Global Investigations Review

The Guide to Sanctions

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Anahita Thoms and Nicholas Turner

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Publisher's Note

The Guide to Sanctions is published by Global Investigations Review – the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing.

As this book goes to press, sanctions are again in the news. Hong Kong is now a sanctioned territory, and the United Kingdom has been forced to banish Huawei from its telecommunications network as a result of US sanctions.

We live, it seems, in a new era for sanctions: more and more countries are using them, with greater creativity and (sometimes) selfishness.

And little wonder. They are powerful tools. They reach people who are otherwise beyond our jurisdiction; they can be imposed or changed at a stroke, without legislative scrutiny; and they are cheap! Others do all the heavy lifting once they are in place.

That heavy lifting is where this book comes in. The pullulation of sanctions has resulted in more and more day-to-day issues for business and their advisers.

Hitherto, no book has addressed this complicated picture in a structured way. The *Guide to Sanctions* corrects that by breaking down the main sanctions regimes and some of the practical problems they create in different spheres of activity.

For newcomers, it will provide an accessible introduction to the territory. For experienced practitioners, it will help them stress-test their own approach. And for those charged with running compliance programmes, it will help them do so better. Whoever you are, we are confident you will learn something new.

The guide is part of the GIR technical library, which has developed around the fabulous *Practitioner's Guide to Global Investigations* (now in its fourth edition). *The Practitioner's Guide* tracks the life cycle of any internal investigation, from discovery of a potential problem to its resolution, telling the reader what to think about at every stage, You should have both books in your library, as well as the other volumes in GIR's growing library – particularly our *Guide to Monitorships*.

We supply copies of all our guides to GIR subscribers, gratis, as part of their subscription. Non-subscribers can read an e-version at www.globalinvestigationsreview.com.

I would like to thank the editors of the *Guide to Sanctions* for shaping our vision (in particular Paul Feldberg, who suggested the idea), and the authors and my colleagues for the elan with which it has been brought to life.

We hope you find the book enjoyable and useful. And we welcome all suggestions on how to make it better. Please write to us at insight@globalinvestigationsreview.com.

Contents

Foreword

I am pleased to welcome you to the *Global Investigations Review* guide to economic sanctions. In the following pages, you'll read in detail about sanctions programmes, best practices for sanctions compliance, enforcement cases, and the unique challenges created in corporate transactions and litigation by sanctions laws. This volume will be a helpful and important resource for anyone striving to maintain compliance and understand the consequences of economic sanctions.

As Under Secretary of the US Department of the Treasury's Office of Terrorism and Financial Intelligence from 2017 to 2019, I had the honour of leading incredibly dedicated professionals strategically implementing US sanctions, overseeing the United States' anti-money laundering (AML) programme, protecting the United States' financial system from abuse, and countering some of the greatest national security threats of our time. We did all of this while working closely with allies and partners around the world. Perhaps most importantly, we greatly appreciated our work with the private sector, providing guidance to financial institutions and companies regarding compliance with US law, typologies of illicit behaviour, and implementing mechanisms to protect the global financial system. Conversely, from my work in the private sector, I have appreciated efforts by the government to promote compliance through guidance and collaboration.

The compliance work conducted by the private sector is critically important to stopping the flow of funds to weapons proliferators such as North Korea and Iran, terrorist organisations like ISIS and Hezbollah, countering Russia's continued aggressive behaviour, targeting human rights violators and corrupt actors, and disrupting drug traffickers such as the Sinaloa Cartel. I strongly believe that we are much more effective in protecting our financial system when government works collaboratively with the private sector.

Accordingly, one of my top priorities as Under Secretary was to provide the private sector with the tools and information necessary to maintain compliance with sanctions and AML laws and to play its role in the fight against illicit finance. The Treasury has provided increasingly detailed guidance on compliance in the form of advisories, hundreds of FAQs, press

releases announcing actions that detail typologies, and the recent OFAC framework to guide companies on the design of their sanctions compliance programmes. Advisories range from detailed guidance from OFAC and our interagency partners for the maritime, energy and insurance sectors, to sanctions press releases that provided greater detail on the means that illicit actors use to try to exploit the financial system, to FinCEN advisories providing typologies relating to a wide range of illicit activity.

Whether it was for the Iran, North Korea or Venezuela programmes, or in connection with human rights abuses and corrupt actors around the globe, the US Treasury has been dedicated to educating the private sector so that they in turn can further protect themselves. The objective is not only to disrupt illicit activity but also to provide greater confidence in the integrity of the financial system, so we can likewise open up new opportunities and access to financial services across the globe. That guidance is particularly important today with the increased use of sanctions and other economic measures across a broader spectrum of jurisdictions and programmes.

As you read this publication, I encourage you to notice the array of guidance, authorities and other materials provided by the US Treasury and other authorities cited and discussed by the authors. This material, provided first-hand from those charged with writing and enforcing sanctions laws, gives us a critical understanding of these laws and how the private sector should respond to them. By understanding and using that guidance, private companies can help to protect US and global financial systems against nefarious actors, as well as avoid unwanted enforcement actions.

Thank you for your interest in these subjects, your dedication to understanding this important area of the law, and your efforts to protect the financial system from abuse.

Sigal Mandelker
Former Under Secretary of the Treasury for Terrorism and Financial Intelligence
July 2020

16

Developments in Mainland China and Hong Kong

Qing Ren and Deming Zhao[1]

Introduction

This chapter provides an overview of the current export control and sanctions regime in mainland China and an introduction to the draft Export Control Law of the People's Republic of China (the New Draft Law) released on 28 December 2019. The chapter also covers the developments of export control and sanctions in the Hong Kong Special Administrative Region (HKSAR).

Export controls in mainland China

In mainland China, export controls include the control of exports of dual-use items and technologies and of arms exports (also called exports of military items). 'Dual-use items and technologies'[2] include eight categories of items and technologies:

- category 1: nuclear materials, nuclear equipment, non-nuclear materials used for reactors and other items, and their related technologies;
- category 2: nuclear dual-use items and related technologies;
- category 3: missiles and related items and technologies;
- category 4: biological dual-use items and related equipment and technologies;
- category 5: controlled chemicals;
- category 6: precursor chemicals;

1 Qing Ren and Deming Zhao are partners at Global Law Office. The authors acknowledge the contributions of Ningxin Huo and Yiqi Du to this chapter.

2 There is a similar but narrower concept of 'sensitive items and technologies' that includes the categories 2, 3, 4, 7 and 8 of dual-use items and technologies. See Administrative Measures for the Registration of the Export Operation of Sensitive Items and Technologies, Article 2.

- category 7: certain chemicals and related equipment and technologies; and
- category 8: dual-use items and technologies subject to provisional export control.[3]

'Arms export' relates to the export for trade of equipment, special production facilities and other materials, technology and related services that are used for military purposes.[4]

Legal framework

Although the Foreign Trade Law, the Customs Law, the Criminal Law and some other laws of China contain certain provisions relating to export controls, currently there is no specialist export control law (see section titled 'The New Draft Control Law', below). The export control system in mainland China is established mainly through the following six administrative regulations promulgated by the State Council:

- Regulations on Nuclear Export Control;
- Regulations on Export Control of Nuclear Dual-Use Items and Related Technologies;
- Regulations on Export Controls of Missiles and Related Items and Technologies;
- Regulations on Export Control of Biologicals Dual-Use Items and Related Equipment and Technologies;
- Regulations on Administration of Controlled Chemicals; and
- Regulations on Administration of Arms Export.[5]

In addition, there are several implementation rules, including:

- Administrative Measures for the Registration of the Export Operation of Sensitive Items and Technologies;
- Administrative Measures for Import and Export Licences for Dual-use Items and Technologies;
- Measures on Export Control of Certain Chemicals and Related Equipment and Technologies; and
- Guiding Opinions of the Ministry of Commerce on Establishing an Internal Export Control Mechanism in Enterprises Engaging Dual-use Items and Technologies.

Competent authorities

The Ministry of Commerce (MOFCOM) is the primary regulatory authority for export control of dual-use items and technologies, although some other government agencies are also involved. First, MOFCOM is responsible for the registration of operators engaging in the export of the above-listed categories 1, 2, 3, 4, 7 and 8 of dual-use items and technologies. Second, MOFCOM is the centralised authority in charge of export licences for all categories of dual-use items and technologies nationwide. Third, MOFCOM is responsible for examining and approving licence applications for exports of categories 2, 3, 4, 6,

3 See Administrative Measures for the Import and Export Licence for Dual-use Items and Technologies, Order 2005 No. 29 of the Ministry of Commerce and the General Administration of Customs, Articles 2 and 10.

4 See Regulations of the People's Republic of China on Administration of Arms Export, Decree No. 366 of the State Council and the Central Military Commission, Article 2.

5 The Regulations on Administration of Arms Export were promulgated by the State Council and the Central Military Commission.

7 and 8 of dual-use items and technologies. Fourth, MOFCOM is empowered to investigate and punish export control violations.

MOFCOM and the State Administration of Science, Technology and Industry for National Defence (SASTIND) are together charged with the examination and approval of licence applications for exports of category 1 items and technologies, as described above.

The Ministry of Industry and Information Technology (MIIT) is in charge of category 5, as described above.

SASTIND and the Equipment Development Department (EDD) of the Central Military Commission are together in charge of arms export controls.

In deciding whether to issue an export licence, the above-mentioned authorities may seek opinions from other relevant government agencies. For exports involving foreign policies, the Ministry of Foreign Affairs (MFA) will normally be consulted. Certain significant exports may require approval from either the State Council independently or jointly with the Central Military Commission.[6]

Finally, customs authorities are empowered to inspect and verify export licences before clearance, and to investigate and punish certain export control violations in accordance with customs law.

Controlled items and technologies

Each of the categories from 1 to 7 of the dual-use items and technologies listed above is set out respectively in a control list that was initially promulgated as an appendix to the relevant regulations or rules but may be revised when necessary. For example, the Export Control List of Nuclear Dual-use Items and Related Technologies was promulgated as an appendix to the Regulations on Export Control of Nuclear Dual-Use Items and Related Technologies in 2007 and was most recently revised in 2017. Dual-use items and technologies under category 8 that are subject to provisional export control are separately determined and promulgated by MOFCOM and the General Administration of Customs (GAC) though announcements. For example, exports of certain unmanned aircraft and high-performance computers have been controlled since 15 August 2015.[7]

All the above control lists and provisional controlled items and technologies are consolidated into a Catalogue of Export Licence Management for Dual-use Items and Technologies (the Catalogue), the latest version of which was promulgated by MOFCOM and GAC on 31 December 2019. The Catalogue consists of:

- Section 1: Items and Technologies Listed on the Nuclear Export Control List, containing 159 entries;
- Section 2: Items and Technologies Listed on the Export Control List of Nuclear Dual-use Items and Related Technologies, containing 204 entries;
- Section 3: Items and Technologies Listed on the Export Control List of Biological Dual-use Items and Related Equipment and Technologies, containing 144 entries;
- Section 4: Items Listed in the Catalogue attached to the Management Regulations on Controlled Chemicals, containing 69 entries;

6 See, e.g., Regulations on Nuclear Export Control, Article 11.

7 Announcement [2015] No. 31 of the Ministry of Commerce and the General Administration of Customs – Announcement on Strengthening the Export Control over Certain Dual-use Items.

- Section 5: Items and Technologies Listed on the Export Control List of Certain Chemicals and Related Equipment and Technologies, containing 37 entries;
- Section 6: Items and Technologies Listed on the Export Control List of Missiles and Related Equipment and Technologies, containing 186 entries;
- Sections 7 and 8: both Precursor Chemicals, containing 65 entries in total;[8]
- Section 9: Certain Dual-use Items and Technologies, containing six entries; and
- Section 10: Special Civil-use Items and Technologies, containing five entries.

In principle, items and technologies not included in the Catalogue are not controlled. However, an exporter is required to apply for export licences if it knows, or ought to know, or is informed by the competent authorities, that the items and technologies it intends to export run the risk of being used for weapons of mass destruction (WMD) or WMD carriers, regardless of whether those items and technologies are listed in the Catalogue.[9] This is called a catch-all control in some other jurisdictions.

The Arms Export Administration List was promulgated as an appendix to the Regulations on Administration of Arms Export in 2002.

Controlled activities

Besides exports for trade, cross-border transfers of dual-use items and technologies by way of a gift, exhibition, scientific and technological cooperation, foreign aid, service or any other manner are also controlled.[10]

The transit, transshipment or through-shipment of dual-use items and technologies included in the Catalogue are controlled.[11] 'Transit, transshipment and through-shipment' of goods refers to goods that come from a place outside China or pass through the territory of China on the way to a place outside China:

- transit goods are those that pass through the territory of China by land;
- transshipment goods are those that do not pass through the territory of China by land but are loaded on a different means of transport at a place with a customs office; and
- through-shipment goods are those that are carried into and out of the territory of China by the same vessel or aircraft.[12]

8 Precursor chemicals are not listed as dual-use items internationally. China has brought precursor chemicals into the Catalogue for the convenience of management. Items in Section 8 only require a licence when being exported to certain countries, such as Vietnam, Laos, and Afghanistan.

9 See, e.g., Administrative Measures for the Import and Export License for Dual-use Items and Technologies, Article 8.

10 See, e.g., Regulations on Export Control of Nuclear Dual-Use Items and Related Technologies, Article 2.

11 See Administrative Measures for the Import and Export License for Dual-use Items and Technologies, Article 6(1).

12 See Customs Law, Article 100(3).

Licensing

Qualified exporting business operators

Exporting business operators (EBOs) wishing to engage in the export of categories 1, 2, 3, 4, 7 and 8 of dual-use items and technologies are required to be registered with MOFCOM.[13] Exports of category 1 items and technologies can only be made by entities designated by the State Council.[14] Exports of category 5 items and technologies can only be made by entities designated by MIIT and MOFCOM.[15]

Arms exports can only be made by arms trading companies approved by MIIT and EDD.[16]

Export licences

Exports of both dual-use items and technologies and arms require an export licence. In general, MOFCOM's licensing process for exports of dual-use items is as follows:

- An EBO files an electronic application form via MOFCOM's unified platform (https://ecomp.mofcom.gov.cn) and submits application materials in writing to a competent provincial-level department of commerce (provincial DOC). The application materials required to be submitted include certifications of end user and end use.
- The provincial DOC transmits the application materials to MOFCOM.
- MOFCOM examines the application independently or jointly with other relevant government agencies and makes approval decisions. Approval by the State Council or the Central Military Commission is required for certain significant exports.
- MOFCOM informs the provincial DOC of its decision, and the latter then issues an export approval sheet to the applicant.
- The EBO receives an export licence from the Quota and Licence Administrative Bureau of MOFCOM or the provincial DOC as entrusted by MOFCOM.

MOFCOM may also issue general licences. Instead of the export approval sheet used when applying for an individual export transaction, a Class A general licence permits the same EBO to export one or more specified items or technologies to one or more end users in one or more countries or regions within the valid period, and a Class B general licence permits the same EBO to export the same items or technologies to the same end user in the same country or region multiple times.[17] An EBO applying for a general licence is required to meet the following conditions:

- it has an internal control mechanism for dual-use items and technologies;
- it has been engaged in dual-use item and technology exports for at least two years (inclusive);
- it has applied for at least 40 (if applying for Class A general licences) or 30 (if applying for Class B general licences) export licences annually for dual-use items and technologies for at least two consecutive years;

13 See Administrative Measures for the Registration of the Export Operation of Sensitive Items and Technologies, Articles 2 and 3.

14 See Regulations on Nuclear Export Control, Article 6.

15 See Regulations on Administration of Controlled Chemicals, Article 14.

16 See Regulations on Administration of Arms Export, Articles 7, 8 and 20.

17 See Administrative Measures for the General Licensing for Export of Dual-use items and Technologies, Article 5.

- it has not been subject to any criminal penalties or administrative penalties imposed by competent departments during the past three years; and
- it shall have relatively stable sales channels and end users for its dual-use items and technologies.[18]

As regards arms exports, any export proposal must be approved by SASTIND and EDD before an export contract is signed. The signed contract shall be approved once again by SASTIND and EDD before it enters into force. Thereafter, an export licence shall be obtained before the shipment of the exported arms.[19]

Consequences of violations

Violations of export controls may result in administrative penalties and criminal liabilities.

Administrative penalties

Administrative penalties may be imposed by (1) customs authorities under customs law and its implementing regulations, and (2) MOFCOM or other government agencies under the export control regulations and rules.

Among other things, exports of dual-use goods or arms without licences may constitute smuggling, permitting customs authorities to confiscate the smuggled goods and illegal gains and, further, to impose a fine in an amount not exceeding the value of the smuggled goods.[20] A failure to submit the licences required to export dual-use goods or arms when making the declaration to the customs authorities shall be subject to a fine of not more than 30 per cent of the value of the goods.[21]

MOFCOM is empowered to impose penalties over exports of dual-use technologies in violation of relevant regulations, but the specific penalties that are authorised vary depending on which category of technologies is exported. Taking the technologies related to nuclear dual-use items as an example, MOFCOM shall impose thereupon a fine of not less than the amount of the illegal turnover but not more than five times that amount (or a fine of not less than 50,000 yuan but not more than 250,000 yuan, if the illegal turnover is less than 50,000 yuan) and confiscate any illegal gains.[22] In addition, MOFCOM may, within a period of more than one year but less than three years of the date on which the relevant decisions on administrative penalties or criminal judgments (see below) come into effect, prohibit the offenders from engaging in relevant foreign-trade operational activities.[23]

Turning to arms exports, if an undertaking is engaged in export activities without authorisation to export arms, the illegal gains shall be confiscated and a fine of not less than the same value as but not more than five times the gains (or a fine of not less than 100,000 yuan but not more than 500,000 yuan, if there is no illegal income or the illegal income is less than 100,000 yuan) shall be imposed.[24]

18 See id., at Article 7.

19 See Regulations on Administration of Arms Export, Articles 13 to 17.

20 See Regulations on Implementing Customs Administrative Penalty, Article 9(2).

21 See id., at Article 14(1).

22 See Regulations on Export Control of Nuclear Dual-Use Items and Related Technologies, Article 23.

23 See Administrative Measures for the Import and Export License for Dual-use Items and Technologies, Article 39.

24 See Regulations on Administration of Arms Export, Article 26.

Criminal liabilities

Violation of export controls may constitute a crime under the Criminal Law, including the crimes of (1) smuggling, (2) illegal business operations, (3) betraying state secrets and (4) forging, altering and dealing with documents, certificates and seals of government agencies.

For instance, an individual who smuggles dual-use items and technologies shall be fined and may also be sentenced to imprisonment for not more than five years or criminal detention. If the circumstances are serious, the individual shall be sentenced to imprisonment for not less than five years and shall also be fined.[25] If an organisation engages in the crime of smuggling, the organisation will be fined and, in addition, any individuals in charge of the organisation who are directly responsible for the crime and other persons who are directly responsible for the crime shall also be punished.[26]

Implementation of UN sanctions in mainland China

China does not have specific laws or administrative regulations on sanctions. China does not take typical unilateral sanction measures, like the United States and the European Union, but implements UN sanctions adopted by relevant Security Council resolutions.

After a UN sanctions-related resolution is adopted or a UN Sanctions List is updated, the MFA will issue a notice forwarding the resolution or list. For example, the Notice on the Implementation of the Sanctions List of the UN Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee (Notice No. 5 [2020]) was issued by the MFA to notify relevant parties that the Sanctions List had been updated and all relevant authorities and entities were requested to take corresponding measures to implement the updated Sanctions List.

Thereafter, relevant authorities may, within their own jurisdiction, issue further notices or take other measures to implement the UN sanctions. For instance, to implement UN sanctions against North Korea, MOFCOM, with other authorities, have promulgated the following announcements since 2017:

- Announcements No. 9 [2017], No. 17 [2018] and No. 36 [2018], prohibiting exports of certain dual-use items and technologies to North Korea;
- Announcements No. 47 [2017] and No. 55 [2017], prohibiting new investment from North Korea to China, or vice versa, and requiring the closure of existing North Korean-invested enterprises in China and overseas joint ventures established by and between Chinese enterprises and North Korean entities or individuals;
- Announcements No. 40 [2017] and No. 52 [2017], prohibiting imports of coal, iron, iron ore, lead, lead ore, water and seafood, and textile products from North Korea, prohibiting exports of condensate and liquefied natural gas to North Korea, and restricting exports of refined petroleum products to North Korea.

Notably, there is a general requirement for the banking sector to implement UN sanctions.[27]

25 See Criminal Law, Article 151(3).

26 id., at Article 151(4).

27 See Measures for the Administration of Combating Money Laundering and Financing of Terrorism by Banking Financial Institutions (Order No. 1 [2019] of China Banking and Insurance Regulatory Commission), Article 20.

The Draft Export Control Law

Introduction

The New Draft Law was released by the Standing Committee of the National People's Congress (NPC) on 28 December 2019 for comments from the general public. It is positioned to be an overarching law on export controls in China, uniformly establishing a fundamental framework and rules about export control policies, control lists, control measures, supervision and legal liabilities.[28] The New Draft Law proposes, among other things:

- to expand the scope of controlled items (see section titled 'Control lists', below);
- to cover re-exports and deemed exports, in addition to exports (see section titled 'Controlled activities', below);
- to strengthen the administration over end users and end use, and to establish a list of 'controlled parties' for foreign importers and end users (see section titled 'List of Controlled Parties', below);
- to grant broad enforcement and investigative powers to export control authorities;
- to significantly increase the penalties on export control violations (see section titled 'Consequences of violations', below); and
- to impose an obligation for EBOs in China to formulate and implement an internal compliance programme for export controls.

The above said, compared with the 2017 MOFCOM draft for comments (the Old Draft), the New Draft Law narrows the scope of extraterritorial jurisdiction in the following respects:

- foreign-made products no longer appear as controlled items (see section titled 'Re-export', below);
- the grounds for designating 'controlled parties' are relatively narrow, and the sanctions against 'controlled parties' are limited to prohibition or restriction of EBOs from transacting with controlled parties (see section titled 'List of Controlled Parties', below); and
- EBOs (as opposed to foreign importers and end users) are the main targets of enforcement measures (see section titled 'Consequences of violations', below).

The contents of the New Draft Law may further evolve during the legislative process. Notably, the Export Control Law has recently been characterised by the Standing Committee of the NPC as one of the Chinese laws having extraterritorial jurisdiction.[29] The NPC Standing Committee is also scheduled to review a revised version of the New Draft Law in late June 2020.[30]

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28 See 'Report on the Draft Export Control Law of the People's Republic of China by the Standing Committee of the NPC', dated 28 December 2019.

29 See summary of 'Report on the work of the Standing Committee of the National People's Congress', at www.xinhuanet.com/politics/2020lh/2020-05/26/c_1126032045.htm.

30 Since the drafting of this chapter, a revised version of the New Draft Law was released, on 3 July 2020, for public comments. Besides streamlining or clarifying several provisions, the main changes include in the revised version are as follows: (1) explicit provision that organisations and individuals outside China may be held liable if they violate export control rules; (2) provision for a new prohibition that individuals and organisations within China shall not transfer 'export control-related information' outside China in violation of Chinese law or endangering China's

Control lists

The New Draft Law (Article 2) controls exports of dual-use items, military items, nuclear items, and other items such as goods, technologies and services that relate to the fulfilment of international obligations and maintenance of national security (collectively referred to as the Controlled Items):

- 'dual-use items' are goods, technologies and services that can be used for both civil and military purposes or contribute to elevating potential military powers, especially those that can be used to design, develop, produce or deploy WMD;
- 'military items' are equipment, special production facilities and other relevant goods, technologies and services used for military purposes; and
- 'nuclear items' are relevant nuclear materials, nuclear equipment and non-nuclear materials used for reactors, and relevant technologies and services.

It can be seen that the scope of dual-use items within the meaning of the New Draft Law is broader than that under the current administrative regulations, as the latter only cover those relating to WMD and WMD carriers.

The New Draft Law clearly indicates (Article 9) that the lists of dual-use items, military items and nuclear items will each be prepared by different authorities.

Article 15 of the New Draft Law contains a 'catch-all control' provision in that:

> *[all] other goods, technologies, and services outside the control lists will be subject to export control licensing if such goods, technologies, or services run the risk of endangering national security or being used in designing, developing, producing, or using weapons of mass destruction or their carrying vehicles or being used for the purposes of nuclear, biology, or chemical terrorism.*

It should be noted that China does not have an export control classification number system for controlled items, and in the control lists, tariff codes are designated for most of the controlled items as far as possible. As Chinese customs largely rely on the tariff codes of the controlled items, EBOs must ensure their exported items have the correct tariff classification. Otherwise, EBOs risk evading customs export control supervision. Customs penalties and even criminal consequences may ensue from the declaration of incorrect tariff codes for exported items. However, apart from tariff code compliance, EBOs must also ensure export compliance by comparing the descriptions of the items on the control lists with their exported items.

national security; (3) to maintain an internal compliance programme for export controls is no longer a mandatory obligation, although an exporting business operator having a well-functioning internal compliance programme may receive discretionary 'general licenses' as an incentive; and (4) provision that the authority may conduct inspections of end users and end uses. Other provisions are largely as described above.

Controlled activities

Export

The term 'export' means the transfer of controlled items from within the territory of the People's Republic of China (PRC) overseas, no matter what means of transfer is used. It should be noted that if the controlled items are transferred overseas by electronic means, Chinese customs authorities do not have the authority to supervise and investigate since no tangible goods have crossed Chinese customs borders. Instead, it would be MOFCOM and other export control authorities who would supervise and investigate the case.

Re-export

The Old Draft identifies foreign-made products as controlled if the products contain China-controlled items in quantities exceeding prescribed levels, and exporting those products to a foreign country may require a licence from the Chinese government (*de minimis* rule). The New Draft Law does not contain such a provision.

Under Article 45 of the New Draft Law, re-export is controlled according to the relevant provisions of the same law. The term 're-export' is not defined and it is not clear exactly what the 'relevant provisions' are. In view of the removal of the *de minimis* rule, it seems safe to say that the re-export provision in the New Draft Law means that the re-export of an item of Chinese origin from overseas to a third country or region requires a licence from Chinese authorities, if the export of that item from China to the same third country or region requires a licence.

Deemed export

Deemed export is controlled. Article 2 of the New Draft Law controls the 'provision of controlled items from Chinese citizens or entities to foreign natural person or entities', no matter where the provision occurs. This deemed control may cause difficulties in respect of inter-company research and development (R&D) activities in which employees of different nationalities are working together. It remains to be seen whether the NPC may eventually take a flexible approach to eliminating or mitigating these negative effects, so as to avoid large-scale divestiture of R&D businesses from China.

Control measures

Qualified EBOs

Article 12 of the New Draft Law provides that EBOs shall be administered by monopoly, recordal filing or other means. It is clearly provided in Article 25 that military items shall be exclusively exported by EBOs with export monopoly qualifications for military items. The qualifications of EBOs for dual-use items, nuclear items and other controlled items are subject to requirements of other laws and regulations.

Licensing

For controlled items, EBOs shall apply for export control licences to the relevant export control administrative authority. In processing applications, the relevant authority may consult other departments and issue the licence if there are no internal objections within government.

Under Article 21 of the New Draft Law, the licence must be presented to Chinese customs to clear the controlled goods for export. If no licence is presented, the customs authorities may seek classification guidance from the relevant export control authority or raise queries concerning the goods when there is evidence that the exported goods may fall within the scope of export controls. In either case, the customs authorities will take the necessary administrative measures based on the classification of the goods or their own findings based on their inquiries. During the process of classification or inquiry, the goods in question will not be released for export by the relevant customs authority.

List of Controlled Parties

Article 20 of the New Draft Law establishes a List of Controlled Parties relating to those foreign importers and end users who are in violation of export control measures taken by the Chinese government under one of the following circumstances:

- breaching its covenants on end users or end use;
- possibly endangering national security; or
- using controlled items for any terrorism purpose.

The term 'possibly endangering national security' may be interpreted broadly. In other words, under the New Draft Law, if the Chinese government has reason to believe that a foreign importer or end user will possibly endanger the national security of China, that importer or end user may be included on the List of Controlled Parties.

According to Article 20, EBOs are prohibited or restricted from transacting with the controlled parties. It seems that anyone other than EBOs can still deal with such controlled parties. For instance, controlled parties can export their products, software, technologies or services to China.

List of Unreliable Entities

On 31 May 2019, a spokesman for MOFCOM announced that China will establish a framework for a List of Unreliable Entities (LUE), and any foreign enterprise, organisation or individual 'who does not abide by market rules, or deviate from the spirit of the contract, block or cut off Chinese enterprises for non-commercial purposes, or seriously damage the legitimate rights and interests of Chinese enterprises', will be listed on the LUE.

The legal basis was said to be the Foreign Trade Law, the Anti-monopoly Law and the National Security Law. It remains to be seen which provisions in these laws provide sufficient legal grounds to compose an LUE and what the exact consequences would be if a foreign entity or individual were listed on the LUE. Article 20 of the New Draft Law may achieve the purpose of the LUE to some extent, as any importer or end user possibly endangering national security could be listed and blocked from importing from China. However, Article 20 is narrower in terms of both the reasons for listing and the consequences of being listed.

Consequences of violations

In the New Draft Law, liabilities for violations have been significantly increased, as compared with the current export control regulations. There are also changes from the Old Draft.

Violations of licence requirements

Under Articles 34 and 35 of the New Draft Law, an EBO who violates the monopoly qualification requirements, or exports controlled items without licences, exports controlled items beyond the scope of a licence, or exports prohibited items, will be subject to a fine of not less than five times and not more than 10 times the amount of the EBO's illegal turnover, subject to a minimum of 500,000 yuan.

Violations in obtaining and using licences

Under Article 36 of the New Draft Law, anyone who obtains export licences for controlled items by cheating, bribery or other improper means, or illegally transfers licences, will be subject to a fine of not less than five times and not more than 10 times the amount of the illegal turnover, subject to a minimum of 200,000 yuan.

Facilitating export control violations

Apart from EBOs, any other party who knowingly facilitates violations of export controls by acting as an agent or providing freight, delivery, customs declarations, third party e-commerce trading platforms, or financial and other services will be subject to a fine under Article 37 of the New Draft Law. 'Knowingly' seems to refer only to actual knowledge, but there is also a view that it may include constructive knowledge (i.e., ought to know). The fine to be imposed shall be not less than three times and not more than five times the amount of the illegal turnover of the service provider, subject to a minimum of 100,000 yuan. Notably, the personal liability proposed in the Old Draft has not been maintained in the New Draft Law. The service providers may also be exposed to joint liability for knowingly facilitating violations of export controls law. Therefore, trade-related service providers must also take compliance measures in advance to avoid legal risks for providing this type of assistance.

Transactions with Controlled Parties

According to Article 38 of the New Draft Law, an EBO transacting with parties who are on the List of Controlled Parties will be subject to a fine of not less than 10 times and not more than 20 times the amount of its illegal turnover (i.e., twice the amount of fines under the Old Draft), subject to a minimum of 500,000 yuan (i.e., 10 times the minimum penalty under the Old Draft). In serious cases, the EBO will be ordered to suspend its business for rectification and its export monopoly qualification may be revoked.

Refusal of or interference with regulatory inspections

According to Article 39 of the New Draft Law, an EBO may be ordered to suspend business and even have its export monopoly qualification revoked if it refuses or interferes with regulatory inspections by the export control authority or customs authority.

Personal liability

The New Draft Law does not impose personal liabilities as proposed in the Old Draft for persons in charge of export control matters and other persons who are directly responsible for violations, but provides for the possible consequence of (1) prohibiting them from engaging in the relevant export businesses for five years when EBOs are penalised for export control

violations, or (2) prohibiting those who are subject to criminal liabilities resulting from violations of export control from engaging in the relevant export business activities for life.

HKSAR: Gateway to the East and West

HKSAR implements strategic trade control in accordance with the Import and Export Ordinance (Cap. 60) and its subsidiary legislation, the Import and Export (Strategic Commodities) Regulations (Cap. 60G), Schedule 1 of which sets out the lists of strategic commodities.

HKSAR also implements UN sanctions in accordance with the United Nations Sanctions Ordinance (UNSO) (Cap. 537), which, by its terms, excludes sanctions targeting the PRC.

Competent authorities

The strategic trade control system in HKSAR is made up of a licensing system and an enforcement system. The Trade and Industry Department is responsible for issuing licences covering the import, export, re-export and transshipment of strategic commodities as well as transit of 'sensitive' items. Other government departments with an interest may be consulted as and when necessary. The Customs and Excise Department (C&ED) is responsible for the enforcement of strategic trade controls in HKSAR.

With respect to sanctions, the Commerce and Economic Development Bureau (CEDB) is responsible for maintaining lists of designated individuals and entities under the UNSO. The Hong Kong Monetary Authority (HKMA) is the competent authority for supervisory and enforcement measures over authorised institutions (AIs), such as banks, for the implementation of UN sanctions and also to combat money laundering and terrorism financing under the HKSAR Anti-Money Laundering Ordinance and related statutes. The HKMA issues statutory and regulatory guidance to provide specific requirements for compliance with UN sanctions by AIs. It is also empowered to take administrative and prudential measures, ranging from warnings to the imposition of restrictions on the business of AIs and financial penalties.[31] The Securities and Futures Commission (SFC) is responsible for anti-money laundering and counter-terrorism financing in the securities and futures sector. It has the power to issue public reprimands or impose fines on regulated entities that violate relevant rules and requirements.[32] Finally, the Hong Kong Police Force (HKPF) and the C&ED are the law enforcement agencies for the purposes of the UNSO. Generally speaking, the HKPF is responsible for investigating financial matters, while the C&ED is mainly responsible for enforcement concerning the supply, sale or transfer of arms and other controlled items.[33]

PRC control over HKSAR policy

As part of the PRC, HKSAR implements UN sanctions pursuant to the instructions of the central government to fulfil China's international obligations.

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31 See Hong Kong Monetary Authority, 'Supervisory Policy Manual', at https://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/supervisory-policy-manual/SPM-AML-1.pdf.

32 See Securities and Futures Commission, 'Anti-money laundering and counter-financing of terrorism', at https://www.sfc.hk/web/EN/rules-and-standards/anti-money-laundering-and-counter-terrorist-financing/.

33 See Hong Kong government press release (23 January 2019), at https://www.info.gov.hk/gia/general/201901/23/P2019012300436.htm.

In accordance with Articles 2 and 3 of the UNSO, the MFA, the instructing authority, may give an instruction to the chief executive (CE) of HKSAR to implement the sanctions specified in the instruction, or when sanctions have been so implemented, to cease or modify the implementation of those sanctions or replace the sanctions specified in the instruction. Upon receipt of these instructions, the CE shall make regulations to give effect to the relevant instructions, including by prescribing penalties thereunder.

Currently, the UN Security Council imposes sanctions or restrictions against 14 territories and two terrorist organisations. The CE and relevant agencies have issued regulations under the UNSO and at the instruction of the MFA to implement UN sanctions or restrictions against each of the UN targets respectively. The Commerce, Industry and Tourism Branch of the CEDB maintains lists of designated individuals and entities under the UNSO.[34]

Although certain countries may impose unilateral sanctions that apply to their nationals in HKSAR, it has been clarified that 'HKSAR does not have the responsibility nor the authority to enforce these unilateral sanctions or investigate related cases' that do not concern HKSAR law.[35]

Non-PRC influences over HKSAR sanctions and export controls

The US and other foreign governments communicate regularly with HKSAR on issues involving sanctions enforcement, strategic trade controls and counter-proliferation concerns.[36]

The US government in particular has attempted to exercise influence over activities in HKSAR related to sanctions and export controls in recent years. For example, under Section 311 of the US Patriot Act, the US Secretary of Treasury has the authority to designate foreign financial institutions and other targets as 'primary money laundering concerns', and further require US domestic financial institutions to take special measures, ranging from heightened due diligence to prohibitions on the opening or maintenance of correspondent or payable-through accounts. When a Section 311 designation has been made, the HKMA and the SFC will normally issue corresponding circulars to advise regulated persons to take appropriate actions, where necessary, if they have any relationship with the designated institutions.[37]

The US Treasury Department is also responsible for making designations under Executive Order 13224 targeting foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism. The HKMA and the SFC also issue circulars to advise regulated persons to screen for the names of persons designated under Executive

34 See 'Lists of Individuals and Entities subject to Targeted Arms-related Sanctions' under the UNSO on Commerce and Economic Development Bureau's website, at https://www.cedb.gov.hk/citb/en/Policy_Responsibilities/united_nations_sanctions.html.

35 See Hong Kong government press release (23 January 2019), at https://www.info.gov.hk/gia/general/201901/23/P2019012300436.htm.

36 See 2019 Hong Kong Policy Act Report issued by the US Department of State, Bureau of East Asian and Pacific Affairs (21 March 2019), at https://www.state.gov/2019-hong-kong-policy-act-report/.

37 See, e.g., Circular on Section 311 of the US Patriot Act issued by Hong Kong Monetary Authority, at https://www.hkma.gov.hk/eng/regulatory-resources/regulatory-guides/circulars/2005/09/circu_20050916-1/.

Order 13224 against their records and to take appropriate measures to ensure compliance with the Order.[38]

In respect of export controls, it should be noted that HKSAR and mainland China are treated as separate territories under US law. In certain situations, items that require a licence for export to mainland China do not require a licence for export to HKSAR.[39] The US Department of Commerce (DOC) has an export control office in HKSAR to conduct end-use checks, industry outreach and government liaison work.[40] In 2017, the DOC's Bureau of Industry and Security amended the EAR, adding a documentation requirement with respect to certain exports to HKSAR. Under the rule, any person intending to export or re-export to HKSAR any items subject to the Commerce Control List for national security, missile technology, nuclear non-proliferation, or chemical and biological weapons reasons is required to obtain an HKSAR import licence or a statement from the HKSAR government that a licence is not required. Any person intending to re-export such items from HKSAR also needs to obtain an HKSAR export licence or a statement from the HKSAR government that a licence is not required.[41]

The US Department of State engages regularly in counter-proliferation dialogue with the HKSAR government to maintain communication and to review policies, procedures and specific cases. As the HKSAR is eligible to receive certain controlled US defence articles sold via direct commercial sale, the US Department of State, which licenses commercial sales of such articles under the International Traffic in Arms Regulations (ITAR), enhanced compliance via its blue lantern end-use monitoring programme and worked with the HKSAR government to reduce the risk of diversion.[42]

In late May 2020, the US Department of State and the White House announced that the US government would begin the process of reviewing, and potentially revoking, Hong Kong's separate status under US law, including for the purposes of US export controls under the EAR and ITAR.

38 See, e.g., Circular to Licensed Corporations and Associated Entities – Anti-Money Laundering/Counter-Terrorist Financing issued by Securities and Futures Commission, at https://www.sfc.hk/edistributionWeb/gateway/EN/circular/aml/doc?refNo=16EC20.

39 See Hong Kong due diligence guidance issued by the US Department of Commerce, Bureau of Industry and Security, at https://www.bis.doc.gov/index.php/policy-guidance/hong-kong-due-diligence-guidance.

40 See '2019 Hong Kong Policy Act Report' issued by the US Department of State, Bureau of East Asian and Pacific Affairs (21 March 2019), at https://www.state.gov/2019-hong-kong-policy-act-report/.

41 See 'Support Document Requirements With Respect to Hong Kong', issued by Industry and Security Bureau (19 January 2017), at https://www.federalregister.gov/documents/2017/01/19/2017-00446/support-document-requirements-with-respect-to-hong-kong.

42 See '2019 Hong Kong Policy Act Report' issued by the US Department of State, Bureau of East Asian and Pacific Affairs (21 March 2019), at https://www.state.gov/2019-hong-kong-policy-act-report/.

Appendix 1

About the Authors

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Qing Ren is a partner of Global Law Office, Beijing. His practices cover international trade law, anti-monopoly law and dispute resolution.

As a leading international trade lawyer recommended by *Chambers and Partners* and *The Legal 500*, Mr Ren has advised, represented or defended many renowned Chinese and foreign companies across various sectors, such as banking, automobile, energy, machinery, electronics, aerospace, artificial intelligence and defence on export controls and economic sanctions. Being proficient in the World Trade Organization (WTO) law, Mr Ren has been elected as an executive director of the WTO Law Research Society of China Law Society.

Mr Ren is listed on panels of arbitrators of main arbitral institutions in China, including the China International Economic and Trade Arbitration Commission, the China Maritime Arbitration Commission, the Beijing Arbitration Commission, the Shanghai International Arbitration Centre and Shenzhen Court of International Arbitration.

Prior to practising as a private lawyer, Mr Ren worked at the Department of Treaty and Law, Ministry of Commerce of China, as deputy director.

Deming Zhao
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Dr Deming Zhao is a partner of Global Law Office, Shanghai. His practices cover corporate and regulatory compliance, customs and trade compliance, export control and shipping litigation. Dr Zhao is one of the pioneers who has developed the legal practice of customs and trade compliance in China, which has won wide recognition among multinational clients. Dr Zhao was also named in the Client Choice – Top 20 Lawyers in China, the first survey of this kind by ALB in 2012.

As the leading lawyer in customs and trade compliance practice, Dr Zhao has advised, represented or defended many renowned multinational companies in customs query, audit

and investigation cases, administrative or criminal, and has led many projects in respect of trade compliance internal control systems, health checks and training for multinational clients in China.

Dr Zhao advises and trains many clients on export control or economic sanctions, and frequently makes speeches on China export control and customs supervision practices at symposiums or seminars in Europe. In 2019, Dr Zhao was invited by the International Anti-Corruption Academy to lecture on China and US export control practices in Seoul to professional audiences from Asian countries. In an administrative review case, Dr Zhao successfully defended a multinational client against the export licensing requirement for a given chemical product.

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We live in a new era for sanctions. More states are using them, in more creative (and often unilateral) ways.

This creates ever more complication for everybody else. Hitherto no book has addressed all the issues raised by the proliferation of sanctions regimes and investigations in a structured way. GIR's *The Guide to Sanctions* addresses that. Written by contributors from the small but expanding field of sanctions enforcement, it dissects the topic in a practical fashion, from every stakeholder's perspective, providing an invaluable resource.

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