CHINA LAW UPDATE

THE ANTI-FOREIGN SANCTIONS LAW: CONTENT, FEATURES, AND LEGITIMACY UNDER INTERNATIONAL LAW

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I. INTRODUCTION

On June 10, 2021, the Standing Committee of the National People's Congress ("NPCSC") enacted the Anti-Foreign Sanctions Law of the People's Republic of China ("AFSL"), which came into effect immediately. This law is considered a countermeasure against unilateral sanctions imposed by the United States ("US") and the European Union ("EU") on Chinese legal and natural persons in connection with human rights concerns in Hong Kong and Xinjiang.[1] China denounced such sanctions as a serious interference in China's internal affairs,[2] especially when senior officials of China were added to the sanction list by the US and subject to restrictive measures.[3] Aimed at countering foreign intervention and illegal unilateral sanctions,[4] the AFSL authorizes the Chinese government to add foreign persons and organizations to an entity list if they directly or indirectly participate in making or implementing foreign discriminatory restrictive measures against Chinese citizens and organizations.[5] Legislators of the NPCSC have described the AFSL as a timely addition to China's legal toolkit for opposing hegemony and preserving its sovereignty through legal means.[6]

[1] *See* Guanyu Zhonghua Renmin Gongheguo Fan Waiguo Zhicai Fa (Cao'an) de Shuoming (关于《中华人民共和国反外国制裁法(草案)》的说明) [Illustration on the Draft Anti-Foreign Sanctions Law of P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Jul. 15, 2021), 2021 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1042, at 1043 [hereinafter "Illustration on the Draft AFSL"].

[2] See *Waijiaobu Fayanren Hua Chunying jiu Meifang Jiekou Shegang Wenti Xuanbu Zhicai Zhongguo Quanguo Renda Changweihui Lingdao Chengyuan Fabiao Tanhua* (外交部发言人华春莹就美方借口涉港问题宣布制裁中国全国人大常委会领导成员发表谈话) [*Foreign Ministry Spokesperson Hua Chunying Made Remarks on the US Announcement of Sanctions Against Leading Members of the NPCSC Under the Pretext of Hong Kong-Related Issues*], MINISTRY OF FOREIGN AFFAIRS OF P.R.C., Dec. 8, 2020, https://www.mfa.gov.cn/web/wjdt_674879/fyrbt_674889/202012/t20201208_7816941.shtml.

[3] For instance, on December 7, 2020, the United States designated 14 vice-chairpersons of the NPCSC on the SDN List due to China's disqualification of elected opposition legislators in Hong Kong. See *Hong Kong-related Designations*, U.S. DEPARTMENT OF THE TREASURY, Dec. 7, 2020, https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20201207.

[4] See Shen Chunyao (沈春耀), *Quanguo Renda Changweihui Fagongwei Fuzeren jiu Fan Waiguo Zhicai Fa Da Jizhe Wen* (全国人大常委会法工委负责人就反外国制裁法答记者问) [*Director of the Legislative Affairs Commission of the NPCSC Answer to Reporters' Questions on the Anti-Foreign Sanctions Law*], XINHUA (Jun. 10, 2021), http://www.xinhuanet.com/politics/2021-06/10/c_1127551967.htm.

[5] Fan Waiguo Zhicai Fa (反外国制裁法) [Anti-Foreign Sanctions Law of P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 10, 2021, effective Jun. 10, 2021), art. 4, CLI.1.5015159 (Chinalawinfo).

[6] *See* Illustration on the Draft AFSL, at 1043.

This Note will mainly discuss how China will make use of the AFSL, and what is probably the legitimate rationale of this legislation under international law. Part II of this Note contains a brief introduction of the main content of the AFSL by illustrating its scope of application, the entity list regime contained therein, and the enforcement of this law. Part III compares the entity list in the AFSL with other entity lists in Chinese domestic law and in the legal system of the US and the EU, and identifies its core and distinguishing features. Part IV analyzes the legitimate rationale of the AFSL under general international law and the law of the World Trade Organization ("WTO"). In this part, the Note will also discuss the dilemma currently faced by international law, i.e., its failure to prevent states from resorting to private remedies in disputes arising out of unilateral sanctions due to the shortage of effective and timely dispute settlement and enforcement mechanisms.

II. AN OVERVIEW OF THE AFSL

The AFSL was enacted after only two readings of the NPCSC without public consultation despite the normal practice of three readings with such consultation,[7] indicating the urgency and necessity of the AFSL.[8] Composed of 16 articles, the AFSL sets out its scope of application, the entity list regime to be established, and the enforcement of this law. It identifies two situations where countermeasures should be applied. The first is that foreign countries impose discriminatory restrictive measures against Chinese citizens and organizations with the purpose of intervening in China's internal affairs. The second is that foreign countries, organizations and persons incite and fund acts that seriously infringe on China's sovereignty, security and development interests, such as separatist activities of Taiwan, Xinjiang, Tibet, and Hong Kong.[9] The majority of 16 articles define and regulate the first situation, and according to Article 15 relevant provisions shall apply *mutatis mutandis* (with the necessary change) to the second situation.

A. Scope of Application

As stated above, the AFSL applies in two situations. The first situation is defined in Article 3(2) which stipulates that China is entitled to take countermeasures if a foreign state, acting in violation of international law and basic norms of international relations, imposes discriminatory restrictive measures against Chinese citizens and organizations, and intervenes in

[7] *See* Lifa Fa (立法法) [Legislation Law of P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective Jul. 1, 2000, amended Mar. 15, 2015, effective Mar. 15, 2015), arts. 29 & 37 (Chinalawinfo).

[8] *See* Zhao Deming (赵德铭) et al., *Fan Waiguo Zhicai Fa Shuping* (《反外国制裁法》述评) [*A Review of the Anti-Foreign Sanctions Law*], GUOJI JINGJIFA XUEKAN (国际经济法学刊) [J. INT'L ECON. L.], no. 1, 2022, at 5.

[9] *See* Illustration on the Draft AFSL, at 1044.

China's internal affairs.[10] The text of this article does not make clear the relationship among these elements, for instance, whether they are cumulative or parallel.[11] As a comparison, the first draft of this article provided that if foreign countries restrain and suppress Chinese citizens and organizations with the purpose of intervening in China's internal affairs and through discriminatory restrictive measures based on their domestic law, China has the right to take corresponding measures.[12] During the second reading of the draft AFSL, some members of the NPCSC suggested that the conditions to apply the AFSL be further clarified. They submitted that unilateral sanctions imposed by foreign countries against China under any pretext or based on their domestic law explicitly violate international law and basic principles of international relations, and thus constitute internationally wrongful acts. As a consequence, it is necessary and legitimate for China to take counter-measures.[13]

The suggestion was accepted by the NPCSC with the insertion of the words "violate international law and basic norms of international relations" at the outset of paragraph 2.[14] Reading the preparatory work of the AFSL leads to the conclusion that the inserted part primarily works to demonstrate the illegal character of discriminatory restrictive measures imposed by foreign countries. Since these measures are the core element of Article 3(2), other elements such as intervening in China's internal affairs and acting in violation of international law, are designed to qualify and define such measures. From this perspective, it can be argued that these elements are cumulative rather than parallel.

Interestingly, the term "unilateral sanctions" does not appear in any part of this law albeit being the main target of the AFSL as indicated by the preparatory history. By contrast, China substituted "discriminatory restrictive measures" for "unilateral sanctions," possibly because there is no generally recognized definition of unilateral sanctions in international law.[15] Some scholars argue that Article 3 paragraph 2 can be considered as a

[10] *See* Anti-Foreign Sanctions Law, art. 3, ¶ 2.

[11] Some Chinese lawyers agree that these conditions should be considered cumulatively. *See* Ren Qing (任清), *Fan Waiguo Zhicai Fa: Shiwu Ge Shiwu Wenda* (《反外国制裁法》：十五个实务问答) [*Anti-Foreign Sanctions Law: fifteen practical questions and answers*], CHUKOU GUANZHI HE ZHICAI GONGZHNONG HAO ("出口管制和制裁"公众号) ["EXPORT CONTROL AND SANCTIONS" WECHAT OFFICIAL ACCOUNT], Jun. 15, 2021, https://mp.weixin.qq.com/s/N3MydsZs7U_0Vi7gZfzysQ.

[12] *See* Quanguo Renmin Daibiao Dahui Xianfa he Falü Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Fan Waiguo Zhicai Fa (Cao'an) Shenyi Jieguo de Baogao (全国人民代表大会宪法和法律委员会关于《中华人民共和国反外国制裁法（草案）》审议结果的报告) [Report on the Constitution and Law Committee's Deliberation Results of the Draft Anti-Foreign Sanctions Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Jul. 15, 2021), 2021 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1045 [hereinafter "Report on the Deliberation Results of the Draft AFSL"].

[13] *See id.*

[14] *See id.*

[15] *See* Surya P. Subedi, *The Status of Unilateral Sanctions in International Law*, *in* UNILATERAL SANCTIONS IN INTERNATIONAL LAW 19, 21 (2021).

definition of "unilateral sanctions" given by China under this specific circumstance.[16] But in any event, China avoids using this term in the official legal text even though it was repeatedly cited during the preparatory work of the AFSL.

B. The Entity List Regime to Be Established

Article 4 authorizes the relevant department of the State Council to add foreign persons and entities who directly or indirectly participate in the determination or implementation of foreign discriminatory restrictive measures to an entity list. Persons and entities on the list will be subject to countermeasures including constraint measures on their property within China, restrictions on their entry into China, and restrictions on their transactions with Chinese persons and organizations. In addition to the persons and entities listed in Article 4, Article 5 further authorizes the government to add their spouses and immediate relatives, senior managers or actual controllers, and organizations in which they serve as senior managers or actually control, to the Entity List.

Article 7 provides that the decision made by the relevant department of the State Council is final, which means the listed persons and entities are not permitted to seek any judicial remedy in China.[17] During the first reading of the draft AFSL, the Director of the Legislative Affairs Commission reported to the NPCSC that in order to strengthen the enforcement and to enhance the deterrent power of countermeasures, the AFSL requires the decision made by the relevant department of the State Council to be final.[18] The finality of the decision also indicates the nature of countermeasures as sovereign acts that cannot be subject to any judicial review pursuant to the Administrative Procedure Law of the People's Republic of China.[19] The sole remedy available to the listed persons and entities is to request the relevant government department to remove them from the list.[20]

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[16] *See* Ma Guang (马光), *Lun Fan Zhicai Cuoshi de Guoji Hefaxing ji Woguo Fan Zhicai Lifa de Wanshan* (论反制裁措施的国际合法性及我国反制裁立法的完善) [*Discussion on the Legality of Anti-Sanction Measures in International Law and the Improvement of the Anti-Sanction Legislation of China*], FAZHI YANJIU (法治研究) [RES. ON RULE OF L.] no. 1, 2022, at 152. *See also* Ren Qing (任清) & Cheng Shuang (程爽), *Fan Waiguo Zhicai Fa Yaodian Jiedu yu Jianyi* (《反外国制裁法》要点解读与建议) [*Interpretation and Suggestions on the Key Points of the Anti-Foreign Sanctions Law*], ZHONGGUO YUANYANG HAIYUN (中国远洋海运) [MARITIME CHINA], no. 7, 2021, at 71.

[17] *See* Jing Yunfeng (景云峰) et al., *Qiye Ruhe Lijie he Zunshou Fan Waiguo Zhicai Fa* (企业如何理解和遵守《反外国制裁法》) [*How Do Companies Understand and Comply with the Anti-Foreign Sanctions Law*], CHINA LAW INSIGHT (Jun. 12, 2021), https://www.chinalawinsight.com/2021/06/articles/corporate-ma.

[18] *See* Illustration on the Draft AFL, at 1044.

[19] *See* Xingzheng Susong Fa, (行政诉讼法) [Administrative Procedure Law of P.R.C. (2017 Amended)] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990, amended Nov. 1, 2014, amended Jun. 27, 2017) art. 13, CLI.1.297380 (Chinalawinfo).

[20] *See* Anti-Foreign Sanctions Law, art. 8.

C. The Enforcement of the AFSL

In accordance with Article 9 of the AFSL, organizations and individuals within China (regardless of their nationality) shall enforce the countermeasures imposed by the relevant department of the State Council. If they fail to comply with the countermeasures, the relevant department may restrict or prohibit them from engaging in related activities. More importantly, Article 10 also requires any organization and individual (within or outside China) not to enforce or assist in enforcing the discriminatory restrictive measures imposed by foreign countries against Chinese citizens or organizations. Otherwise, if they violate this provision and infringe upon the lawful rights and interests of Chinese citizens or organizations, the latter may initiate civil litigations in Chinese domestic courts to demand the cease of the infringement and compensation for losses.

Article 10 does not create an independent cause of action for Chinese citizens and organizations to initiate civil proceedings, but rather falls within the suit of tort that already existed in the Civil Procedure Law of the People's Republic of China.[21] Some scholars warned of the negative economic effect that this article could bring about since it potentially forces foreign companies to "take sides" between China and the US by requiring them not to enforce unilateral sanctions of the US against Chinese citizens and organizations.[22] They also predicted that a large number of litigations would be initiated by Chinese citizens and organizations against foreign companies that comply with sanctions of the US.[23] However, no such lawsuit has been filed in any domestic court of China until now although many foreign companies had potentially violated Article 12 of the AFSL, for instance, those textile enterprises that refuse to use the cotton produced in Xinjiang.[24]

III. UNDERSTAND THE AFSL'S ENTITY LIST FROM A COMPARATIVE PERSPECTIVE

China has currently formed three sets of entity list regimes in the field of foreign trade, export control, and countering foreign sanctions. Before the promulgation of the AFSL, the Ministry of Commerce of China ("MOFCOM") adopted in September 2020 Provisions on the Unreliable Entity List ("PUEL") that proposed the establishment of the Unreliable Entity List

[21] *See* Ye Yan (叶研), *Fan Waiguo Zhicai Fa Di 12 Tiao de Wenti, Pingxi ji Jianyi* (《反外国制裁法》第12条的问题、评析及建议) [*Questions, Comments and Suggestions on Article 12 of the Anti-Foreign Sanctions Law*], CHUKOU GUANZHI HE ZHICAI GONGZHNONG HAO ("出口管制和制裁"公众号) [EXPORT CONTROL AND SANCTIONS WECHAT OFFICIAL ACCOUNT] (Jun. 17, 2021), https://mp.weixin.qq.com/s/-MpY3JI_3Nq9EOb30mb6aA.

[22] *See* Zhao et al., *supra* note 8, at 12. *See also* Ye, *supra* note 21.

[23] *See* Ye, *supra* note 21.

[24] *See id.*

System.[25] The NPCSC subsequently enacted the Export Control Law of the People's Republic of China ("Export Control Law") in October 2020, by which a control list regime will be established.[26] The PUEL and the Export Control Law, together with the AFSL, all resort to entity lists as the legal tool, but their functions are distinctive and they deal with different concerns of China in international relations. In this part, the author will identify situations where these three sets of entity list regimes are applicable. Moreover, the author will also compare the Entity list in the AFSL with entity lists of the US and the EU so as to find different concerns and purposes among states when imposing restrictive measures, and then explain why China differs from others.

A. A Comparison with Other Entity Lists in Chinese Domestic Law

As stated above, the PUEL and the Export Control Law also establish entity list regimes that apply in different situations. The PUEL is mainly used to protect Chinese enterprises' interests and safeguard a fair and free international economic order,[27] although the Chinese government has not yet issued any relevant entity list. On the other hand, the Export Control Law authorizes the Chinese government to designate foreign importers and end-users who violate end-user or end-use commitment, threaten China's national security and interests, or use controlled items for terrorism, and to restrict or prohibit transfers of controlled items to them.[28] Similarly, no control list has been issued by China under the Export Control Law.

1. The PUEL

The PUEL is directed at foreign entities which apply discriminatory measures against Chinese companies in the field of foreign trade. One example would be that foreign suppliers arbitrarily cut off their supply to, or suspend their transactions with Chinese companies (most probably high-tech enterprises, such as Huawei) for the reason of complying with foreign sanctions against the latter.[29] In addition, foreign entities which threaten China's sovereignty, national security, and development interests, will be added to the list as well. The consequences of being identified as an

[25] *See* Bu Kekao Shiti Qingdan Guiding (不可靠实体清单规定) [Provisions on the Unreliable Entity List] (promulgated by the St. Council, Sep. 19, 2020, effective Sep. 19, 2020), art. 2, CLI.4.346165 (Chinalawinfo).

[26] *See* Chukou Guanzhi Fa (出口管制法) [Export Control Law of P.R.C.] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 17, 2020, effective Oct. 17, 2020), art. 18, CLI.1.346977 (Chinalawinfo).

[27] *See* Shangwubu Tiaoyue falüsi Fuzeren jiu Bu Kekao Shiti Qingdan Guiding Da Jizhe Wen (商务部条约法律司负责人就《不可靠实体清单规定》答记者问) [Director of the Department of Treaty and Law Answers Reporter's Questions Relating to the Provisions on the Unreliable Entity List] (promulgated by the MOFCOM, Sep. 20, 2020), http://www.mofcom.gov.cn/article/news/202009/20200903002631.shtml.

[28] *See* Export Control Law, art. 21.

[29] *See* Zhou Yong (周勇) et al., *Dui "Bu Kekao Shiti Qingdan" de Falü Fenxi* (对"不可靠实体清单"的法律分析) [*Legal Analysis of China's "Unreliable Entities List"*], JUNHE FAPING (君合法评) [JUNHE LLP LAW UPDATES] (Jun. 18, 2019), http://www.junhe.com/legal-updates/962.

unreliable entity include restrictions or prohibitions on the export or import activities, investment, entry, residence, and work in China. The relevant government department may also impose a fine of a certain amount corresponding to the severity of the circumstances. Pursuant to Article 12 of the PUEL, Chinese individuals or enterprises can ask for permission to conduct transactions with the listed entity where special circumstances so require.

On the other hand, the entity list of the AFSL is designed to counter those who directly or indirectly participate in the determination and enforcement of discriminatory restrictive measures, which is broader than foreign entities who apply discriminatory restrictive measures against Chinese companies in the economic and trade fields. The PUEL focuses on foreign enterprises that enforce foreign unilateral sanctions, while the AFSL also adds persons and entities getting involved in the decision-making process of these sanctions, thus including foreign politicians. In addition, the PUEL permits Chinese individuals and enterprises to apply for transactions with the listed entity if necessary, while the text of the AFSL does not contain such a provision.

2. The Control List in the Export Control Law

The application of the Export Control Law is confined to "controlled items" which include dual-use items, military products, nuclear products, and any other goods, technologies, or services in relation to national security and non-proliferation.[30] A control list will be established under Article 18 which authorizes the Chinese government to add foreign importers and end-users if they fall within any of the following circumstances: (1) violate end-use and end-user commitment, (2) threaten China's national security and interests, or (3) use the controlled items for terrorism. These entities will be restricted or prohibited from acquiring the controlled items. Where it is necessary to trade with an entity on the control list, export business operators can ask for permission.[31]

The control list does not work to counter foreign sanctions, but rather to monitor and regulate the export of sensitive items to foreign importers and end-users which have nothing to do with unilateral sanctions imposed by foreign countries against China. The latter will fall within the scope of the AFSL where foreign sanctions in respect of export control against Chinese citizens and organizations can also trigger the application of the AFSL in accordance with Article 3(2).

[30] *See* Export Control Law, art. 2.
[31] *See* Export Control Law, art. 18.

B. A Comparison with Entity Lists in the US and the EU

Entity lists contained in numerous sanctions programs have been used by the US and the EU to advance their foreign policy, protect national security, and fulfill their international obligations such as non-proliferation.[32]

1. A Brief Introduction on the Entity Lists in the US/EU

The US sanctions regime is primarily based on two legislations, each of which confers upon the US President's broad authority to impose unilateral sanctions to address various concerns.[33] The first is the Trading with the Enemy Act of 1917, which authorizes the President to impose sanctions against hostile states during times of war.[34] The second is the International Emergency Economic Powers Act, which gives the President authority to declare a national emergency and take sanction measures in response to any unusual and extraordinary threat that has its source wholly or in substantial part outside the United States, including those that occur in times of peace.[35] Currently, 37 sanctions programs have been established by the US to address a wide array of concerns around the world from human rights abuses, nuclear proliferation, anti-terrorism to democracy promotion.[36] The US Department of the Treasury's Office of Foreign Assets Control ("OFAC") is the principal government agency responsible for enforcing the sanctions regime by designating persons and entities and placing them on different entity lists, for instance, the Specially Designated Nationals And Blocked Persons List ("SDN List").[37] The designated persons and entities will be subject to assets freeze, prohibition of transactions with US persons, and restrictions on export control in accordance with the relevant sanction program.

In comparison with that of the US, the foreign sanction regime of the EU is less complicated. The authority to impose sanctions rests on Article 215(2) of the Treaty on the Functioning of the EU which provides that the European Council may adopt a decision to impose restrictive measures against natural and legal persons, or non-state entities.[38] All targeted persons and entities will be added to the Consolidated Financial Sanctions List through the European Council's decisions. Available restrictive measures include arms embargoes, restrictions on admission (travel bans), asset freezes, and restric-

[32] *See* Zachary Goldman & Alina Lindblom, *The US Position and Practice with Regards to Unilateral and Extraterritorial Sanctions: Reimagining the US Sanctions Regime in A World of Advanced Technology*, *in* RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS 130, 130 (Charlotte Beaucillon ed., 2021).

[33] *See id.*

[34] *See* Trading with the Enemy Act of 1917, 50 U.S.C. §§ 4301–4341.

[35] *See* International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1708.

[36] See *Sanctions Programs and Country Information*, U.S. DEPARTMENT OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information.

[37] *See* Goldman & Lindblom, *supra* note 32, at 132.

[38] *See* Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, O.J. (C 326) 47, art. 215, ¶ 2.

tions on imports and exports.[39] The EU entity list regime has various objectives, such as promoting international peace and security, preventing conflicts, and supporting democracy, the rule of law, and human rights.[40]

2. Differences and the Underlining Rationale

The entity list in the AFSL differs from that of the US or the EU in the following two aspects. First, as illustrated by legislators during the first reading of the draft AFSL, the application of the Entity list in the AFSL is confined to unilateral sanctions imposed by foreign states against Chinese citizens and organizations that constitute intervention in China's internal affairs, or violate China's territorial integrity.[41] By contrast, the US and the EU apply entity lists in more situations including human rights protection and democracy promotion, where they not only deal with threats to their own territory but cover situations outside their jurisdiction, such as the US Global Magnitsky Sanction Program which addresses serious human rights abuses and corruption outside the US.[42] Second, the entity list in the AFSL is more defensive and reactive because it works to counter foreign sanctions instead of imposing unilateral sanctions by China on its own initiative. Typically, the title of the AFSL uses the term "anti-foreign sanctions" which explicitly indicates passiveness. By comparison, the US and the EU seek to extend their jurisdiction and advance their foreign policy goals through unilateral sanctions, thus making their entity list regimes more proactive.

China declines to extend the application of the AFSL to more situations such as human rights abuses outside China because otherwise, it would contravene China's consistent foreign policy on the denial of foreign intervention that could result in the regime change for whatever reason, including human rights protection and democracy promotion.[43] China has repeated in the AFSL its adherence to the Five Principles of Peaceful Coexistence which underline sovereign equality and non-intervention.[44] In 2016, China and Russia issued a joint Declaration on the Promotion of International Law where two countries share the view that "the principle of sovereign equality is crucial for the stability of international relations," and they "fully support the principle of non-intervention in the internal or external affairs of States, and condemn as a violation of this principle any

[39] See *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy* 8, COM (2020) 9432 final (Dec. 17, 2020).

[40] See *Objectives of Restrictive Measures (Sanctions)*, E.U. COMMMISSION, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en#objectives.

[41] *See* Illustration on the Draft AFSL, at 1044.

[42] *See* Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption, Exec. Order No. 13,818, 82 C.F.R., at 60,839 (Dec. 20, 2017).

[43] *See* Matthias Vanhullebusch, *Regime Change, the Security Council and China*, 14 CHINESE J. INT'L L. 665, 671 (2015).

[44] *See* Anti-Foreign Sanctions Law, art. 2.

interference by States in the internal affairs of other States with the aim of forging change of legitimate governments."[45] In addition, they strongly oppose the imposition of unilateral coercive measures not based on international law.[46] Therefore, China will not impose unilateral sanctions upon other states for the purpose of human rights protection or democracy promotion.

IV. THE LEGITIMACY OF THE AFSL UNDER INTERNATIONAL LAW

Almost all persons and entities that are added to the Entity list in the AFSL until now have been foreign politicians and political organizations, except in a few cases where certain US defense contractors were added because they participated in the US's arms sales to Taiwan,[47] and where the Essex Court Chamber composed of some British barristers was designated for maliciously spreading lies and false information relating to the human rights issue in Xinjiang.[48] In this part, the author will identify the legitimate rationale of the AFSL from the perspective of general international law and WTO law. Part IV(A) focuses on the legitimacy of restrictive measures against foreign political subjects under general international law, and Part IV(B) will discuss the legitimacy of these measures against foreign commercial subjects under WTO law. After the discussion on the legitimacy under international law, in Part IV(C) the author will make some comments on why states return to private remedies and resort to self-help more frequently.

A. Legitimacy Under General International Law

Under general international law, a state has the authority to exercise jurisdiction within its own territory over persons, objects, and activities that are situated or occur outside its territory unless special rules prohibit so. The authority reflects the state sovereignty and has been recognized by the Permanent Court of International Justice in *Lotus* case.[49] Therefore, anti-sanction measures adopted in accordance with the AFSL are *prima facie* not

[45] See *Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, MINISTRY OF FOREIGN AFFAIRS OF RUSSIA (Jun. 25, 2016), https://mid.ru/en/foreign_policy/position_word_order/1530748/.

[46] *See id.*

[47] See *Waijiaobu Fayanren Zhao Lijian Zhuchi Lixing Jizhe Hui* (外交部发言人赵立坚主持例行记者会) [*Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference*] (promulgated by the MFA of P.R.C, Oct. 26, 2020), https://www.fmprc.gov.cn/web/fyrbt_673021/jzhsl_673025/202010/t20201026_5419454.shtml.

[48] See *Waijiaobu Fayanren Xuanbu Zhongfang dui Yingguo Youguan Renyuan he Shiti Shishi Zhicai* (外交部发言人宣布中方对英国有关人员和实体实施制裁) [Foreign Ministry Spokesperson Announced That China Imposed Sanctions on Relevant British Individuals and Entities] (promulgated by the MFA of P.R.C., Mar. 26, 2021), https://www.fmprc.gov.cn/fyrbt_673021/dhdw_673027/202103/t20210326_9171337.shtml.

[49] *See* The Case of the S.S. "Lotus" (France v. Turkey), Judgment, 1927 P.C.I.J. (ser A) No. 10, at 18 (Sep. 7, 1927).

in violation of international law unless a specific rule that prohibits China from applying such measures exists.

1. Anti-sanction Measures that Constitute Retorsion Do Not Contravene International Law

Before moving to justifications that China may invoke, this Note shall first examine whether anti-sanction measures contained in the AFSL violate any rule of general international law. Arguably, these measures against foreign politicians and political organizations constitute retorsion that does not contravene international law. Retorsion refers to those reactions that are taken by a state against all kinds of unwelcome acts adopted by another state, and do not interfere with the latter's rights under international law.[50] As an instrument of self-help in the form of unilateral acts applied by states to enforce their rights or their political or moral interests, measures of retorsion amount to unfriendly acts which are wrongful not in the legal but only in the political or moral sense, or a simple discourtesy.[51]

Restrictive measures imposed by China under the AFSL, such as freezing the assets of foreign politicians or political organizations, and prohibitions on their entry into China, are reactions taken by one state in a political sense against another state's prior unfriendly acts with the same character. These reactions constitute retorsion rather than internationally wrongful acts that are prohibited by general international law, for instance, the principle of non-intervention. The International Court of Justice ("ICJ") in *Nicaragua* case dismissed the argument submitted by Nicaragua that the cessation of economic aid, trade embargo, and sugar quota restrictions imposed by the US for coercing Nicaragua to accept US policies and political demands were in violation of non-intervention.[52] The Court observed that intervention is wrongful when it uses methods of coercion the element of which is particularly obvious in the case where military force is used.[53] In the ICJ's view, any economic intervention should be narrowly construed, and economic sanctions that possibly contravene international economic instruments cannot suffice the coercion element.[54] Similarly, anti-sanction measures against foreign political subjects under the AFSL do not suffice either, and they cannot be considered as in violation of international law.

[50] *See* Thomas Giegerich, *Retorsion*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Sep. 2020), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e983.

[51] *See id.*

[52] *See* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, 1986 I.C.J. 14, ¶ 239, 244-245 (Jun. 27, 1986).

[53] *See id.*, ¶ 205.

[54] *See* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 370 (2009).

2. Countermeasures as an Available Justification

Even if some restrictive measures adopted in accordance with the AFSL violate general international law, they can be justified by countermeasures that preclude the wrongfulness and excuse the responsibility. Many Chinese scholars share this view by arguing that these measures fulfill the conditions required by countermeasures.[55] These conditions are illustrated in Draft Articles on Responsibility of States for Internationally Wrongful Act adopted by the International Law Commission: (1) countermeasures must be taken against a state which is responsible for an internationally wrongful act, (2) countermeasures must be commensurate with the injury suffered, (3) countermeasures shall be terminated as soon as the responsible state has complied with its obligations.[56]

The preparatory work of the AFSL proves that Chinese legislators perceived foreign unilateral sanctions with the purpose of intervening in China's internal affairs as an explicit violation of international law.[57] In order to induce these foreign countries to revoke their unilateral sanctions, China has the right to take reactions proportionate to the injury suffered. Travel bans and freezing assets are common sanction measures that the US and the EU imposed on Chinese persons and organizations under the pretext of human rights protection. China is thus entitled to apply restrictive measures the gravity and forms of which are equivalent to those of foreign unilateral sanctions. Therefore, countermeasures could serve as an available justification for China.

B. Legitimacy Under WTO Law

In this part, the author will discuss whether anti-sanction measures against foreign commercial subjects may violate WTO law although until now the AFSL has not been applied frequently in such cases. China is a Member of the WTO and bears the obligation to respect those rules contained in WTO-covered agreements. According to Article XVI:4 of the WTO Agreement,[58] a Member's domestic rules *as such* shall comply with WTO rules. Hence, the AFSL establishing the entity list regime must be compatible with WTO rules. Anti-sanction measures are retaliatory in nature that work to counter unilateral sanctions previously imposed by foreign states usually being also WTO Members. In this sense, Article 23 of the WTO Dispute Settlement Understanding ("DSU") which prohibits Members from resorting

[55] *See* Huo Zhengxin (霍政欣), *Fan Waiguo Zhicai Fa de Guojifa Yihan* (《反外国制裁法》的国际法意涵) [*Implications of the Anti-Foreign Sanctions Law in International Law*], BIJIAO FA YANJIU (比较法研究) [J. OF COMP. L.], no. 4, 2021, at 153-154. *See also* Zhao, *supra* note 8, at 11.

[56] *See* Draft Articles on Responsibility of States for Internationally Wrongful Act, G.A. Res. 56/83 (Dec. 12, 2001), arts. 49–53.

[57] *See* Report on the Deliberation Results of the Draft AFSL, at 1045.

[58] *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. XVI:4.

to self-help or retaliatory measures among them is relevant.[59] In addition, restrictive measures such as restrictions on transactions (including import and export) with Chinese entities or individuals may contravene Article I:1 of the General Agreement on Tariffs and Trade ("GATT"), i.e., the Most-Favoured-Nation treatment ("MFN treatment"). The author will also analyze whether exceptions contained in Article XX and XXI of the GATT could justify these measures.

1. Article 23 of the DSU

Article 23 of the DSU requires Members to resort to WTO dispute settlement procedures when seeking the redress of a violation of obligations or other nullification or impairment of benefits under WTO covered agreements. This provision excludes unilateral self-help and rejects unilateralism as a substitute for the multilateral approach to resolving trade disputes.[60] An important element to establish the violation of Article 23 is the phrase "seek the redress of a WTO violation." The Panel in *EC—Commercial Vessels* observed that this phrase covers "any act of a Member in response to *what it considers* to be a violation of a WTO obligation by another Member whereby the first Member attempts to restore the balance of rights and obligations by seeking the removal of the WTO inconsistent measure, by seeking compensation from the other Member, or by suspending concessions or obligations under the WTO Agreement in relation to that Member."[61] Whether this element is satisfied must be based on a thorough review of statements and reactions made by the Member concerned.

In *US—Certain EC Products*, the Panel took note of the Trade Representative of the US ("USTR") Press Release that announced the imposition of a retaliatory duty exclusively on products from the European Communities ("EC") and explicitly referred to the WTO inconsistency of the EC bananas regime as the reason to add such duties.[62] The Panel also noticed the Press Conference held by the then Deputy USTR where he stated that the US retaliated by effectively suspending the trade in response to the harm caused by the EC's WTO inconsistent banana regime.[63] Relying on these statements, the Panel concluded that the US's imposition of duties on certain EC imports was a unilateral measure seeking the redress of WTO violation.[64]

[59] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23, Apr. 15, 1994, *in* Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1867 U.N.T.S. 401 [hereinafter "DSU"].

[60] *See* Panel Report, *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, ¶ 7.170, WTO Doc. WT/DS222/R (adopted Jan. 28, 2002).

[61] *See* Panel Report, *European Communities—Measures Affecting Trade in Commercial Vessels*, ¶ 7.196, WTO Doc. WT/DS301/R (adopted Apr. 22, 2005).

[62] *See* Panel Report, *United States—Import Measures on Certain Products from the European Communities*, ¶ 6.25–6.26, WTO Doc. WT/DS165/R (adopted Jul. 17, 2000).

[63] *See id.*, ¶ 6.31.

[64] *See id.*, ¶ 6.24.

With respect to restrictive measures under the AFSL, they do not contravene Article 23 of the DSU because the requirement "seek the redress of a WTO violation" cannot be satisfied. These measures are intended to counter unilateral sanctions imposed by foreign countries for the purpose of intervening in China's internal affairs which usually do not affect China's rights and benefits under the WTO-covered agreements. For instance, the US defense contractors Lockheed Martin, Boeing Defence, and Raytheon were added to the Entity list for their arms sales to Taiwan, which is not regulated by any WTO rule. The Essex Court Chamber was designated for its participation in spreading misinformation relating to human rights issues in Xinjiang which also falls outside WTO rules. Accordingly, anti-sanction measures against foreign commercial subjects for the purpose of countering intervention do not violate Article 23 of the DSU, and China is entitled to seek private remedy when WTO rules are not involved. Nevertheless, China will still have the right to seek the redress of a WTO violation in accordance with rules and procedures of the DSU if discriminatory restrictive measures imposed by foreign countries against Chinese persons and organizations violate WTO law.

2. Article I:1 of the GATT

The MFN treatment mandated by Article I:1 of the GATT is a fundamental non-discrimination obligation that has been described as "one of the pillars of the WTO trading system."[65] WTO jurisprudence sets out the order of examination and four elements to be considered: (1) the measure at issue must fall within the scope of application of Article I:1, for instance, all rules and formalities in connection with importation and exportation; (2) the imported or exported products at issue are like products; (3) the measure at issue confers an advantage, favor, privilege, or immunity upon a product originating in or destined for any other country; and (4) the advantage so granted is not extended immediately and unconditionally" to like products.[66]

With regard to the first element, the Panel in *US—Poultry (China)* accorded a broad interpretation to the scope of the application of Article I:1. The Panel conceived the phrase "all rules and formalities in connection with importation" as encompassing both measures directly related to the process of importation, and those that have an impact on actual importation.[67] Based on such a broad interpretation, anti-sanction measures restricting the importation and exportation activities of foreign entities and individuals with China can satisfy this element. Concerning the second and fourth elements,

[65] *See* Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶ 69, WTO Doc. WT/DS139/AB/R (adopted May. 31, 2000).

[66] *See* Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.86, WTO Doc. WT/DS400/AB/R (adopted May. 22, 2014).

[67] *See* Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, ¶ 7.410, WTO Doc. WT/DS392/R (adopted Sep. 29, 2010).

the listed entities and persons will be subject to import and export restrictions while other entities and persons can import or export the same products in normal transactions with China. Hence, the second and the fourth elements are satisfied.

To determine whether the third element is also satisfied, the author recalls that the entity list under the AFSL is directed at persons and entities of a specific country that imposes discriminatory restrictive measures against China. Hence, the entity list under the AFSL will affect the importation and exportation of products based on the origin of the listed entities and persons. In this regard, a restriction on the listed entity or person's trade activities will amount to the restriction on the importation and exportation of products originating in or destined for a specific Member. Accordingly, restrictions applied under the AFSL may not be compatible with the MFN treatment. The author will continue to analyze whether such a violation could be justified by any exceptions under WTO law.

3. Available Justifications for China Under WTO Law

As the Appellate Body pointed out in *China—Publications and Audiovisual Products*, there are two ways for WTO Members to be consistent with WTO rules.[68] The first is not to contravene any WTO obligation, and the second is to justify their unlawful measure by relying on available exceptions. WTO agreements provide Members with several exceptions, such as general exceptions and the national security exception contained in Article XX and XXI of the GATT.

Article XX:(a) of the GATT 1994 provides that WTO Members can apply measures "necessary to protect public morals." As interpreted by the Panel in *US—Gambling*, the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.[69] In the Panel's view, the content of "public morals" is dependent upon prevailing social, cultural, ethical, and religious values.[70] Further, WTO Members should be given some scope to define and apply for themselves the concept of "public morals" in their respective territories, according to their own systems and scales of values.[71] Accordingly, the Panel accorded a broad discretion for WTO Members to define their own public morals. The Panel in *China—Publications and Audiovisual Products* has accepted China's submission that the protection of territorial integrity is a public

[68] *See* Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 223, WTO Doc. WT/DS363/AB/R (adopted Dec. 21, 2009).

[69] *See* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.465, WTO Doc. WT/DS285/R (adopted Nov. 10, 2004).

[70] *See id.*, ¶ 6.461.

[71] *See id.*

moral of China.[72] Thus, anti-sanction measures adopted to counter foreign intervention in China's internal affairs relating to Hong Kong and Xinjiang can be justified by public morals of China that include the protection of territorial integrity.

Additionally, Article XXI:(b) of the GATT confirms WTO Members' right to take any action which it considers necessary to protect its essential security interests under certain situations. In *Russia—Traffic in Transit*, the Panel clarified that WTO Members remain free to define their own essential security interests and take measures as they consider necessary, and they must act in good faith.[73] Measures to be justified under Article XXI:(b) shall fall within any of the following situations: (1) related to fissionable materials; or (2) related to the traffic in arms, ammunition, and implements of war; or (3) taken in war or "other emergency in international relations." National security may serve as an available approach for China to justify restrictions on listed entities and persons' transactions with China, [74] but more attention should be paid to the application of Article XXI:(b).

WTO jurisprudence has interpreted the term "other emergency in international relations" in two cases. The Panel in *Russia—Traffic in Transit* observed that this phrase generally refers to "a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state."[75] Particularly, the Panel noted that political and economic differences between States do not constitute such an emergency unless they touch upon military and defense interests, or the maintenance of law and public order. [76] In *Saudi Arabia—Intellectual Property Rights*, the Panel discussed whether tensions between Saudi Arabia and Qatar fell within the term "other emergency in international relations," while no armed conflict existed at that moment. The Panel noticed that these two countries had severed diplomatic and consular relations, and terminated all economic and trade relations. The severance of all ties was perceived as a strong indication of an exceptional and serious crisis.[77] Moreover, the Panel also recalled the context of severance where Saudi Arabia repeatedly alleged that Qatar supported terrorism and extremism, and such accusation might also reflect the situation of heightened tension.[78] Hence, the Panel concluded there was an emergency in international relations. These cases

[72] *See* Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.760–7.763, WTO Doc. WT/DS363/R (adopted Aug. 12, 2009).

[73] *See* Panel Report, *Russia—Measures Concerning Traffic in Transit*, ¶ 7.132, WTO Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter "Traffic in Transit Panel Report"].

[74] *See* Huo, *supra* note 55, at 152.

[75] *See* Traffic in Transit Panel Report, ¶ 7.76.

[76] *See id.*, ¶ 7.75.

[77] *See* Panel Report, *Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights*, ¶ 7.258–7.262, WTO Doc. WT/DS567/R (adopted Jun. 16, 2020).

[78] *See id.*, ¶ 7.263.

indicate that the phrase "other emergency in international relations" has been narrowly interpreted by panels to exclude political tensions among Members that do not suffice certain gravity.

In conclusion, Article XX:(a) and Article XXI:(b) of the GATT may serve as legitimate justifications for China to impose restrictions on trade activities of listed entities and persons with Chinese citizens and organizations.

C. Why States Return To Self-Help: The Weakness and Dilemma of International Law

International law traditionally recognizes both the right of states to enforce and protect their own rights through unilateral actions and the obligation to peacefully settle disputes through consensual methods.[79] Math Noortmann defined them as the self-help and self-constraint approach respectively.[80] The latter mainly consists of bilateral negotiations and third-party dispute settlement mechanisms previously agreed upon by the parties. These two approaches are not mutually exclusive since self-help may appear at any stage of the dispute settlement procedures under the self-constraint approach. For instance, self-help measures may be used for bargaining during the bilateral negotiation,[81] and will also be applied in the phrase of implementation due to the lack of effective international enforcement mechanisms.[82] From a broader perspective, self-help remains prominent in the field of enforcing international rules.[83]

There are arguably two major reasons for a state to seek the self-help rather than self-constraint approach: one is the weakness of international law and the other is the political necessity in international relations.[84] Self-help measures can be further characterized on the basis of their objectives as: (1) symbolic, (2) protective, (3) remedial, (4) manipulative, and (5) punitive.[85] Among these objectives, the weakness of international law will more likely result in protective or remedial self-help measures against illegal actions that cannot be redressed effectively by international institutions.[86] On the other hand, the political necessity corresponds to symbolic self-help measures that intend to demonstrate the disapproval of another state's policies or to satisfy

[79] *See* MATH NOORTMANN, ENFORCING INTERNATIONAL LAW: FROM SELF-HELP TO SELF-CONTAINED REGIMES 3 (2005).

[80] *See id.*, at 85.

[81] *See* CECILIA ALBIN, JUSTICE AND FAIRNESS IN INTERNATIONAL NEGOTIATION 4–7 (2001).

[82] *See* NOORTMANN, *supra* note 79, at 108.

[83] *See* Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT'L L. 539, 539 (1995).

[84] *See* Cai Congyan, *China's Position and Practice Concerning Unilateral Sanctions*, *in* RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS 70, 71 (Charlotte Beaucillon ed., 2021).

[85] *See* NOORTMANN, *supra* note 79, at 17 & 18.

[86] *See* Oscar Schachter, *Self-Help in International Law: U.S. Action in the Iranian Hostages Crisis*, 37 J. INT'L AFFAIRS 231, 231 (1984).

domestic opinions relating to a matter of international relations.[87] With respect to the AFSL, both the weakness of international law and the political necessity contribute to the establishment of the entity list regime. In this Note, the author focuses on the former, i.e., how the shortage of effective dispute settlement in international law would impel states to private remedies.

1. Lack of Effective Dispute Settlement Mechanisms Under General International Law

Under general international law, the self-constraint approach makes it available for states to settle their disputes through diplomatic or judicial methods. Among these methods, adjudication by a third-party organ is a good way to dispose of legal issues because states can obtain binding and dispositive decisions given by impartial judges.[88] However, it is a fundamental principle of international law that no state need submit its dispute to adjudication unless it gives prior consent.[89] In other words, international judicial dispute settlement mechanisms are voluntary and optional.[90] Notwithstanding the existence of the ICJ's compulsory jurisdiction, states are reluctant to subscribe to it since they are aware of the risks involved in a commitment to litigate their disputes whose results cannot be foreseen.[91] Currently, 73 states (China and the US not included) have deposited declarations to accept the Court's compulsory jurisdiction,[92] while many of them contain reservations excluding some kinds of disputes. The lack of compulsory mechanisms in general international law denies the option to resolve disputes relating to unilateral sanctions through adjudication. Without such compulsory mechanism and binding decisions rendered thereby, states that impose illegal unilateral sanctions cannot be forced to rectify their wrongful acts unless the victim states resort to private remedies.

The shortage of effective enforcement mechanisms is another problem. Although Article 94(2) of the United Nations Charter authorizes the Security Council to make recommendations that it deems necessary if any party to a dispute fails to perform its obligation incumbent upon it under the judgment rendered by the ICJ,[93] the Security Council is not obliged to take action.[94] In practice, some states explicitly refused to comply with the judgment

[87] *See* NOORTMANN, *supra* note 79, at 19.

[88] *See* JOHN MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 310 (6th ed., 2017).

[89] *See* Richard Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 EMORY J. INT'L DISP. RESOL. 131, 135 (1987).

[90] *See* Arthur Watts, *Enhancing the Effectiveness of Procedures of International Dispute Settlement*, 5 MAX PLANCK Y. B. U.N. L. 21, 36 (2001).

[91] *See* MERRILLS, *supra* note 88, at 311.

[92] Deposited declarations recognizing the jurisdiction of the Court as compulsory have been published by the ICJ on its official website: https://icj-cij.org/en/declarations.

[93] *See* U.N. Charter, art. 94, ¶ 2.

[94] *See* BRUNO SIMMA ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 3288 (3rd ed., 2012).

rendered by the Court that did not favor them, without being urged by the Security Council to enforce it.[95] This may indicate that resolving disputes through international courts and tribunals cannot assure the enforcement of the judgment even if the jurisdiction bar is lifted. Such a limitation, in turn, contributes to the preference of states for taking unilateral actions.

2. Lengthy Procedures of WTO Dispute Settlement and the Paralysis of the Appellate Body

In comparison with general international law, WTO has an integrated dispute settlement system that applies to all covered agreements.[96] Article 23(1) of the DSU requires that Members shall have recourse to the DSU rules and procedures for seeking the redress of a WTO violation, and nullification or impairment of benefits under all covered agreements.[97] This provision is considered as establishing the compulsory and exclusive jurisdiction of the WTO dispute settlement mechanism.[98] The primary objective of this mechanism is to resolve disputes in a prompt and positive manner, and all other objectives set out in the DSU are subordinate to this task.[99] Nevertheless, lengthy procedures prevent WTO Members from obtaining timely relief. A panel proceeding could last for three to nine months,[100] and the duration of the appellate review could be longer up to 691 days.[101] Such delay is adverse to the prompt settlement of disputes, especially in urgent situations such as the US-China trade tensions.

Further, the Appellate Body ("AB") has been unable to review new appeals since December 2019 given its ongoing vacancies caused by the US's blockage of the selection of the AB members.[102] Many WTO Members make use of the paralysis of the AB to set aside the panel report that is adverse to their interests by submitting an appeal.[103] On April 30, 2020, China, the EU, and other 17 WTO Members proposed to establish the Multi-

[95] For instance, the U.S. refused to comply with the judgment rendered by the I.C.J. in *Nicaragua* case, and when Nicaragua invoked Article 94(2) of the U.N. Charter to the Security Council to demand enforcement, the U.S. vetoed the attempt. *See* U.N. SCOR, 41st Sess., 2718th mtg. at 28, U.N. Doc. S/PV.2718 (Oct. 28, 1986).

[96] *See* Appellate Body Report, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, ¶ 64, WTO Doc. WT/DS60/AB/R (Nov. 2, 1998).

[97] *See* DSU, art. 23, ¶ 1.

[98] *See* WTO SECRETARIAT, A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM 16 (2nd ed., 2017).

[99] *See* Robert McDougall, *The Crisis in WTO Dispute Settlement: Fixing Birth Defects to Restore Balance*, 52 J. WORLD TRADE 867, 886 (2018).

[100] *See* DSU, art. 9. *See also* Working Procedures of the panel, Appendix 3 to the DSU, ¶ 12.

[101] *See* WTO Analytical Index, *DSU—Article 17 (Jurisprudence)*, at 4 (Jun. 2021), https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art17_jur.pdf.

[102] *See* Press Release, *DG Azevêdo to Launch Intensive Consultations on Resolving Appellate Body Impasse*, WTO (Dec. 9, 2019), https://www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm.

[103] As of 22 March 2022, 14 appeals have been notified by WTO Members to the Dispute Settlement Body during the paralysis of the AB, *see* Current Notified Appeals, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

Party Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU for a temporary replacement of the AB,[104] but the absence of the US in this mechanism makes the crisis unresolved. The paralysis of the AB also undermines Members' confidence in the dispute settlement mechanism of the WTO.

V. CONCLUSION

The AFSL provides China with a new legal tool to counter foreign unilateral sanctions taken under the pretext of human rights protection or any other concern. Different from entity list regimes of the US or the EU, the application of the AFSL is confined to discriminatory restrictive measures imposed by foreign countries that purport to intervene in Chinese internal affairs and act in violation of international law. Such passive nature and limited scope of application confer legitimacy on the AFSL. Under general international law, restrictive measures against foreign political subjects may be classified as retorsion which does not contravene rules of general international law. In any event, countermeasures may serve as an available justification for any potential violation of general international law. Under WTO law, restrictive measures against foreign commercial subjects with the purpose of countering intervention cannot amount to seeking redress of a WTO violation, and thus are compatible with Article 23 of the DSU. Notwithstanding the potential inconsistency with the MFN treatment of the GATT, these measures can be justified by public morals or national security exceptions.

As a general rule, self-help measures should be subordinated to peaceful settlement of disputes by bilateral negotiation or third-party adjudication.[105] However, China's enactment of the AFSL indicates an emerging phenomenon that states have more frequent recourse to private remedies as a supplementary means though not necessarily a substitute for diplomatic or judicial methods. The weakness and dilemma of international law in respect of dispute settlement probably contribute to such a phenomenon. Due to the shortage of a world court with compulsory jurisdiction and an effective enforcement mechanism, states are inclined to take retaliation measures in response to a prior violation of general international law. With the lengthy procedures and the paralysis of the AB, the WTO dispute settlement mechanism also comes to a crisis that is hard to be resolved in a short term, leaving WTO Members self-help as a more practical choice in case of emergency. As Stephan Wittich argued, the more international law offers effective implementation and enforcement mechanisms, the more its

[104] *See* Dispute Settlement Body, *Statement on A Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, WTO Doc. OB/DSB/1/Add.12 (Apr. 30, 2020).

[105] *See* Schachter, *supra* note 86, at 231.

substantive rules will be observed and respected.[106] If the vacancy of an effective dispute settlement mechanism remains, substantive rules of both general international law and WTO law will possibly be challenged by states with more frequency but without much cost.

[106] *See* Stephan Wittich, *The Judicial Functions of the International Court of Justice*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 981, 981 (Isabelle Buffard et al. eds., 2008).