

Sanctions and Long-Arm Jurisdiction

2023 COLLOQUIUM ON
INTERNATIONAL LAW



Navigating the current
International Legal Order

Dr Anthony Neoh SC JP

Co-Chairman

Asian Academy of International Law

When Are Sanctions Justified under UN Charter or WTO

Article 41 of the UN Charter

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

15 regimes subject to oversight of 15 Committees of the Security Council, strict application to avoid civilian suffering and regular review

- <https://www.un.org/securitycouncil/sanctions/information>
- <http://tcsp.cr.gov.hk/portal/ami-uns-page>

WTO Rules on ‘anti-dumping and countervailing duties’ and ‘retaliation’ under Dispute Settlement Rules of the WTO

Customary International Law

- Military and Paramilitary activities in and against Nicaragua 1986, ICJ judgment:
 - Principle of non-intervention means that no State can intervene in a manner in which a State is permitted to act by the principle of sovereignty to freely decide and intervention is wrongful when it uses methods of coercion in regard to such choices.
- International Law Commission Draft Articles on State Responsibility and Wrongful Acts
 - Article 22 – a countermeasure taken in conformity with Chapter II is permitted. Articles 49–54 impose stringent measures to ensure no degradation of humanitarian conditions and only to extent necessary to force State acting wrongfully (i.e. State not complying with an international obligation) to desist.

Unilateral Sanctions

- Not based on international law, but on national interest
<http://ofac.treasury.gov>
- Primary and secondary sanctions
- Directed at own nationals (including companies) but could include trade and investment embargoes and tariffs, plus asset freezes
- Should be territorial but because of global economic reach of financial and trading system, can have serious long-arm effect

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

2012 2018 2019 Mar. 2020 Apr. 2020 May 2020 Jun. 2020 Jul. 2020 Aug. 2020 Sep. 2020 Oct. 2020 Nov. 2020 Dec. 2020



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

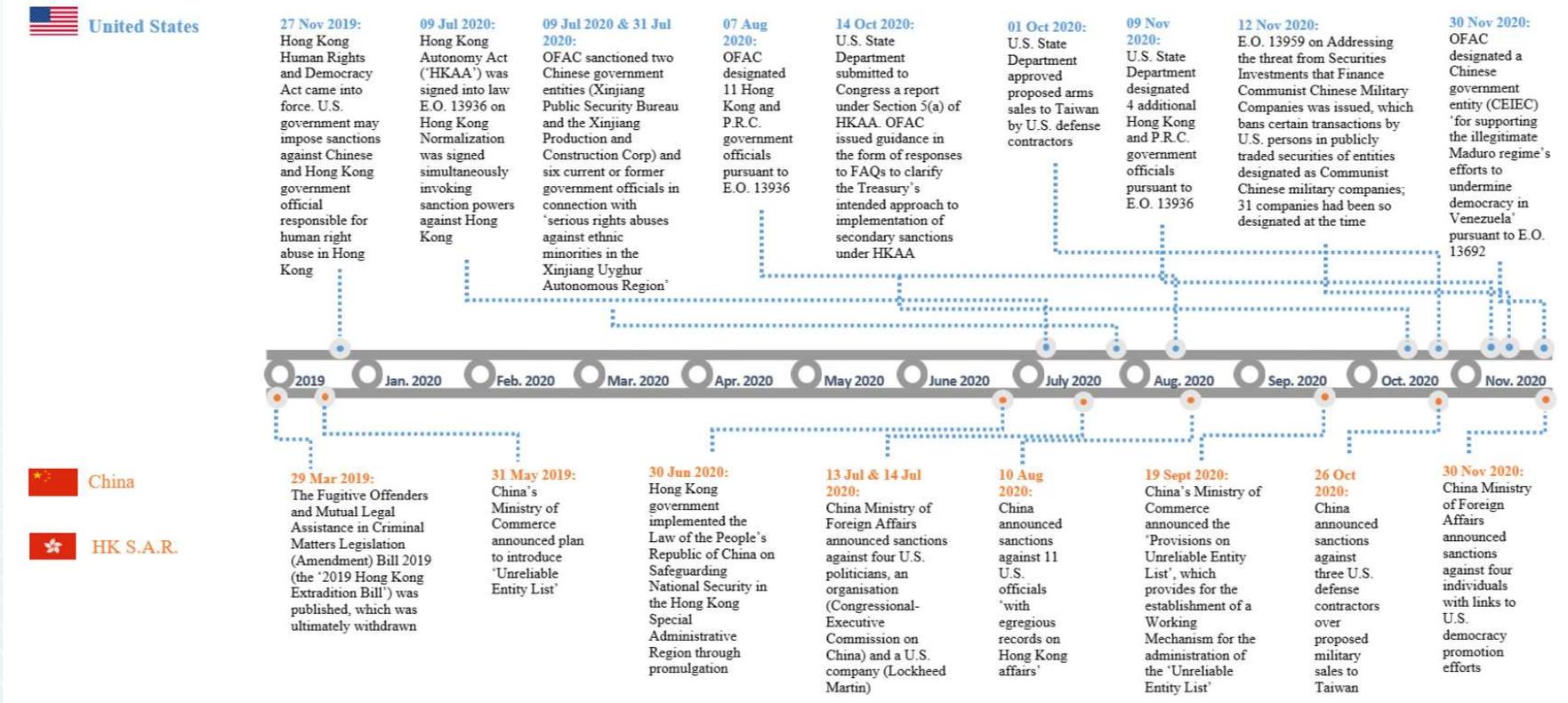
17 Oct 2020:
The Standing Committee of the National People's Congress adopted the Export Control Law of China

2023 COLLOQUIUM ON
INTERNATIONAL LAW



Navigating the current
International Legal order

US Actions and China's Response Timeline



Strategies Addressing Such Sanctions

- Ask yourself the question as to whether you need to export or invest in the US or the country imposing sanction
- Ask yourself the question whether you need to use US dollars
- Ask yourself the question whether you might be the subject of a secondary sanction
- Ensure compliance with anti-money laundering disclosure and compliance with the FCPA