



International Sanctions – Practical Problems, Potential Solutions and Possible Alternatives

2020 colloquium on
International Law

CHALLENGING AN

WINTERDEPENDENT
WORLD / SANCTIONS /

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International Sanctions

- **‘Sanctions policy and practice must be properly managed in accordance with the rule of law’ – Kimberley Prost, Judge, International Criminal Court**
- **‘We have indeed verified that all the transactions were in line with EU and French rules, regulations and directives ...’ – Christian Noyer of the French Central Bank, reported on 31 May 2014 – (BNP Paribas fined USD 8.9 billion)**

Legislative Developments in China and U.S.

Regulatory controls: Information flows and market access



United States

Dec 2012:
U.S. Securities and Exchange Commission ('SEC') proceedings against 'Big Four' accounting firms' Chinese branches

07 Dec 2018:
SEC and the Public Company Accounting Oversight Board ('PCAOB') issued a joint statement highlighting the lack of financial transparency of foreign issuers

21 April 2020:
SEC and PCAOB issued a joint statement highlighting PCAOB's inability to inspect audit work papers in China

18 May 2020:
Nasdaq proposed additional listing criteria targeting foreign issuers coming from 'Restrictive Markets'

20 May 2020:
Holding Foreign Companies Accountable Act passed by U.S. Senate, imposing heightened restrictions on U.S. reporting issuers who retain an auditor that the PCAOB is unable to fully inspect or investigate due to foreign government restrictions (citing Art. 177 of the P.R.C. Securities Law as an example)

06 Aug 2020:
President's Working Group ('PWG') made recommendations to address risks to U.S. markets posed by countries that do not allow PCAOB inspections – 'comply or delist'

03 Dec 2020:
Holding Foreign Companies Accountable Act passed by U.S. House of Representatives



China

May 2013:
PCAOB entered into MOU with China's Ministry of Finance and China Securities Regulatory Commission ('CSRC')

Oct 2018:
The Standing Committee of the National People's Congress passed the International Criminal Judicial Assistance Law

1 Mar 2020:
Revised P.R.C Securities Law took effect, including a new Art. 177, blocking the cross-border transfer of securities business data to foreign securities regulators without CSRC's approval

03 Jul 2020:
The Standing Committee of the National People's Congress released the 1st draft of the P.R.C. Data Security Law. If enacted, the new law will require approval from P.R.C. authorities before producing data in response to foreign law enforcement agencies' data request

17 Oct 2020:
The Standing Committee of the National People's Congress adopted the Export Control Law of China

U.S. Actions & China's Response

Timeline



United States

27 Nov 2019:
Hong Kong Human Rights and Democracy Act came into force. U.S. government may impose sanctions against Chinese and Hong Kong government official responsible for human right abuse in Hong Kong

09 Jul 2020:
Hong Kong Autonomy Act ('HKAA') was signed into law E.O. 13936 on Hong Kong Normalization was signed simultaneously invoking sanction powers against Hong Kong

09 Jul 2020 & 31 Jul 2020:
OFAC sanctioned two Chinese government entities (Xinjiang Public Security Bureau and the Xinjiang Production and Construction Corp) and six current or former government officials in connection with 'serious rights abuses against ethnic minorities in the Xinjiang Uyghur Autonomous Region'

07 Aug 2020:
OFAC designated 11 Hong Kong and P.R.C. government officials pursuant to E.O. 13936

14 Oct 2020:
U.S. State Department submitted to Congress a report under Section 5(a) of HKAA. OFAC issued guidance in the form of responses to FAQs to clarify the Treasury's intended approach to implementation of secondary sanctions under HKAA

01 Oct 2020:
U.S. State Department approved proposed arms sales to Taiwan by U.S. defense contractors

09 Nov 2020:
U.S. State Department designated 4 additional Hong Kong and P.R.C. government officials pursuant to E.O. 13936

12 Nov 2020:
E.O. 13959 on Addressing the threat from Securities Investments that Finance Communist Chinese Military Companies was issued, which bans certain transactions by U.S. persons in publicly traded securities of entities designated as Communist Chinese military companies; 31 companies had been so designated at the time

30 Nov 2020:
OFAC designated a Chinese government entity (CEIEC) 'for supporting the illegitimate Maduro regime's efforts to undermine democracy in Venezuela' pursuant to E.O. 13692



China



HK S.A.R.

29 Mar 2019:
The Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (the '2019 Hong Kong Extradition Bill') was published, which was ultimately withdrawn

31 May 2019:
China's Ministry of Commerce announced plan to introduce 'Unreliable Entity List'

30 Jun 2020:
Hong Kong government implemented the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region through promulgation

13 Jul & 14 Jul 2020:
China Ministry of Foreign Affairs announced sanctions against four U.S. politicians, an organisation (Congressional-Executive Commission on China) and a U.S. company (Lockheed Martin)

10 Aug 2020:
China announced sanctions against 11 U.S. officials 'with egregious records on Hong Kong affairs'

19 Sept 2020:
China's Ministry of Commerce announced the 'Provisions on Unreliable Entity List', which provides for the establishment of a Working Mechanism for the administration of the 'Unreliable Entity List'

26 Oct 2020:
China announced sanctions against three U.S. defense contractors over proposed military sales to Taiwan

30 Nov 2020:
China Ministry of Foreign Affairs announced sanctions against four individuals with links to U.S. democracy promotion efforts

U.S. Sanctions and Executive Orders

Key questions for a non-U.S. financial institution operating in Hong Kong

1. To what extent are we directly subject to the prohibitions imposed under the U.S. sanctions program or Executive Order, either directly as an entity or because our senior management includes individuals who are U.S. persons?
2. How does extra-territoriality work?
3. To what extent are we indirectly subject to the U.S. sanctions or Executive Order, in particular at risk of liability under secondary sanctions?
4. How do we interpret the U.S. sanctions or Executive Order?
5. What is the scope and what are the limitations of a financial sanction against designated persons?
6. What is the scope of any transaction controls?
7. Even if we are not subject to any direct restrictions, will we be impacted by restrictions on facilitation of transactions to which U.S. persons are subject?
8. Have we protected ourselves vis-a-vis third parties in our contractual documents?
9. Should we consider obtaining a license or exemption?

U.S. Sanctions and Executive Orders

Key questions for a non-U.S. financial institution operating in Hong Kong

10. To what penalties may we be subject for non-compliance? In particular, are we at risk of (i) being denied access to the U.S. dollar clearing system or (ii) our U.S. branches being closed down or restricted?
11. How might we be subject to investigation and what are the potential penalties for non-compliance?
12. If we do wish to comply with an investigation by the U.S. authorities, to what extent would we be prevented from doing so, or at risk of being penalised, because of local blocking legislation in the country or countries in which the information required to be provided by the U.S. authorities is located?
13. Can the U.S. sanctions or Executive Order be challenged?
14. If we do comply with the U.S. sanctions or Executive Order, does that of itself put us at risk of breaching local laws?
15. What is the prospect that so far are our own stakeholders are concerned, particularly if they are U.S. persons for the purposes of the U.S. sanctions regime, we will be asked questions, and required to provide assurances, as to our degree of compliance with the U.S. sanctions programs and Executive Orders?