

International Trade Update

March 2021

China-U.S. Legal and Regulatory Update

Over the past year, there have been many legal and regulatory developments that critically impact trade and investment between China and the United States. These include not only new U.S. restrictions, but also potentially wide-ranging new trade and investment authorities under Chinese law. This briefing provides a review of some of these key changes.

Investment Ban on Chinese Military Companies

On November 12, 2020, former President Trump issued [Executive Order 13959](#) prohibiting U.S. persons from transacting in certain publicly traded securities of Chinese companies designated by the U.S. Department of Defense as enabling Chinese military aims. Specifically, a U.S. person is prohibited from conducting any transaction in publicly traded securities or securities that are derivative of or designed to provide investment exposure to such securities of any Communist Chinese Military Company (CCMC) after 60 days of the date a company is determined to be a CCMC. Purchases of securities solely to divest such securities in such a CCMC owned by U.S. person are permitted within the one-year period from the date a company is determined to be a CCMC. The ban was effective on January 11, 2021. See our [January 15, 2021](#) and [January 7, 2021](#) *International Trade Updates* for more information.

On January 14, the Department of Defense added Xiaomi Corporation, Luokong Technology Corporation and others to the list of CCMCs. Xiaomi Corporation filed a lawsuit in the U.S. District Court for the District of Columbia challenging E.O. 13959. On March 12, the District Court issued an order in *Xiaomi Corporation v. Department of*

Defense preliminarily enjoining the implementation and enforcement of the E.O. 13959 prohibitions against Xiaomi. Consequently, the prohibitions in E.O. 13959 do not apply with respect to Xiaomi pending further order of the District Court. See our [March 17, 2021](#) SmarTrade blog post for additional details.

On March 15, the Department of Defense also clarified that its listing of Luokong Technology Corporation was erroneous and listed Luokung Technology Corp. instead, postponing the prohibition against U.S. persons' transactions of this company's publicly held securities to May 8 and allowing divestment transactions until March 9, 2022.

WRO Holds Imports from Xinjiang at U.S. Border over Forced Labor Concerns

On January 13, 2021, U.S. Customs and Border Protection (CBP) issued a new regional withhold release order (WRO) on all cotton and tomato products grown and produced by entities operating in China's Xinjiang Uyghur Autonomous Region. A CBP investigation found reasonable indications of the use of detainee or prison labor or other situations of forced labor. Specifically, CBP identified forced labor factors including debt bondage, restriction of movement, isolation, intimidation and threats, withholding of wages, and abusive living and working conditions. The WRO directs CBP personnel at all U.S. ports of entry to detain cotton and tomato products grown or produced by entities operating in Xinjiang, including apparel, textiles, tomato seeds, canned tomatoes, tomato sauce and other goods made with cotton and tomatoes. See [January 13, 2021](#) SmarTrade blog post.

Federal statute 19 U.S.C. 1307 prohibits the importation of merchandise produced, wholly or in part, by convict labor, forced labor and/or indentured labor, including forced or indentured child labor. Importers are responsible for ensuring that imported products do not exploit forced labor at any point in their supply chain, including during the production or harvesting of raw material. Importers of detained shipments, however, have the opportunity to demonstrate that the merchandise was not produced with forced labor to secure release of a shipment.

Further, and while not China-specific, CBP's Commercial Customs Operations Advisory Committee (COAC) recently indicated that CBP intends to add forced labor to its list of priority trade issues. The COAC issued [recommendations](#) on how to "ensure a more holistic U.S. government-wide approach to addressing forced labor." The COAC Forced Labor Working Group recommendations urge CBP to collaborate with other agencies and the private sector to develop objective metrics for success in combating forced labor. See [March 18, 2021](#) SmarTrade blog post.

U.S. Removes Differential Treatment Status for Hong Kong and Implements Related Sanctions on China

In July 2020, former President Trump issued [Executive Order 13936](#), which determined that Hong Kong was no longer sufficiently autonomous from the People's Republic of China (China) to justify differential treatment under various U.S. laws and regulations due to increasingly denied autonomy and freedoms that China promised to the people of Hong Kong. At the same time, Trump also signed into law the Hong Kong Autonomy Act, which imposes sanctions on persons and foreign financial institutions designated as contributing to China's failure to adhere to its obligations in maintaining Hong Kong's autonomy. See [July 16, 2020](#) SmarTrade blog post.

On January 15, the Department of the Treasury's Office of Foreign Assets Control (OFAC) formally issued regulations implementing aspects of the executive order and establishing sanctions and the blocking of property of designated foreign persons determined "to be or have been involved, directly or indirectly, in the coercing, arresting,

detaining, or imprisoning of individuals under the authority of, or to be or have been responsible for or involved in developing, adopting, or implementing, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Administrative Region." See [January 15, 2021](#) SmarTrade blog post.

Similarly, the Department of Commerce's Bureau of Industry and Security (BIS) removed Hong Kong as a "separate destination" from China, which had allowed it to have a more liberal policy on the receipt of exports of U.S. goods and technology. As of December 23, 2020, Hong Kong now falls into a more restrictive national security export licensing category, and certain long-standing export license exceptions for exports, reexports and in-country transfers to Hong Kong have been revoked. See [December 28, 2020](#) SmarTrade blog post.

Thousands of U.S. Importers Sue USTR for "Unlawful Escalation" of Section 301 Tariffs Against China

On September 10, 2020, HMTX Industries LLC and two of its subsidiaries ("complainants") filed a [complaint](#) at the U.S. Court of International Trade (CIT) alleging an unlawful escalation of the ongoing trade war with China through the imposition of tariffs on imports covered under Lists 3 and 4. Arguing that the Trade Act of 1974 did not confer authority on the Office of the U.S. Trade Representative (USTR) "to litigate a vast trade war for however long, and by whatever means, they choose," the complaint states that the USTR had a limited time to determine any actions to take and that the "arbitrary manner" in which the List 3 tariff actions were implemented violates the Administrative Procedure Act.

In the months that followed, over 3,600 similar cases were filed with the CIT and the litigation has continued, with various procedural orders entered, a three-judge panel appointed and, most recently, the Department of Justice issuing its first substantive [answer](#) to the complaint. See [September 14, 2020](#), [October 21, 2020](#), [February 8, 2021](#), [February 18, 2021](#) and [March 15, 2021](#) SmarTrade blog posts.

These tariffs were implemented after the USTR, pursuant to Section 301 of the Trade Act of 1974, initiated an

investigation and determined that that China's acts, policies, and practices related to technology transfer, intellectual property, and innovation were unreasonable and discriminatory. This determination led to imposition of tariffs ranging from 7.5% - 25%, on certain Chinese imports into the United States.

U.S. Tightens Export Controls Against Huawei and Affiliates Through Huawei-Related Direct Product Rule

On August 17, 2020, BIS issued a *Federal Register* [notice and Final Rule](#) taking several actions directly impacting Huawei Technologies Co., Ltd. (Huawei) and its non-U.S. affiliates. In addition to 68 Huawei affiliates placed on the Entity List in May 2019 and 46 added in August 2019, BIS added another 38 Huawei non-U.S. affiliates to the Entity List effective immediately, bringing the total number of listed and restricted affiliates to 152. For prior information on Huawei's temporary general license and its prior status, see [May 21, 2019](#) and [May 15, 2020](#) SmarTrade blog posts.

Significantly, the Final Rule removed the requirement that covered semiconductor items must be designed by Huawei to be subject to the EAR. Now, the Final Rule makes the following subject to the EAR, necessitating a license to transfer to Huawei:

- items that are the direct product of certain controlled electronic devices, computer and telecommunications software or technology involving certain electronic circuits; processors; integrated circuits; electronic and digital computers; and certain telecommunications test, inspection and production equipment;
- items that are manufactured at plants located outside of the United States that are the direct product of such controlled U.S.-origin software or technology; and
- when there is "knowledge" that the foreign-produced item: (1) will be incorporated into, or will be used in the "production" or "development" of any "part," "component," or "equipment" produced, purchased, or ordered by any listed Huawei entity or affiliate; or (2) any listed Huawei entity or affiliate is a party to any transaction involving the foreign-produced item, e.g., as a "purchaser," "intermediate consignee," "ultimate consignee," or "end-user."

See [August 19, 2020](#) SmarTrade blog post.

U.S. Divestment Order and Ban on Transactions Related to Chinese Mobile Applications TikTok and WeChat

On August 6, 2020, former President Trump issued two executive orders potentially banning certain transactions with China-based mobile applications TikTok and WeChat. Both orders noted that additional steps must be taken to address the national emergency involving the information and communications technology and services supply chain declared in Executive Order 13873. See [August 7, 2020](#) SmarTrade blog post. On September 18, 2020, the Department of Commerce [announced](#) prohibitions on transactions with WeChat and TikTok to "safeguard the national security of the United States" that were to become effective on September 20 and November 12, 2020. Two lawsuits filed to enjoin the U.S. government from enforcing these orders remain pending in U.S. federal courts. Most recently, the Biden administration has requested the courts pause these cases. See [September 22, 2020](#), [September 24, 2020](#), [October 5, 2020](#) and [February 12, 2021](#) SmarTrade blog posts.

On August 14, 2020, after an extensive review and unanimous recommendation by the Committee on Foreign Investment in the United States, Trump issued an [executive order](#) directing that the already completed transaction that resulted in the acquisition of Musical.ly, now known as TikTok, by the Chinese company ByteDance Ltd. be unwound. Commerce's seven-day delay of the prohibitions against TikTok followed the September 19, 2020 announcements of [Walmart](#) and [Oracle's](#) deal with TikTok to form a new entity called TikTok Global, which will be headquartered in the United States.

U.S. Sanctions on Chinese Persons for Human Rights Abuses and Government Corruption

On July 1, 2020, the Departments of State, Commerce, Homeland Security and the Treasury issued the [Xinjiang Supply Chain Business Advisory](#), which is intended to alert businesses of the potential exposure in their supply chains to entities that engage in human rights abuses, including

forced labor in Xinjiang or elsewhere in China (see above). See [July 14, 2020](#) *International Trade Update*.

Additionally, in August 2020, OFAC [sanctioned](#) several entities in Xinjiang that were accused of human rights abuses against ethnic minorities in the Xinjiang Uyghur Autonomous Region. See [August 3, 2020](#) SmarTrade blog post.

Congress Passes Legislation to Enhance Efforts to Secure U.S. Telecommunication Networks

On March 12, 2020, former President Trump signed into law [H.R. 4998](#), the Secure and Trusted Communications Networks Act of 2019, which prohibits the use of certain federal funds and subsidies to purchase communications equipment or services posing national security risks. The act, passed by the House of Representatives and the Senate by voice vote and now Public Law No. 116-124, also creates a reimbursement program to assist with the removal and replacement of current equipment in use that was manufactured by entities posing unacceptable national security risks. See [March 13, 2020](#) SmarTrade blog post.

China (PRC) Issues Blocking Rules

On January 9, China's Ministry of Commerce (MOFCOM) issued Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures. The rules, which have similar language to the EU Blocking Law (Regulation No. 2271/96), state that they provide protection and counteract the extraterritorial application of non-Chinese laws and regulations that violate "international law and basic principles of international relations" and "unjustifiably prohibit or restrict Chinese persons from engaging in normal economic, trade and related activities with a third State (or region) or its citizens, legal persons or other organizations." U.S. or other non-Chinese sanctions are among the many laws that might fall under this description.

A reasonable interpretation of the rules suggests that they only apply to Chinese persons, i.e., "Chinese citizens, legal persons, or other organizations." However, whether a Chinese subsidiary of a non-Chinese person can be considered a Chinese legal person requires a case-by-case determination.

To implement the rules, the Chinese government has designated a joint committee called the Working Mechanism. Under the rules, a Chinese person must report within 30 days to MOFCOM if they encounter unjustified extraterritorial application of non-Chinese legislation and measures. Failure to report may result in warnings and penalties.

The Working Mechanism may issue an order prohibiting all Chinese persons from complying with an extraterritorial law. Once an order is issued, any Chinese person that suffers damages from actions that comply with the extraterritorial law (e.g., U.S. sanctions) instead of the PRC prohibition order may seek legal redress and compensation through Chinese courts.

The rules also provide a procedure for seeking an exemption from the prohibition order.

China (PRC) Export Control Law

On December 1, 2020, China issued its new Export Control Law (ECL), which provides an expansive definition of controlled items, including military products, and dual-use items such as nuclear and other goods, technologies, services and other items related to "national security and interests" and fulfilling international obligations such as non-proliferation.

The ECL applies to a broad range of conduct and transactions. It places controls on the "transfer of controlled items from the territory of the People's Republic of China to overseas" and "the provision of controlled items by any citizen or incorporated or non-incorporated organization of the People's Republic of China to any foreign organization or individual." The ECL also applies to "the transit, transshipment, through transportation, or re-export of controlled items, or the export of controlled items from any bonded areas, export processing zones or other special customs supervision zones or export supervised warehouses, bonded logistics centers or other bonded supervision premises to overseas." Given the expansive definition of controlled items to include "technologies" and "data," disclosures of controlled technology to third persons may also be treated as exports (similar to the U.S. concept of deemed exports).

See Thompson Hine's recent [webinar](#) on this topic and the ECL's potential impact on global business for more information.

China's Foreign Direct Investment Review Law

On December 19, 2020, China published Measures for the Security Review of Foreign Investments (FDI Law), which took effect on January 18. It expands the scope and heightens the level of scrutiny of the existing security review of foreign direct investments in China.

The FDI Law has a sweeping scope of application, which may include "greenfield investments" that were not previously subject of security review. Under the FDI Law, two categories of investments must be declared to the government and receive approval before completion: investments in military-related entities and investments in certain industries if the foreign investors have obtained an actual control stake. "Actual control stake" in the investee enterprise is defined as where the foreign investor holds more than 50% of the equity of an enterprise; where the foreign investor holds less than 50% of the equity of an enterprise, but the voting rights held by it can have significant impact on the resolutions of the board of directors, the board of shareholders or the general meeting of shareholders; or other circumstances where the foreign investor may have significant impact on the enterprise's business decision-making, human resources, finance, technology, etc.

China's New Five-Year Plan

Earlier this month, China issued its 14th Five-Year Plan for 2021-2025. It expounds on China's strategic intentions, specifies the government's priorities and provides guidance on the behaviors of market entities. It adopts the idea of "dual circulation" as the core concept for China's future economic growth, in which China will rely not only on its domestic system (i.e., internal circulation) but also on international trade and foreign investment (i.e., external circulation). It also highlights innovation and technology developments as the country's strategic priorities, signaling China's reduced reliance on technology imports.

While an English-language translation of the Five-Year Plan is not available, the Congressional Research Service recently prepared a ["first look" summary of the plan](#), which includes an overview of the dual circulation concept, as well as China's desire to secure its supply chains and boost self-sufficiency in agriculture, energy, technology and industry.

FOR MORE INFORMATION

For more information on any of these topics, please contact a member of our [International Trade](#) group.

This advisory bulletin may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgment of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions.

© 2021 THOMPSON HINE LLP. ALL RIGHTS RESERVED.