

Global Investigations Review

The Guide to Sanctions

Editors

Rachel Barnes, Paul Feldberg, Nicholas Turner, Anna Bradshaw,
David Mortlock, Anahita Thoms and Rachel Alpert

Second Edition

The Guide to Sanctions

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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.

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 fifth 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.

David Samuels
Publisher, GIR
June 2021

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Foreword

I am pleased to welcome you to the Global Investigations Review guide to economic sanctions. In the following pages, you will 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.

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, as Under Secretary of the US Department of the Treasury's Office of Terrorism and Financial Intelligence from 2017 to 2019, one of my top priorities 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 Office of Foreign Assets Control (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 provide greater detail on the means that illicit actors use to try to exploit the financial system, to Financial Crimes Enforcement Network (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 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
June 2021

Part I

Sanctions and Export Control Regimes Around the World

12

Developments in Mainland China and Hong Kong

Qing Ren, Deming Zhao and Ningxin Huo¹

Introduction

This chapter provides an overview of the export control regime overarched by the newly enacted Export Control Law of the People's Republic of China (the Export Control Law), as well as recent developments in respect of sanctions and blocking measures in mainland China. It also provides an introduction to the export control and sanctions in the Hong Kong Special Administrative Region (HKSAR).

Export controls in mainland China

On 17 October 2020, the National People's Congress Standing Committee of China promulgated the Export Control Law, with effect from 1 December 2020. This new law unified the previous, fragmented export control regimes in China with a comprehensive new framework for regulating exports of goods, technologies and services to 'safeguard national security and interests' and 'fulfil non-proliferation and other international obligations' (Article 1).² It is, however, worth noting that the previous administrative regulations, detailed below, promulgated by the State Council³ and their implementing rules remain effective until revocation or amendment:

- 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;

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

2 'Article 1' refers to Article 1 of the Export Control Law. (Also below.)

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

- 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.

Overall, the Export Control Law is formulated with characteristics of full coverage, strict regulation and severe penalties. That is, it expands the scope of controlled items; covers re-export and deemed export, in addition to export; strengthens the administration over end users and end use; and significantly increases the penalties on export control violations. However, several key provisions therein need clarification, which may be provided in the implementing regulations to be promulgated by the State Council.

Competent authorities

The Export Control Law permits those administrative and military departments previously in charge of export control in China to continue to undertake their functions, but calls for the creation of an export control coordination mechanism to facilitate interagency coordination and information sharing.

Specifically, the departments of the State Council and of the Central Military Commission that perform the export control functions (collectively, the 'State Export Control Administrative Departments' or 'SECADs') shall be responsible for tasks relating to export control according to their assigned duties (Article 5). This suggests that the existing structure of export control administration remains unchanged. In other words, the Ministry of Commerce (MOFCOM), the Ministry of Industry and Information Technology (MIIT), the State Administration of Science, Technology and Industry for National Defence (SASTIND) and the Equipment Development Department of the Central Military Commission (EDD) will continue to be the SECADs under the Export Control Law.

Among the SECADs, MOFCOM is the regulatory authority for export control of all dual-use items except certain controlled chemicals, for which MIIT is in charge. MOFCOM and SASTIND are jointly in charge of export control of nuclear items, and SASTIND and EDD are jointly in charge of export control of military items.

Controlled items

The Export Control Law (Article 2) applies to the following controlled items:

- dual-use items: goods, technologies, services and other items that have both civil and military uses or contribute to the enhancement of military potential, including, especially, those that can be used to design, develop, produce or deploy weapons of mass destruction (WMD) and their means of delivery;
- military items: equipment, special production facilities and other relevant goods, technologies and services used for military purposes;
- nuclear items: nuclear materials, nuclear equipment, non-nuclear materials for reactors and related technologies and services; and
- the 'catch-all' category: other goods, technologies, services and other items related to safeguarding national security and interests and fulfilling international obligations such as non-proliferation.

An item is not automatically subject to control measures because it falls within the above general definition of ‘controlled items’. It depends on whether the item is:

- included in an export control list (Article 9);
- subject to temporary controls (Article 9);
- prohibited from exporting (Article 10); or
- otherwise subject to the ‘catch-all control’ (Article 12(3)).

The control lists are to be formulated and promulgated by the SECADs jointly, with the related departments following prescribed procedures (Article 9). To date, apart from the Commercial Code Export Control List issued by MOFCOM, State Cryptography Administration and General Administration of Customs (GAC), on 2 December 2020, no other lists have been published since the Export Control Law came into force. Therefore, control lists that are currently in force include (but are not limited to) the following:

- the Commercial Code Export Control List 2020;
- the List of Schedules of Controlled Chemicals 2020;
- the Nuclear Export Control List 2018;
- the Nuclear Dual-use Items and Related Technologies 2017;
- the Biological Dual-Use Items and Related Equipment and Technologies Export Control List 2006;
- the Missiles and Missile-related Items and Technologies Export Control List 2002;
- the Certain Chemicals and Related Equipment and Technologies Export Control List 2002; and
- the Arms Export Control List 2002.

Temporary controls and prohibition will be imposed by the SECADs upon approval of the State Council, or both the State Council and the Central Military Commission accordingly. Certain temporary controls were imposed prior to the entry into force of the Export Control Law. For example, the export of certain unmanned aircrafts and high-performance computers has been controlled since 15 August 2015.⁴ Prohibition, which has been less used in prior practice, could be used as a basis for sanction measures targeting specific countries, regions, entities or individuals.

In general, except for the Arms Export Control List, all the above-mentioned control lists and temporary controls are consolidated into a Catalogue of Export Licence Management for Dual-use Items and Technologies, the latest version of which was promulgated by MOFCOM and GAC on 31 December 2020.⁵

The term ‘catch-all control’ means any item outside the control lists, and temporary controls will be subject to the export control licensing requirement where an export operator is or should be aware, or is notified by the SECADs, that the item may pose any of the following risks (Article 12(3)):

- endangering national security and interests;

4 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.

5 Announcement [2020] No. 75 of the Ministry of Commerce and the General Administration of Customs – Catalogue of Export Licence Management for Dual-use Items and Technologies.

- being used to design, develop, produce or use WMD and their means of delivery; and
- being used for the purposes of terrorism.

Covered activities

The Export Control Law applies to more than the export of controlled items by transferring them from within the territory of China to outside of China (Article 2). It also applies to:

- export of controlled items by providing them to foreign natural persons or entities by Chinese citizens or entities ('providing controlled items to foreigners') (Article 2);
- transit, transshipment and through-shipment of controlled items (Article 45);
- re-export of controlled items (Article 45); and
- facilitation of export control violations (Article 20).

The scope of 'providing controlled items to foreigners' seems to be broader than that of 'deemed export' under the US export control law, because on its face: (1) it applies to goods and services, in addition to technologies and software; and (2) it could take place either within or outside of China. It is particularly relevant to technology companies, and may cause difficulties in respect of inter-company research and development where employees of different nationalities work together. The precise coverage of 'providing controlled items to foreigners' is expected to be clarified in the implementing regulations to be promulgated.

Re-export under Article 45 seems to only cover export of Chinese-origin controlled items (as opposed to any foreign products that contain a certain percentage of Chinese-origin controlled items) from one foreign country or region to another, subject to future clarifications in the implementing regulations to be promulgated.

Article 20 prohibits any organisations or persons from facilitating violations of export controls by acting as an agent or providing freight, delivery, customs declarations, third-party e-commerce trading platforms, financial services and other services. Article 36 further provides corresponding legal liabilities.

Control measures

The Export Control Law establishes a range of control measures, including qualification, licensing requirement, 'end users and end uses' management and a List of Controlled Parties (CPL).

Qualification

Military items must be exclusively exported by export business operators (EBOs) with export monopoly qualifications for military items (Article 23), namely, arms trading companies approved by MIIT and EDD.⁶ The qualifications of EBOs for dual-use items, nuclear items and other controlled items are subject to requirements of other laws and regulations (Article 11). Currently, EBOs wishing to engage in all the dual-use items are required to be registered with MOFCOM,⁷ except that export of certain controlled chemicals can only be engaged by

⁶ See Articles 7, 8 and 20 of the Regulations on Administration of Arms Export.

⁷ See Articles 2 and 3 of the Administrative Measures for the Registration of the Export Operation of Sensitive Items and Technologies.

entities designated by MIIT and MOFCOM.⁸ Export of nuclear items can only be engaged by entities designated by the State Council.⁹

Licensing

Article 12 imposes a licensing requirement for the export of controlled items that are on a control list, subject to temporary controls, or within the scope of the 'catch-all control'. Transit, transshipment, through-shipment, and re-export of such items may also require a licence (Article 45).

The SECADs should consider the following factors (Article 13) when determining whether to grant the licence:

- national security and interests;
- international obligations and commitments;
- type of export;
- sensitivity of controlled items;
- destination country or region of export;
- end users and end uses;
- the exporter's relevant credit record; and
- other factors as prescribed by laws and administrative regulations.

Currently, MOFCOM's licensing process for the export of dual-use items are as follows:¹⁰

- an EBO files an electronic application form via MOFCOM's uniform platform (<https://ecomp.mofcom.gov.cn>) and submits application materials in writing to the competent provincial-level department of commerce (the Provincial DOC). Among other application materials, certifications of end user and end use should be submitted;
- the Provincial DOC transmits the application materials to MOFCOM;
- MOFCOM examines independently or jointly with other relevant government agencies and makes approval decisions. Approval by the State Council, the Central Military Commission, or both, is required for certain significant exports;
- MOFCOM informs the Provincial DOC about its decisions, and the latter then issues an export approval sheet to the applicant; and
- the EBO then 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 to EBOs satisfying certain conditions.¹¹ In contrast with an export approval sheet applying for an individual export transaction, a Class A general licence permits the same EBO to export one or more specified items and technologies to one or more end users in one or more countries or regions within the valid period,

8 See Article 14 of the Regulations on Administration of Controlled Chemicals.

9 See Article 6 of the Regulations on Nuclear Export Control.

10 See MOFCOM, 'Guidance to the approval of import and export of dual-use items and technologies', at <http://exctrl.mofcom.gov.cn/zhinan4.shtml>.

11 See Article 7 of the Administrative Measures for the General Licensing for Export of Dual-use items and Technologies.

while a Class B general licence permits the same EBO to export the same items and technologies to the same end user in the same country or region multiple times.¹²

End users and end uses

The Export Control Law attaches great importance to the management of 'end users and end uses'. In particular:

- EBOs are required to submit end-user and end-use statements to the SECADs (Article 15);
- End users must undertake not to alter the end use of the controlled items concerned or assign the items to any third party without the approval of the SECADs (Article 16);
- EBOs and importers are required to immediately report to the SECADs when they become aware of any possible change of the end user or end use (Article 16); and
- The SECADs should establish a risk management system to assess and verify the end users and end uses (Article 17), which implies that the SECADs may conduct on-site verification when necessary.

List of controlled parties

The SECADs are authorised under Article 18 to establish a CPL, listing those foreign importers and end users that are discovered to be doing any of the following:

- violating the requirements regarding the management of end users or end uses;
- potentially endangering national security or interests; and
- using controlled items for any terrorism purpose.

The SECADs may, among other things, prohibit or restrict the controlled parties from engaging in transactions relating to relevant controlled items, or order the suspension of the export of controlled items. The term 'transactions' seems to cover more than export. However, given that the scope of controlled items is narrower than the items subject to the US Export Administration Regulations, the consequence of being listed into the CPL seems less severe, compared with that of being listed into the Entity List of the US Department of Commerce.

Enforcement and investigation

According to Article 28, the SECADs may take the following measures when conducting an investigation of suspected violations of the Export Control Law:

- entering the business premises of the investigation subject or other relevant premises for inspection;
- making enquiries of the investigation subject, interested parties and other relevant organisations or individuals, and requesting that they explain matters related to the event under investigation;
- consulting and copying relevant documents, agreements, accounting books, business correspondence and other documents and materials of the investigation subject, interested parties and other relevant organisations or individuals;

¹² See Article 5 of the Administrative Measures for the General Licensing for Export of Dual-use items and Technologies.

- inspecting the means of transport used for export, stopping the loading of suspicious export items and ordering the return of illegally exported items;
- sealing up and seizing relevant items involved in the case; and
- examining the bank accounts of the investigation subject.

Article 19 further requires that:

- relevant departments of the State Council and local governments assist the SECADs to carry out their duties in accordance with the law; and
- relevant organisations and persons should cooperate and should not reject or impede the supervision and administration work of the SECADs.

Penalties

Articles 33 through 38 of the Export Control Law provide seven types of administrative penalties for nine types of violations respectively, including warnings, order to stop illegal activities, confiscation of illegal gains, fines, order to suspend business for rectification, revocation of licences, and revocation of the qualification for exporting relevant controlled items.

Notably, fines apply to all nine types of violations and the amount of the fines prescribed is relatively high. For example, an EBO that exports controlled items without obtaining the required qualification, or without a licence or beyond the scope of the licence, 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 (Article 34). Consequently, assuming that the illegal turnover is 100 million yuan, the fine could be up to 1 billion yuan. Any person facilitating export control violations may be imposed a fine of three to five times the illegal turnover, while an EBO entering into a transaction with an importer or end user on the CPL may face a fine of 10 to 20 times the illegal turnover.

Apart from the above administrative penalties, the SECADs may refuse to accept a licence application submitted by an EBO who was penalised for export control violations for up to five years, while persons in charge of such EBO and other persons who are directly responsible for the violations may be prohibited from engaging in the relevant export businesses activities for five years, or even for life for those who have been charged with criminal liabilities (Article 39(1)).

Additionally, persons who export items prohibited from exportation, or export controlled items without approval, would be charged with criminal liabilities in accordance with the law (Article 43(2)). The 'criminal liabilities' in this context may refer to those for the crimes of, among other things, smuggling and illegal business operations under China's Criminal Law 1997 (last revised in 2017).

So far, we have not found any instance where the administrative or criminal penalties were based on the Export Control Law. There were some instances of export control violations in 2020, when the China Customs respectively imposed a penalty ranging from 5 per cent to 30 per cent of the value of exported goods under the Implementing Administrative Regulation on Customs Penalty. Had the violations occurred after 1 December 2020, the China Customs would be able to impose, under the Export Control Law, penalties ranging from five to 10 times of the value of the exported goods in question.

Administration of technology export in mainland China

Besides the export control regime, China has established a separate administration regime for technology export under the Regulations of the People's Republic of China on the Administration of Technology Import and Export, which was promulgated in 2001 and revised in 2019 (the Regulations)

The Regulations apply to the transfer of any technology from inside the territory of China to outside the territory of China by way of trade, investment or economic and technological cooperation, and such technology transfer includes, among others, transfer of patent rights, transfer of patent application rights, patent licensing and transfer of know-how, technology services.¹³ However, export of nuclear technologies, dual-use nuclear technologies, technologies concerning the production of controlled chemicals, military technologies and other export control technologies shall be subject to the export control laws and regulations.¹⁴

Under the Regulations, technologies are divided into three categories: permitted, restricted and prohibited. Contracts of permitted technology export should be reported to the competent authority for record-filing; restricted technology should not be exported without an export licence; and technologies within the prohibited category are forbidden to be exported.¹⁵ A Catalogue of Technologies Prohibited and Restricted from Export (the Catalogue) was promulgated by the MOFCOM and the Ministry of Science and Technology in 2001, and amended in 2008 and 2020 respectively. The 2020 version of the Catalogue removed certain technologies from the prohibition and restriction categories and added a number of technologies into the restriction category, including some emerging technologies like 3D printing technology, unmanned aerial vehicle technology, information defence technology, artificial intelligence interactive interface technology and personalised information push service technology based on data analysis.¹⁶

Since 2007, the MOFCOM has delegated authority for reviewing and approving the export of restricted technologies to commercial departments at the provincial level.¹⁷ Upon receipt of an application for technology export, the competent commercial department shall, within 30 working days, review the application in conjunction with the competent science and technology department, make a decision on approval or non-approval, and, in the case of approval, issue a letter of intent for technology export licence. An applicant may engage in substantive negotiations and sign a technology export contract with foreign parties only after having obtained the aforesaid letter of intent. After having signed a technology export contract, the applicant can apply for the technology export licence. The competent commercial department shall examine the authenticity of the technology export contract and decide whether to grant the technology export licence within 15 working days upon receipt of the

13 See Article 2 of the 2019 Regulations.

14 See Article 43 of the 2019 Regulations.

15 See Articles 37, 31 and 30 of the 2019 Regulations.

16 Announcement [2020] No. 38 of the Ministry of Commerce and Ministry of Science and Technology – Announcement on the Amendment and Release of China's Catalogue of Technologies Prohibited and Restricted from Export.

17 See Article 4 of the Administrative Measures on Prohibition and Restriction of Exported Technologies.

application. The relevant technology export contract shall come into effect as of the date of issuance of the technology export licence.¹⁸

Sanctions and blocking measures in mainland China

Although it has not enacted specific laws on sanctions, China has a good record of implementing UN sanctions adopted by relevant Security Council resolutions, and in recent years has begun to take certain autonomous sanction measures. China has also promulgated two sanctions-related rules to safeguard its national sovereignty, security or development interests, namely the Provisions on the Unreliable Entity List (Order [2020] No. 4 of the MOFCOM; 'UEL Provisions') and the Rules on Counteracting Unjustified Extra-territorial Application of Foreign Legislation and Other Measures (Order [2021] No. 1 of the MOFCOM, 'Blocking Rules').

Implementation of UN sanctions

After a UN sanctions-related resolution is adopted or a UN Sanctions List is updated, the Ministry of Foreign Affairs (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; and
- 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.¹⁹

18 See Articles 6, 10, 11, 13, 14 and 15 of the Administrative Measures on Prohibition and Restriction of Exported Technologies.

19 See Article 20 of the 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).

Sanctions in response to foreign sanctions against China

In recent years, the MFA has announced several sanction measures in response to foreign sanctions and interference. For instance:

- 13 July 2020, in response to the US sanctions imposed on one government agency and four officials of China, China imposed reciprocal sanctions on one governmental entity and four officials on the US side;²⁰
- 14 July 2020, China imposed sanctions on a US company for selling arms to Taiwan;²¹
- 10 August 2020, in response to US government sanctions imposed on 11 Chinese officials, China imposed reciprocal sanctions on 11 officials on the US side;²²
- 26 October 2020, China imposed sanctions on several US companies for selling arms to Taiwan;²³
- 10 December 2020, in response to the US sanctions on 14 vice-chairmen of the Standing Committee of the National People's Congress of China, China imposed reciprocal sanctions on officials of the US executive branch, members of Congress, personnel of non-governmental organisations and their immediate family members;²⁴
- 21 January 2021, China imposed sanctions on 28 US persons who seriously violated China's sovereignty and who were mainly responsible for the anti-China movement in the US. These individuals and their immediate family members are prohibited from entering the mainland, Hong Kong and Macao of China. They and companies and institutions associated with them are also restricted from doing business with China;²⁵
- 22 March 2021, in response to EU sanctions on Chinese individuals and entities, China imposed sanctions on 10 individuals and four entities on the EU side;²⁶
- 26 March 2021, in response to UK sanctions on Chinese individuals and entities for Xinjiang issues, China imposed sanctions on nine individuals and four entities on the UK side;²⁷
- 27 March 2021, in response to US and Canada sanctions on Chinese individuals and entities for Xinjiang issues, China imposed sanctions on two individuals on the US side and one individual and one entity on the Canada side;²⁸ and

20 See Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 13 July 2020, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1797412.shtml.

21 See Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on 14 July 2020, at https://www.fmprc.gov.cn/web/wjdt_674879/fyrbt_674889/t1797678.shtml.

22 See Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on 10 August 2020, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1805214.shtml.

23 See Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on 26 October 2020, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1826627.shtml.

24 See Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 10 December 2020, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1839233.shtml.

25 See Foreign Ministry Spokesperson's Announcement, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1847570.shtml.

26 See Foreign Ministry Spokesperson's Announcement, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1863102.shtml.

27 See Foreign Ministry Spokesperson's Announcement, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1864363.shtml.

28 See Foreign Ministry Spokesperson's Announcement, at https://www.fmprc.gov.cn/web/fyrbt_673021/t1864786.shtml.

- 16 April 2021, in response to Iceland sanctions on Chinese individuals and entities, China imposed sanctions on one individual on the Icelandic side.²⁹

Unreliable Entity List

On 19 September 2020, the MOFCOM issued the UEL Provisions. Under those Provisions, a foreign entity or individual may be put onto the Unreliable Entity List (UEL) by the Chinese government if (1) it endangers the national sovereignty, security or development interests of China; and/or³⁰ (2) stops, in violation of normal market transaction principles, the supplies to, or discriminates against, a Chinese company, which as a result suffers serious damage.³¹

If included on the UEL, a foreign entity or individual may, among other things, not be able to trade with or invest in China if the Chinese government so determines at its own discretion.³² Accordingly, the UEL listing may have a far-reaching impact, compared with being included on a CPL under the Export Control Law. As mentioned earlier, a CPL listing only impacts the export of controlled items.

It is not clear whether the UEL Provisions apply to foreign entities that stop supplies to Chinese companies on the Entity List of the Bureau of Industry and Security (BIS). If so, foreign entities may have to explore a way to manage the conflicting requirements from the US side and the Chinese side (e.g., find another supply chain without any commodity, technology or software of US origin).

To date, no foreign entity or individual has been listed on the UEL, which may be seen as self-restraint by the Chinese government in implementing the UEL Provisions.

Blocking Rules

On 9 January 2021, the MOFCOM issued the Blocking Rules.

According to its Article 2, the Blocking Rules apply to situations where the extra-territorial application of foreign legislations and other measures, in violation of international law and the basic principles of international relations, unjustifiably prohibits or restricts Chinese entities or individuals from engaging in normal economic, trade and related activities with a third state (or region) or its entities or individuals.

Unlike the approach of the EU Blocking Statute, the Blocking Rules do not identify which foreign legislations or other measures are blocked, but provide a working mechanism led by the MOFCOM to determine which foreign legislations or other measures shall be blocked.³³ It has thus led to different readings as to the scope of application of the Rules. It is a common ground that the Blocking Rules apply to the 'secondary sanctions' of the US as such sanctions prohibit or restrict Chinese parties from entering into certain transactions with third-country parties. However, it is not clear whether the Blocking Rules may also apply to other circumstances. For example, it remains to be seen whether the Blocking Rules apply to (1) some US primary sanctions to the extent that they prohibit or restrict Chinese

29 See Chinese Embassy Spokesperson's Statement on China's Sanctions on One Relevant Icelandic Individual, at <http://is.china-embassy.org/eng/zbqx/t1869512.htm>.

30 Note that it is not entirely clear whether conditions (1) and (2) are accumulative or alternative.

31 See Article 2 of the UEL Provisions.

32 See Article 10 of the UEL Provisions.

33 See Article 4 of the Rules.

parties' transactions with third-country parties by reasons of the 'US-nexus' (e.g., US dollar payment or transfer through the US financial system); or (2) some US export control rules to the extent that they prohibit or restrict Chinese parties from re-exporting Chinese-origin products with US content (e.g., the de-minimis rule and the direct product rule). Further, there are discussions regarding whether Chinese companies blacklisted by OFAC or BIS on their SDN or Entity List may also invoke the Blocking Rules.

The Blocking Rules establish a reporting requirement; namely, any Chinese party who encounters the above-mentioned prohibition or restriction by foreign legislation and other measures shall truthfully report such matters to the MOFCOM within 30 days.³⁴

The Rules authorise the working mechanism to determine whether the prohibition or restriction constitute unjustified extra-territorial application,³⁵ and if so, to issue a prohibition order to the effect that the relevant foreign legislation and other measures shall not be recognised, executed or complied with.³⁶ Chinese parties are required to comply with such a prohibition order; that is, they are prohibited from complying with the foreign law or measure within the scope of the prohibition order, unless they obtain an exemption from the MOFCOM.³⁷ Otherwise, a penalty (amount uncertain now) and suit for damages against such complying Chinese parties may follow.³⁸

A foreign party may also risk facing a lawsuit in China, to redress its benefits from a foreign suit derived from the foreign legislation blocked by China.³⁹

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 China.

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

³⁴ See Article 5 of the Rules.

³⁵ See Article 6 of the Rules.

³⁶ See Article 7 of the Rules.

³⁷ See Article 8 of the Rules.

³⁸ See Article 13 of the Rules.

³⁹ See Article 9 of the Rules.

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.⁴⁰ The Securities and Futures Commission (SFC) is responsible for anti-money laundering and counterterrorism 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.⁴¹ 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.⁴²

PRC control over HKSAR policy

As part of China, HKSAR implements UN sanctions as well as unilateral sanctions under the instructions of the Central People's Government.

In respect of the UN sanctions, considering 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.⁴³

HKSAR also take measures to implement Central People's Government's autonomous sanctions. For example, on 10 December 2020, HKSAR announced the cancellation of visa-free visit arrangement for the US diplomatic passports holders with immediate effect, which was in line with the Central People's Government's countermeasure against the US.⁴⁴

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

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

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

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

43 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.

44 See Hong Kong government press release (10 December 2020), at <https://www.info.gov.hk/gia/general/202012/10/P2020121000909.htm?fontSize=1>.

authority to enforce these unilateral sanctions or investigate related cases' that do not concern HKSAR law.⁴⁵

Non-PRC influences over HKSAR sanctions and export controls

After the promulgation and implementation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the HK National Security Law) on 30 June 2020, the US and certain other foreign governments changed their policies towards Hong Kong in relation to export controls and sanctions.

In respect of export control, HKSAR was treated as a separate territory under US law. In certain situations, items that require a licence for export to mainland China did not require a licence for export to HKSAR. After the HK National Security Law came into force, the US government, through the Executive Order on Hong Kong Normalisation ('EO 13936') of 14 July 2020 and related measures, revoked such treatment of Hong Kong. Hong Kong is now subject to the same licence requirements, licensing exceptions, and provisions applicable to mainland China under the US export control regime.

As for sanctions, according to its 2021 Hong Kong Policy Act Report, the US government communicates regularly with HKSAR on issues involving sanctions implementation, and multinational and local financial services firms in Hong Kong have gained a greater awareness of sanctions-related risks in recent years, leading to increased compliance.⁴⁶ However, the 2020 and 2021 Reports did not mention cooperation regarding strategic trade controls and counterproliferation as in the previous reports.

US Sanctions over HKSAR

After the promulgation of the HK National Security Law, the US government imposed a series of sanctions on mainland China and HKSAR.

On 14 July 2020, the US President issued the EO 13936 and signed the 2020 Hong Kong Autonomy Act (HKAA) into law. The EO 13936 authorises the Treasury and State Departments to impose property blocking sanctions on foreign persons in relation to certain events in HKSAR, while the HKAA authorises (and in certain circumstances, requires) the executive branch to impose sanctions on any foreign person identified in a report submitted by the State Department to the Congress and to impose at least five of 10 enumerated sanctions on any foreign financial institution included in a report submitted by the Treasury Department to the Congress.

To date, 35 HKSAR and mainland China officials have been designated onto the OFAC's SDN List, and 34 of them have been identified by the State Department under the HKAA. No foreign financial institution has been identified yet under the HKAA.

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

46 See 2021 Hong Kong Policy Act Report issued by the US Department of State, Bureau of East Asian and Pacific Affairs (31 March 2021), at www.state.gov/2021-hong-kong-policy-act-report/.

Appendix 2

About the Authors

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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, insurance, automobile, energy, chemicals, machinery, electronics, aerospace, internet, 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 the 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.

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Dr Deming Zhao is a partner at 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 named in the Client Choice – Top 20 Lawyers in China, the first survey of this kind by ALB in 2012 and top ranked in 2021 by *Chambers Global* as a highly recommended lawyer, Customs, Export Control and Economic Sanctions (PRC Firms).

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. From 2020 through 2021, Dr Zhao has been the leading lawyer supervising a global export control compliance programme for a leading Chinese company.

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