U.K., and the EU have used the Xinjiang human rights issue to launch sanctions against China, and the U.S. even signed the Uyghur Human Rights Policy Act of 2020, which puts a number of domestic enterprises on a list of Specially Designated Nationals. The fourth category is accountability bills in the wake of the New Crown epidemic. U.S. lawmakers proposed the Chinese Government Accountability for the New Crown Virus Act and the New Crown Virus Origins Verification, Investigation, and Determination Act of 2022, in an attempt to transfer economic pressure to China by offering it large amounts of compensation. In response to these unwarranted sanctions, China's countermeasures have mainly consisted of banning the entry of the persons concerned and their immediate family members into the country (including Hong Kong and Macao), freezing their property in China, and prohibiting Chinese citizens and organizations from trading with them.

In order to resist foreign aggression, it is also necessary to protect the interior. Articles 11 and 12 of the Anti-Foreign Sanctions Act require that organizations and individuals within the territory are prohibited from complying with the laws of the sanctioning State, and that they shall not assist in, or carry out, discriminatory restrictive measures taken by foreign States, and shall at the same time carry out the countermeasures taken by our country. This is a profound consideration by the legislator due to the reality of the situation, to avoid the possibility that certain organizations and individuals within the territory may, for their own economic interests, support inappropriate sanctioning acts by foreign countries, which may in turn disrupt the order of the Chinese market or endanger China's national security. "Organizations and individuals within China's territory" shall refer to all organizations and citizens of Chinese nationality registered and established in China, including foreign-invested enterprises registered in China by foreign entities, and representative offices of foreign organizations in China.The "Flextronics Incident" in 2019 was the earliest case that revealed China's countermeasures laws and regulations. Founded in 1969 in Silicon Valley, the Zhuhai-based company is one of Huawei's key suppliers.On May 15, 2019, the U.S. Department of Commerce announced that Huawei and its subsidiaries would be placed on the "Entity List," prohibiting Huawei and its subsidiaries from making any unauthorized use of its products. The U.S. Department of Commerce announced on May 15, 2019 that it had placed Huawei and its subsidiaries on the "Entity List," prohibiting Huawei and its subsidiaries from purchasing and using U.S. technology products and services without authorization, and Flextronics immediately ceased cooperation with Huawei on the basis of the use of U.S. technology in the foundry parts that it supplied and withheld Huawei's materials and equipment in accordance with the U.S. Export Control Regulations (EAR). At that time, we did not have a corresponding law to counteract this, and the Department of Commerce had to urgently formulate the Unreliable Entity List System. The Anti-Foreign Sanctions Act (AFSA) now provides a strong legal basis to fill this legal void.

3.2. Vertical: composite pathway for multisectoral linkages under the umbrella of the coordination mechanism

The most important thing in the practice of the Anti-Foreign Sanctions Act is to put the anti-sanctions measures into practice. The Act contains only 16 articles of principle, which are very limited in content. In order to cope with the complexity of international sanctions, Article 10 of the Anti-Foreign Sanctions Act adopts a composite path of anti-sanctions implementation, i.e., multi-sectoral coordination under the coordination mechanism of anti-foreign sanctions work. The relevant provisions on the implementation of counter-sanctions do not establish a fixed main body for implementation. Only the Ministry of Foreign Affairs is explicitly authorized to issue counter-sanctions lists and counter-measures, while the other relevant departments of the State Council are used to refer to them. In practice, the departments involved may also include the Ministry of Commerce, the Ministry of Public Security and the People's Bank of China. For example, countermeasures such as visa denials and immigration control fall primarily within the purview of the Ministry of Foreign Affairs, the State Administration of Migration and the General Administration of Customs, which will also be primarily responsible for their implementation. For countermeasures such as asset freezing, the

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Ministry of Finance and the State Administration of Foreign Exchange may be responsible. Elements such as prohibiting or restricting trading activities may involve the Ministry of Commerce. In fact, the Anti-Foreign Sanctions Law is intended to authorize, at the national legislative level, relevant departments of the State Council, such as the Ministry of Foreign Affairs and the Ministry of Commerce, to formulate administrative regulations and departmental rules within their areas of responsibility in accordance with actual needs, so as to effectively link up the implementation of countermeasures.

At the same time, the State has set up a coordination mechanism for anti-foreign sanctions work, which is specifically responsible for integrating and coordinating the work of various departments, so as to facilitate mutual cooperation. Before the enactment of the Anti-Foreign Sanctions Law, China had already issued a number of laws and regulations containing provisions on extraterritorial application, such as the Export Control Law, the Foreign Trade Law, the List of Unreliable Entities, and the Measures for Blocking the Improper Extraterritorial Application of Foreign Laws and Measures (hereinafter referred to as the "Blocking Measures"). The competent authorities and enforcement departments in the different laws and regulations mentioned above are not the same, which may lead to the problem of conflicting countermeasures in real practice. The fact that the Foreign Trade Law and the National Security Law both provide authorizing provisions for countering foreign economic sanctions may also lead to different legal bases for the implementation of countermeasures. This requires the coordination mechanism for countering foreign sanctions to play a coordinating role, linking up various departments to achieve information sharing and coordination. In the future, it is likely that the working mechanism will be centered in the Ministry of Foreign Affairs, and its office will probably be located there as well.[7]

3.3. Sample: Semi-Closed Path to Final Decision on Countermeasures by State Department Departments

The implementation of countermeasures in China is not static and closed, but can be changed in accordance with objective circumstances. On the one hand, the Anti-Foreign Sanctions Law provides that administrative decisions made by the relevant departments of the State Council are final. Unlike specific administrative acts in general, the Anti-Foreign Sanctions Law does not establish avenues of redress. Individuals or organizations that have been subjected to a decision to impose countermeasures are not able to remedy their rights by applying for administrative reconsideration or filing an administrative lawsuit. Countermeasure decisions made by the relevant departments of the State Council, once made, take immediate effect and are final and applicable to both the target of the countermeasure and the countermeasure. This indicates that our country considers the countermeasures decisions made by the State Council departments to be the embodiment of the national will, which is a national act with diplomatic elements. And according to the provisions of the Administrative Procedure Law, national defense, diplomacy and other state actions are not appealable. By the same token, no administrative reconsideration can be filed. From this point of view, the countermeasures are one-shot, closed, the relevant individuals and organizations can not raise objections. The legislative purpose behind this is, firstly, to take into account the effectiveness of counter-sanctions; if administrative remedies are allowed, counter-sanctions cannot be implemented immediately, which will inevitably affect the effectiveness of counter-sanctions implementation. The second is to realize "reciprocal countermeasures" from the technical level of legislation. The sanctions imposed by the U.S. Department of the Treasury on Huawei are non-actionable, and if our countermeasures can be subject to litigation or reconsideration, it will not be conducive to the protection of China's interests.

On the other hand, however, our country advocates the development of friendly relations with all countries of the world on the basis of adherence to the five principles of peaceful coexistence, and counter-sanctions are only a means of self-help and not an end in themselves. When the situation between countries eases or when foreign countries lift sanctions, the relevant departments of the State Council can also suspend or cancel countermeasures and make changes to the sanctions list on their own. Analyzing this feature, the implementation of countermeasures is, to a certain extent, open-ended, and can be canceled on the basis of changes in circumstances. In the international community, this kind of situation-dependent sanctions is more common. After Iran and the United States restarted negotiations on the Iranian nuclear issue, Iran's Foreign Minister Mohammad Javad Zarif said that as long as the United States returned to the Iranian nuclear deal and lifted sanctions on Iran, the measures Iran is now taking are completely reversible. The U.S. has taken sanctions against Russian fertilizers since the outbreak of the Russo-Ukrainian war through the Russian Sanctions Regulation on Harmful Foreign Activities, which has led to shortages of agrochemicals and a steady rise in food prices. The

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U.S. Treasury Department has thus issued pass-through permits, effectively lifting restrictions on Russian fertilizer imports.

4. Problems in the implementation process of the Anti-Foreign Sanctions Act

With regard to problems in the implementation of counter-sanctions, the competent authorities for counter-sanctions have not been clearly defined; with regard to the conditions for the implementation of counter-sanctions, the definition of "discriminatory restrictive measures" is unclear; and with regard to the targets for the implementation of counter-sanctions, domestic and private subjects are caught in a dilemma.

4.1. Lack of clarity on the competent counter-sanctions authority

At present, the Anti-Foreign Sanctions Act does not provide for an independent authority for counter-terrorism work, but only establishes a coordination mechanism for anti-foreign sanctions work to oversee the relevant work. This provision is overly principled, leaving a void in terms of what the "relevant departments" are and how the division of labor and cooperation among them is coordinated, and the lack of a competent authority is not conducive to the development of counter-terrorism efforts.

First, there is a lack of clarity in the division of labor among departments within the State Department. [8] The implementation of anti-foreign sanctions involves various fields of economics and trade and multiple government departments. China has not clarified the counter-sanctions powers of the various departments of the State Council, which theoretically can implement countermeasures as long as they involve their own duties. The three countermeasures listed in article 6 of the Anti-Foreign Sanctions Act are a combination of administrative duties and administrative coercive measures. Among them is the "seizure, detention and freezing of domestic property", which, in addition to involving the competence of such departments as the Ministry of Finance, the State Administration of Foreign Exchange and the People's Bank of China, can be implemented by an organ with administrative enforcement powers or by an administrative organ applying to a people's court for implementation, in accordance with the provisions of the Administrative Compulsory Law, which involves a larger number of departments. There is also a confusing division of labor with regard to the issuance of countermeasures, with article 8 stipulating that the relevant departments of the State Council may change countermeasures according to the circumstances. Article 9, however, states that the Ministry of Foreign Affairs or other departments of the State Council shall issue orders to change countermeasures. In accordance with the principle of legislative uniformity, there should be consistency between the sanctioning department and the issuing department, and there is no need to single out the Ministry of Foreign Affairs. Otherwise, in practice, it is necessary to clarify the Ministry of Foreign Affairs and other State Council departments to issue orders in different situations. It is noteworthy that the previous countermeasures of our country were expressed by the spokesman of the Ministry of Foreign Affairs until August 5, 2022, when the Ministry of Foreign Affairs announced for the first time in the name of the Ministry of Foreign Affairs, "Pelosi's interference in the internal affairs of our country" countermeasures. Although the Ministry of Foreign Affairs is still responsible for countermeasures, the fact that they are issued in the name of the ministry shows that our country is gradually becoming more aware of the division of competencies among the ministries. At present, the unclear division of responsibilities among departments makes it inevitable that different departments will be able to implement the same countermeasures, thus wasting administrative resources and reducing the efficiency of countermeasures.

Secondly, the problem of sectoral collaboration in the application of the Anti-Foreign Sanctions Act and other laws is acute. In the process of implementing countermeasures, the cooperation of other legal provisions is required. The implementation of the three types of countermeasures usually involves the Foreign Trade Law, the Exit-Entry Administration Law, the Export Control Law and other laws. When the provisions of these laws are inconsistent, how to interpret the rules or determine the order of application requires specialized knowledge and rich experience of the working departments to deal with. At the same time, in implementing the Anti-Foreign Sanctions Act, the administrative agencies have their own responsibilities as well as collaborate with each other. As the understanding of the laws and regulations of each department is not the same, the number of times of cooperative enforcement in the field of counter-sanctions is relatively small, which will inevitably lead to difficulties in friction. In practice, conflicts arising from counter-sanctions enforcement can be broadly categorized into positive enforcement disputes and negative enforcement disputes. The former manifests itself in the form of

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different administrative organs all believing that they have the right to administer the same matter, thus competing for administration or duplicating law enforcement. The latter manifests itself in the form of administrative organs shirking responsibility for matters that they do not consider to be under their own management, resulting in "gaps" in law enforcement. However, the enabling provisions of the Anti-Foreign Sanctions Act focus on the substantive level and do not provide for specific procedural rules, nor do they establish a competent authority to coordinate countermeasures.

4.2. Poorly defined discriminatory restrictive measures

Our Anti-Foreign Sanctions Act, whose legislative purpose is anti-sanctions, anti-interference and anti-long-arm jurisdiction, and which mainly opposes unilateral sanctioning by foreign countries, uses the term "discriminatory restrictive measures" in its provisions. In fact, the term "discriminatory restrictive measures" has long been used in our legal documents, including the Provisions on the List of Unreliable Entities, the Foreign Trade Law and the Personal Information Protection Law. Our Foreign Ministry and Ministry of Commerce spokespersons have also repeatedly used the term in their statements, such as the Ministry of Foreign Affairs' countermeasures against the U.S. crackdown on Chinese media outlets in the U.S. in 2020, and the Ministry of Commerce's public statement on India's permanent ban on Chinese cell phone apps in 2021. The Anti-Foreign Sanctions Act continues to use this term, both for the sake of legislative unity and systemicity, and for the broadness of the application of the term "measures". However, neither the laws and regulations nor the State Council departments implementing countermeasures have ever positively explained the scope of application of discriminatory restrictive measures.

As mentioned above, the concept of discriminatory restrictive measures is broad and leaves much room for interpretation. Although the legislator's original intent was to refer to unilateral sanctions against China by foreign countries, improper judicial decisions and procedural orders issued by foreign judicial organs can also be interpreted as "measures" in a broader sense.[9] If a broader interpretation of discriminatory restrictive measures is adopted, a large number of foreign laws, sanctions and sanctions lists can be covered. If a narrower interpretation is adopted, then only some of the unilateral sanctions imposed by foreign countries are covered. At present, the factors to be considered in determining discriminatory restrictive measures in concrete practice are more complicated, and need to be analyzed in conjunction with the foreign misbehavior itself as well as the motivation behind the sanctions. Take the United States as an example, the scope of "discriminatory restrictive measures" may include border-related Taiwan-related sanctions, China's military-industrial complex enterprise sanctions and export control and other areas. In the field of export control, the United States based on a variety of reasons will be included in the entity list of Chinese individuals, entities, but the entity list or specific penalties should be recognized as discriminatory restrictive measures, need to be judged in the context of the specific circumstances. If the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce includes Chinese entities on the list for explicitly discriminatory reasons such as human rights in Xinjiang and the South China Sea issue, such behavior should be recognized as discriminatory restrictive measures against China. In addition, the degree of "discriminatory" in discriminatory restrictive measures is also worth examining. Whether this discriminatory means unequal treatment of Chinese enterprises, or whether it needs to be elevated to the level of national containment or suppression, or whether it should also meet the other conditions of Article 3(2) of the Anti-Foreign Sanctions Act, there is no official document to clarify this for the time being. Our country has not explained discriminatory restrictive measures, on the one hand, because the domestic and foreign legislative experience of anti-sanctions is not mature enough to accurately explain the connotation of discriminatory restrictive measures. On the other hand, it is to facilitate a more comprehensive and flexible response to unilateral sanctions by foreign countries, and to leave room for discretion for other laws and regulations to improve the countermeasure rules. However, with the development of countermeasures practice, if the definition of "discriminatory restrictive measures" is not defined, excessive discretion or misidentification of foreign measures may lead to the failure of the premise of countermeasures, which may result in the adoption of countermeasures constituting an internationally wrongful act and bring about greater loss of national interests. Companies may also adopt conservative compliance policies and cut off commercial dealings with trade targets that pose a risk of sanctions. Multinational companies may even terminate their China operations. The WTO Dispute Settlement Body has also pointed out that "discrimination" has many meanings, and to avoid ambiguity, the use of this term should be avoided as long as it is possible to use more precise criteria. If it is used, it should be interpreted with extra caution.[10]

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4.3. Domestic private subjects face a dilemma

In the process of countering foreign sanctions, China has adjusted its foreign economic policy to a certain extent by requiring individuals and organizations within its territory not to implement or assist in the implementation of discriminatory foreign restrictive measures. Both individuals and enterprises within the territory should comply with China's countermeasures. However, the U.S. has increased the strength of its economic sanctions against China, showing a new trend of a comprehensive economic sanctions model based on secondary economic sanctions, resulting in the relevant private subjects in China being forced to weigh the pros and cons in order to implement the countermeasures, which has seriously jeopardized the trade interactions of enterprises. [11] U.S. judicial and administrative organs usually impose high fines on extraterritorial parties that violate the law. The Iran-Libya Sanctions Act of 1996 and the International Emergency Economic Powers Act (IEEPA), among others, provide for fines. In the latter case, for example, an extraterritorial party who violates the regulations in foreign trade activities may be sentenced, in terms of civil penalties, to a fine of $250,000 or two times the amount of the underlying transaction. In terms of criminal penalties, a fine of $1 million may be imposed, and senior executives of the enterprise may even be sentenced to imprisonment for up to 20 years. In contrast, Article 12 of the Anti-Foreign Sanctions Law provides that if a private subject infringes on the rights of other individuals or organizations in China by complying with a foreign law, the relevant citizens or organizations in China may file a lawsuit with the court to demand the cessation of the infringement and compensation for the damages. Specifically, two types of lawsuits may be involved. One is a tort claim, which can be brought by a Chinese enterprise that has been harmed when a foreign entity complies with foreign sanction rules and refuses to trade with the sanctioned Chinese enterprise. The second type of action may be for breach of contract, for example, where an enterprise refuses to fulfill a contract because the other party to the contract has been subject to economic sanctions, which constitutes a breach of contract, or where economic sanctions have been stipulated as an exculpatory circumstance in the contract. In this case, the parties may seek judicial remedies under Article 153 of the Civil Code by claiming that the contractual agreement is invalid because it violates the mandatory provisions of the law. In any case, the breach of such obligations is mainly remedied by civil lawsuits, and there is no provision for the public authorities to hold them liable. As to whether it will constitute the Anti-Foreign Sanctions Act, Article 4, "directly or indirectly" the implementation of foreign discriminatory restrictive measures of the participants, it is still debatable. However, whichever way we analyze it, our penalties and deterrent effect are relatively light.

Inevitably, after assessing the risks and expected damages, companies will choose to comply with foreign law in order to avoid hefty fines. "Bank Melli Iran v. Telekom Deutschland Gmbh is a case in point. Telekom Deutschland Gmbh terminated the contract when Bank Melli was placed on the U.S. SDN Sanctions List. Mellibank brought a civil action before the District Court of Hamburg, Germany, claiming that Telekom Deutschland Gmbh's compliance with the U.S. sanctions violated Article 5 of the EU Blocking Regulation. Due to the complexity of the case, a "preliminary ruling" was finally made by the European Court of Justice (ECJ), and Advocate General Hogan issued a legal opinion on four questions regarding whether Telekom GmbH had violated the EU Blocking Law. There was also a related case in China. In the case of Plaintiff Qingdao Jinhai Chain International Trade Co. v. Defendant Guangzhou Development Bibi Oil Products Co. in a dispute over a sale and purchase contract, the Plaintiff issued a "Declaration and Warranty on Trade Sanctions" agreeing that "the goods supplied are not petroleum, petroleum products or petrochemicals originating from Iran, Syria, North Korea, Cuba, the Crimea region and Venezuela, or the Defendant shall have the right to to terminate the contract". After investigation, the defendant determined that the goods provided by the plaintiff methanol originated from Iran, and therefore decided to terminate the performance of the contract. The plaintiff claimed that the defendant's behavior constituted a breach of contract, and that the Declaration and Warranty on Trade Sanctions was invalid in violation of the mandatory provisions of the Anti-Foreign Sanctions Act and the Blocking Measures. In this case, the court did not recognize the plaintiff's claim, and held that the document was a true expression of the parties' intent, and that the content of the document did not fall within the scope of the aforementioned laws and regulations. Judging from the reasons for the judgment, the court did not discuss this in more detail. Can an enterprise refuse to perform a contract simply because it wants to prevent losses that may be brought about by foreign sanction rules when the foreign country has not issued a relevant sanction order against the domestic commercial entity? And does this constitute assistance in the implementation of discriminatory restrictive measures and the application of Article 12 of the Anti-Foreign Sanctions Act? The answer cannot be derived from this case for the time being. This also reflects the fact that the legal issues for enterprises arising from sanctions and counter-sanctions are also more complex, and enterprises have to face a dilemma.

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5. Recommendations for improving the implementation mechanism of the Anti-Foreign Sanctions Act

There are deficiencies in the existing counter-sanctions implementation mechanism, and in order to ensure accurate and effective counter-sanctions, it is necessary to set up a specialized counter-sanctions body to coordinate counter-sanctions, refine the rules for the implementation of counter-sanctions, and improve the procedural provisions and supporting measures.

5.1. Establishment of specialized counter-sanctions bodies to lead countermeasures efforts

The implementation of the Anti-Foreign Sanctions Act involves a wide range of legal, economic and political fields, and the framework implementation provisions fail to effectively delineate interdepartmental counter-terrorism competencies, which may easily lead to the failure to realize the counter-terrorism effect. Although China has set up a coordinating mechanism for anti-foreign sanctions work to coordinate countermeasures, the mechanism is not perfect for the time being, and it will take some time for the mechanism to be put into practice. In order to better cope with foreign unilateral sanctions, China can set up a specialized anti-sanctions agency on the basis of the anti-sanctions coordination mechanism. Similar to the U.S. OFAC, the agency is responsible for managing anti-sanctions based on national security and foreign economic policy. In terms of personnel composition, the relevant departments of the State Council should send people to set up a team with professional anti-sanctions experience. In terms of functions, it consists of three parts: prior organization, mid-course coordination, and post-course supervision. First, the counter-sanctions agency is responsible for organizing counter-sanctions work within the State Council departments and planning the procedural steps for the implementation of countermeasures. In the event of disagreement among departments over the division of responsibilities, the anti-sanctions agency convenes consultations among departments to ensure effective cooperation; second, the anti-sanctions agency is responsible for organizing information on sanctions and disseminating relevant anti-foreign sanctions laws, regulations and administrative ordinances. It also guides the work of each department, coordinates conflicts that arise in the implementation of countermeasures by administrative agencies, and improves the efficiency of countermeasures. In view of the fact that multi-departmental countermeasures coordination requires rapid information sharing, the countermeasures agency can also act as an information hub, establishing a joint mechanism for information sharing and communication, and transmitting information in a timely manner; finally, the countermeasures agency is responsible for overseeing the implementation of countermeasures and realizing "high-efficiency and precise" countermeasures. Through administrative internal supervision, internal control can be strengthened and self-correction of illegal administrative behavior.[12] Supervision mechanism not only reflects the rationality and prudence of China's counter-sanctions institutions, but also can effectively protect the rights of administrative counterparts. Counter-sanctions agencies should adhere to the "principle of legality" and "principle of extensiveness" to supervise countermeasures, and actively urge the relevant departments of the State Council to strictly fulfill their legal administrative powers. When the objective conditions on which the countermeasures are based change or when there are improper countermeasures, the relevant departments of the State Council shall be notified in a timely manner to change or cancel the ban. At the same time, it analyzes the feedback from countermeasures practice, studies the difficulties in the application of laws and regulations as well as normative documents, and evaluates the feasibility and practical effects of the implementation of countermeasures rules. If there are deficiencies in the laws and norms themselves, timely advice is given to the relevant authorities.

5.2. Regulating the criteria for recognizing discriminatory restrictive measures

Discriminatory restrictive measures are a prerequisite for the application of the Anti-Foreign Sanctions Act and the scope of the obligations to be recognized and complied with by the individuals or enterprises concerned. This term is not a commonly used juridical concept in the field of international law, and there is no authoritative domestic or foreign legal text to elaborate on it. Although the ambiguity of discriminatory restrictive measures gives the administrative organs enough room for discretion, there should also be relative standards for identification. In order to avoid our countermeasures failure, it can be regulated from two aspects: formal standard and substantive standard. In terms of formal criteria, discriminatory restrictive measures should comply with the basic elements stipulated in the Anti-Foreign Sanctions Act. According to the provisions of articles 3, 4 and 12, the subjects of discriminatory restrictive measures include foreign countries, organizations and individuals, as well as those who implement or assist in the implementation of such measures within the country.

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The targets of implementation are our citizens and organizations, and foreign countries intend to suppress our development and harm our national interests through the containment of the entities concerned. In terms of implementation conditions, the other three conditions stipulated in Article 3 do not need to be fulfilled at the same time. The Anti-Foreign Sanctions Act is intended to provide broader legal authorization, so an expanded understanding of the countermeasure conditions is more practical. In addition to safeguarding our national interests, the purpose of our legislation also includes protecting the legitimate rights and interests of our citizens and organizations. Discriminatory restrictive measures do not necessarily interfere in China's internal affairs or threaten sovereign security and development interests, in order to ensure a certain scope of countermeasures, should not be more restrictive. China does not limit the external manifestations of discriminatory restrictive measures. According to past countermeasures practice, discriminatory bills, tariffs, visa restrictions, export controls and financial sanctions imposed by foreign countries against China may all be included in the scope of discriminatory restrictive measures.

In terms of substantive criteria, the determination of "discriminatory" is the key factor in identifying discriminatory restrictive measures, and is an important feature that distinguishes them from other foreign restrictive measures. Since the Anti-Foreign Sanctions Act has not been in place for a long time and there is little countermeasure practice involving discriminatory restrictive measures in domestic practice, an attempt can be made to glimpse the "discriminatory standard" in the international arena. Discrimination means unfair treatment, and in international law, it usually refers to the illegal restriction of products, services and tariffs by one country to another country, and the application of different treatment to the discriminated country compared with its own country or a third country, such as sub-national treatment and most-favored-nation treatment. Although discriminatory restrictive measures have not been defined internationally, however, the WTO Dispute Settlement Body has dealt with disputes in which member countries have imposed discriminatory tariff barriers against other countries, and the International Court of Justice (ICJ) has had a few cases involving discriminatory restrictive measures in the areas of interstate politics and international human rights disputes.[13] It is now well established in GATT and WTO case practice that discrimination encompasses both de jure and de facto discrimination. De jure discrimination refers to a series of unfair treatment set up by a foreign country through domestic laws and regulations. De facto discrimination refers to the form of equality but in fact there is a difference in treatment, although no legal provisions have been adopted, but has the effect of de facto discrimination. Discriminatory restrictive measures should also be included in this sense. In addition, the determination of "discriminatory" still needs to take into account the international law factors precluding wrongfulness in order to avoid misidentification. Foreign countries often invoke the Draft Articles on Responsibility of States for Internationally Wrongful Acts or the WTO's General and Security Exceptions to preclude the wrongfulness of discriminatory acts. In the case of the U.S. Tariff Measures on Goods from China (DS543) and the sanctions against high-tech industries such as Huawei and ZTE, the U.S. has frequently adopted discriminatory restrictive measures against China under the guise of safeguarding national security and public morality, arguing that its sanctions are in line with the WTO's security exceptions. Therefore, when reviewing the discriminatory behavior of foreign countries, the relevant departments of the State Council should be careful to identify whether the elements of blocking illegality in international law are met before carrying out specific countermeasures.

5.3. Establishment of a private subject exemption licensing mechanism

The implementation of our Anti-Foreign Sanctions Act (AFSA) takes a two-way path of "external countermeasures and internal blocking", providing for both countermeasures and blocking obligations. However, there are very few cases in countries around the world in which companies and individuals have abandoned compliance with U.S. law in order to comply with their own laws.[14] Severe countermeasures are conducive to the protection of China's sovereign security and interests, but they are not conducive to safeguarding the rights and interests of China's private subjects, and sometimes entail great economic risks. In particular, the content of Article 12 puts domestic private subjects in a dilemma. And in terms of resolving the conflict between the sanctions and counter-sanctions legal system, applying for an exceptional exemption is one of the important remedies available to the parties.[15] In essence, China's "blocking measures" in the specific application of the problem, which allows the parties to obtain exemptions, and provides that the parties due to the violation of foreign sanctions caused significant losses, the government may, depending on the circumstances of the support. Article 7 of the EU Blocking Regulation also provides for exceptional exemptions, where non-compliance with a foreign ban will result in damage to the interests of a domestic natural or legal person, an application may be made to the European Commission for authorization to comply in

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accordance with statutory procedures. Partial compliance with foreign laws and judgments is possible in specific cases. The enactment of the Anti-Foreign Sanctions Act has compensated to a certain extent for the low legislative level of the Blocking Scheme, but this supplementation is insufficient, neither fully covering its scope nor clarifying the rules on party immunity. Therefore, it is necessary to further establish a private subject exemption licensing mechanism to provide conditions for private subjects to identify the target of countermeasures as well as to comply with blocking obligations.

Specifically, there are four steps. First, submit an application for exemption. When natural and legal persons in China may be involved in the implementation of discriminatory restrictive measures of foreign countries, take the initiative to submit a written application for exemption and supporting materials to the relevant departments of the State Council, stating the facts and reasons for the exemption, and setting out the losses that will be brought about by non-compliance with the discriminatory restrictive measures as well as the matters that are desired to be exempted, so as to prove that the application for exemption is justified and necessary. The second step is evaluation and investigation. Based on the countermeasures list and countermeasures, the relevant department of the State Council comprehensively examines the impact that the foreign country's discriminatory restrictive measures may have on the applicant. The third step is to grant or deny the exemption. After evaluation, the State Council department may grant exemption if it thinks that it may have a greater impact on the applicant or the domestic economic environment. If the conditions for exemption are not met, the exemption will not be granted and reasons will be given. The findings are also reported to the competent counter-sanctions bodies mentioned above for the record. In view of the countermeasures and the constantly changing trade environment, such exemption authorization should be limited to a period of validity. At the same time, in order to harmonize with the countermeasures provisions, the exemption decision made by the State Council department is also final. The fourth step is to apply for a change or renewal. When the validity period expires or the applicant requests to change the exemption matters, it should be submitted to the initial application department. After examination, the relevant department of the State Council shall make a decision on whether or not to grant the change or continuation, and report it to the competent anti-sanctions agency for the record. The establishment of the exemption and authorization mechanism in accordance with the law can maintain the coordination of the counter-sanctions legal system and also increase the flexibility of countermeasures practice.

6. Conclusions

In the face of an increasingly complex international sanctions environment, the Anti-Foreign Sanctions Act provides rule of law support and safeguards for China to take corresponding countermeasures. However, in the process of implementing counter-sanctions, China still faces many challenges and needs to continuously improve the relevant rules and optimize the counter-sanctions implementation mechanism. Taking into account foreign countermeasures experience and China's actual situation, it is necessary to establish a systematic and complete counter-sanctions legal system, promote the construction of China's rule of law in relation to foreign affairs, actively safeguard national security, sovereignty and development interests, and take the initiative to work together with the international community to build a more just and reasonable international order.

Acknowledgements

The research for this thesis was supported by the project "Research on the Application of China's Anti-Sanctions Legal System under the Rule of Law Construction Related to Foreign Countries" (Project Approval No. ACYC2022192) of the Graduate Student Research Innovation Fund of Anhui University of Finance and Economics, for which we would like to express our gratitude.

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