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深度解析中国反制裁新举措研究报告

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编者按

本研究报告由卓纬高级国际顾问吕立山（Robert Lewis）撰写，中文版由卓纬团队翻译并由卓纬合伙人李丽律师校定。本系列文章分析了美国次级制裁实施的影响、研究了中国新的阻断法令和其他反制裁措施，深入探讨了新法律制度的地缘政治、实际运用等要点。

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一、美国次级制裁激起世界各国的强烈反对

--美国目前处于非对称杠杆地位，但其单边政策带来更大的地缘政治风险

作为世界上领先的超级大国，美国或许拥有无可匹敌的军事实力，但近几十年来，美国更倾向于将经济制裁武器化，作为其在全球投射实力和影响力的工具。

经济抵制、封锁和其他贸易制裁的历史可以追溯到几千年前。20 世纪下半叶，制裁成为更突出的经济治国手段，因为美国和其他西方国家认为，与战争相比，金融和贸易压力更适合作为执行战后全球新秩序的手段，其可以使经济强国无需派遣地面部队或将军队置于危险境地即可实现许多相同的地缘政治目的。

制裁可能是在多边或单边基础上实施的，但美国是全球制裁博弈中唯一不可或缺的参与者，其制裁范围最广，执行能力最强、最有效。没有美国，多边制裁就没有真正的效力，美国单独行动仍然可以有效地将其意愿强加给世界各地的企业和个人，迫使他们遵守其规则。

美国制裁的力量源于在这个互联程度空前的全球中，其在军事、经济和技术领域上融合了无可争议的领先地位。美国在国际秩序中的核心地位，尤其是美元在全球的主导地位，使美国拥有无与伦比的影响力，并使其影响力呈指数级增长。

但是这种不受制约的实施制裁的权力，不可避免地遭到了来自世界各地的强烈反对，不仅来自美国制裁的目标政府和企业，还有那些外交政策和商业利益受到美国次级制裁限制的第三国。欧盟、加拿大以及其它传统上与美国结盟的国家已经在阻止这一点。如今，中国也加入了这场战争，增加了地缘政治对抗的风险，也增加了跨国公司的合规风险。

在本系列文章第一篇中，我们将简要介绍美国次级制裁的历史、美国主张域外管辖权的依据，以及为什么美国在执行相同制裁中处于独特地位--其他国家可能希望做但实际上无法做到。后续文章，我们将更详细地探讨其他国家正在采取的反制措施，特别是欧盟、加拿大和中国通过的阻断法令(现中国新颁布《反外国制裁法》补充已有法令) ，以及通过在国际贸易中与美元脱钩来绕过美

国的长臂管辖权。

（一）聪明制裁的兴起

过去的几十年，美国在加大制裁力度的同时，提高了制裁的有效性和精确度。经济禁运和封锁历来被批评为过于生硬的手段，往往不仅影响到做坏事的被制裁目标，而且无差别地对无辜的旁观者造成严重伤害。在许多情况下，这被认为从根本上不符合制裁所述的人道主义或人权目标，但即使制裁的目的是为了实现国家安全的目标，人力成本也往往被认为是过高了。

1996 年，克林顿政府时期的美国国务卿马德琳·奥尔布赖特（Madeleine Albright）在接受美国有影响力的电视新闻节目《60 分钟》（60 Minutes）采访时谈到的即使（假设）萨达姆·侯赛因（Saddam Hussein）时期对伊拉克的贸易封锁导致了 50 万伊拉克儿童死亡，“这个代价也是值得的。[1]” 她的言论体现了美国对制裁给人们造成的苦难明显的漠不关心。

2001 年 9.11 恐怖袭击后，美国发明了新的“聪明”制裁措施，目标更明确、力度更大。根据相关立法和行政命令，对受制裁国家的指定人员以及恐怖组织和贩毒集团等非国家行为者实施处罚。此类制裁由美国财政部下属的外国资产管制办公室（OFAC）作出，目标当事方被列入特别指定国民名单（SDN List，下称“SDN 名单”）上，该名单是 OFAC 管理的若干制裁名单之一。

对于与美国几乎没有联系的被制裁人员来说，初看时，被列入 SDN 名单可能几乎没有什么实际影响，在某些情况下，被列入制裁名单甚至被那些公开反对美国外交政策、并骄傲地嘲讽美国试图将规则强加于境外的人视为荣誉勋章。

但是，其他情况下 SDN 名单可能会产生毁灭性的影响。被制裁方的所有由美国控制资产均被冻结，任何美国人与 SDN 名单上的实体或个人之间的任何类型的投资、贸易或信贷交易都被全面禁止。此外，根据 OFAC 的 50%的规则，这种基于清单的制裁也适用于由清单所列实体或个人拥

1 https://www.washingtonpost.com/opinions/five-myths-about-sanctions/2014/05/02/a4f607b6-d0b4-11e3-9e25-188ebe1fa93b_story.html#:~:text=%20%20%201%20Sanctions%20never%20work.%0AFifteen%20years,%E2%80%9Cmore%20pain%2C%20more%20gain%E2%80%9D%20when%20it...%20More%20

有 50%或 50%股权以上的任何实体。[2]

对被制裁者来说，更糟糕的是，许多非美国机构，特别是外国银行，可能同样因为害怕自己被列入制裁名单而拒绝与 SDN 名单上的当事方打交道。因此，50%的规定、主流非美国银行和许多其他非美国方广泛回避与被制裁者的关联等因素结合在一起产生了强大的连锁效应，使美国制裁的触角延伸到被制裁者的金融帝国，有可能切断该集团所有成员与整个以美元计价和美元主导的全球金融体系的联系，从而切断其世界各地的主要收入来源。

这种精确制导的经济弹道导弹被部署在一系列场景中，目标是广泛的做坏事的人，从恐怖主义组织及其支持者，到贩毒者和相关协助者，以及被美国视为有侵犯人权、违反不扩散议定书、其他违反国际法、或违反美国外交政策和国家利益的行为的政府官员和国有企业。

美国政府对 SDN 名单的潜在制裁目标有裁量权。例如，特朗普总统禁止与委内瑞拉国有石油公司（Petroleos de Venezuela, S. A.）和委内瑞拉政府做交易，这也影响了与委内瑞拉政府有关的利润分配以及证券和贷款交易。[3]2018 年，特朗普政府的财政部将某些伊朗银行列入 SDN 名单，[4]导致这些银行无法进入全球 SWIFT 支付网络。[5]2020 年，特朗普政府以在新疆和香港侵犯人权为由对中国内地和香港的多名高级官员实施制裁。[6]最近，拜登总统对涉嫌网络安全攻击和干扰选举的俄罗斯官员和企业实施了制裁。[7]

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[2] See https://www.ustreas.gov/ofac

[3] https://www.hg.org/legal-articles/ofac-list-in-the-usa-sanctions-and-consequences-47906

[4] https://sanctionsnews.bakermckenzie.com/ofac-designates-iranian-entities-and-banks-as-specially-designated-nationals-and-fincen-issues-advisory-on-irans-illicit-and-malign-activities-and-attempts-to-exploit-financial-systems/

[5] https://www.reuters.com/article/us-usa-iran-sanctions-swift-idUSKCN1NA1PN

[6] "US sanctions Chinese officials over Xinjiang 'violations'", www.bbc.com. July 9, 2020; "Treasury Sanctions Individuals for Undermining Hong Kong's Autonomy". United States Department of the Treasury. 7 August 2020.

[7] https://www.internationaltradeinsights.com/2021/04/biden-administration-imposes-new-russia-sanctions-and-establishes-framework-for-future-expansion-of-russian-sanctions-regime/

（二）利用美国的技术领导地位

SDN 名单并不是美国经济措施中唯一可以针对世界各地外国公司的武器。美国商务部下属的工业安全局（Bureau of Industry Security, BIS）管理着另外两份名单：拒绝人员名单和实体清单。拒绝人员名单包括被 BIS 拒绝出口和再出口特权的个人和公司。实体清单包括被视为参与威胁美国国家安全或外交政策的活动的实体，例如向受制裁国家出售源自美国的军民两用技术。将某些源自美国的敏感技术出口到上述名单上的实体也受到许可限制。

同样，再出口包含源自美国的受控技术和软件的产品也要遵守美国出口管理条例(EAR) 项下的许可要求。该再出口禁令适用于指定的美国产品或世界任何地方生产的包含不少于 25%的原产于美国的受控技术的产品，如果最终用户所在国被指定为支持恐怖主义的国家(特别是古巴、北朝鲜、伊朗和叙利亚) ，最小比例的要求门槛将降至 10%。[8]对于某些特定商品，最小比例为 0%，即不允许再出口。

美国人与 SDN 名单或实体清单上的公司或个人交易的豁免权，可以通过一般许可证或特别许可证获得，但这类许可证通常受到严格限制，以避免破坏相关制裁计划的目标和效力。

虽然 SDN 名单规定全面禁止与被制裁方的所有交易，实体清单下的限制仅限于涉及受控的美国来源技术的交易。然而，实际上对于依赖于获得此类源自美国的技术的公司来说，在许多情况下被列入实体清单这个“黑名单”可能等同于经济死刑。

就像 2018 年，中国的中兴通讯(ZTE)违反其先前的和解协议的条款而被判处 7 年禁止向美企业购买敏感产品，这本质上将关闭其全球安卓手机业务，因为它将无法再将广受欢迎的谷歌应用商店、Gmail 和 YouTube 等捆绑于 Android 系统。如果特朗普没有为了让当时正在进行中的中美贸易谈判保持正轨而进行干预，中兴可能无法生存。[9]

2019 年，美国还将华为列入实体清单，并进一步打击了这家中国电信设备巨头，禁止其购买

[8] https://www.bis.doc.gov/index.php/documents/licensing-forms/4-guidelines-to-reexport-publications/file

[9] https://asialawportal.com/2021/03/03/the-defense-of-huawei-cfo-meng-wanzhou-how-the-principles-of-the-rule-of-law-extend-fundamental-protections-to-non-u-s-companies-and-executives-subject-to-extraterritorial-jurisdiction/

含有美国敏感技术的半导体芯片。因此，华为手机销量预计将从 2020 年的 1.7 亿台（当时华为仍在使用禁令生效前采购和储存的芯片）下降至 2021 年仅销售 4,500 万台，从当年全球排名仅次于三星和苹果的第三位，降至第七位。[10]华为公布了 2021 年第一季度总体收入[11]同比下降 16.5%，而 2020 年同比增长 3.8%，主要是由于中国市场的强劲销售抵消了国际销售额的下降。[12]

（三）次级制裁——强大的地缘政治权力的行使

美国对华为采取的行动对该公司造成了严重但并非致命的打击。虽然美国有权控制美国科技公司出口敏感技术，但在这件事上，美国远远超出这一点，它争取到了全球科技公司的参与，将华为排除在美国主导的全球半导体供应链之外。

这是美国制裁的精髓，也展示了其巨大的力量--美国利用其科技领先地位和在全球金融体系中的主导地位，不仅限制美国人的行为，也限制美国以外的公司和个人的行为。尽管 OFAC 实施的次级制裁和《美国出口管理条例》对美国敏感技术的再出口禁令存在一些重要的技术区别，但在以上两个案例中，美国都将其长臂管辖权的范围扩张与铁腕手段结合在一起，旨在迫使外国各方遵守美国外交政策，否则就有可能丧失进入美国金融体系或获得美国技术的机会。

次级制裁的两个早期例子出现在《古巴自由和民主团结法》(LIBERTAD) ，通常称为《赫尔姆斯-伯顿法》，以及《伊朗-利比亚制裁法》(ILSA) ，有时称为 D'Amato 法 ，这两项法律均于 1996 年生效，旨在阻止美国和外国公司与古巴、伊朗及利比亚进行某些交易。

ILSA 的主要发起人、参议员达马托（D'Amato）在这番非常直率的声明中总结了美国的态度：“现在世界各国将知道，他们可以与他们（伊朗和利比亚）进行贸易，也可以与我们进行贸易。他们必须做出选择。”[13]

美国实施次级制裁的理由很简单。在美国实施的直接制裁下，美国公司和个人被禁止从事某些

[10] https://technode.com/2021/01/06/huawei-to-fall-to-seventh-place-in-2021-global-handset-rankings-report/
[11] https://www.cnbc.com/2021/04/28/huawei-reports-16point5percent-drop-in-revenues-in-first-quarter.html
[12] https://www-file.huawei.com/minisite/media/annual_report/annual_report_2020_en.pdf
[13] Jerry Gray, Foreigners Investing in Libya or in Iran Face U.S. Sanctions, N.Y. TIMES (July 24, 1996), http://www.nytimes.com/1996/07/24/world/foreignersinvesting-in-libya-or-in-iran-face-us-sanctions.html.

交易。如果外国竞争对手没有受到同样的限制，并填补了美国公司撤出所造成的真空(这一过程称为“回填”) ，那么美国公司将把业务拱手让给外国竞争对手，同时美国的政策目标可能会受阻或完全受挫。因此，从美国的角度来看，次级制裁被视为一种“反规避”措施。

美国两党政界人士达成广泛共识，支持实施日益激进的制裁措施。这不仅是共和党总统采取的立场，也是民主党总统采取的立场，不仅是行政部门采取的立场，也是(或许更主要是)国会采取的立场——他们都是美国单边制裁的狂热支持者和提供者(尽管特朗普在单独行动方面无论以任何标准衡量都是一个离群者，他甚至常常不与西方盟友进行名义上的协商和协调)。

美国政治阶层敏锐地意识到，美国拥有无可匹敌的经济实力，他们会毫不犹豫地运用它来追击他们认为做坏事的人，以实现美国的外交政策目标。此外，他们也非常愿意要求世界其他国家与他们统一战线，即使在地缘政治目的和手段上的看法不尽相同。

（四）美国对抗世界

涉及此类次级制裁问题上，美国有朋友但没有盟友，至少没有自愿的盟友。全世界一致反对美国公然越权，滥用其在全球体系中的主导地位。

法律学者对美国单方面的次级制裁提出质疑，认为其域外管辖权的行使违反了国际法的核心原则。[14]更根本的是，世界各国政府，包括许多美国最亲密的合作伙伴，都抗议美国次级制裁的域外因素，认为侵犯了他们的主权。[15]

为反对 1996 年美国根据《赫尔姆斯-伯顿法案》(Helms-Burton Act)对古巴、伊朗和利比亚实施的制裁，加拿大、几个欧洲国家和其他国家向世贸组织提起诉讼。此外，加拿大、欧盟和其他一些国家通过了阻断法令，规定本国国民遵守美国制裁命令是违法的。在这种压力下，美国最终同意放弃执行某些更令人反感的域外条款。针对伊朗的制裁，美国在继续实施单边制裁的同时，也与西方盟友重新达成共识。

[14] HYPERLINK "https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823" https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

[15] https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1854&context=wilj,

尽管美国政府扩大了次级制裁的使用，但主要西方国家在制裁方面的广泛共识在奥巴马执政期间一直持续。[16]但特朗普在 2018 年改变策略，再次对古巴和伊朗实施制裁，包括增加次级制裁，世界各国再次大声抱怨，欧盟和加拿大重拾 20 年前的旧阻断法令。然而，这一次他们发现，面对美国次级制裁可能带来的巨额经济惩罚，他们的抱怨和反制措施基本上是无效的。全球各地的企业几乎全都屈服于美国的法令。

原因很简单——大多数大型跨国公司都承担不起因违反美国次级制裁而失去进入美国市场的代价。更重要的是，没有一家公司，无论规模大小，能够承受被贴上违反制裁的标签，并冒着被切断与全球银行体系联系的风险。

美国在全球金融体系中的绝对主导地位使它与其他国家相比占据了极不对称的优势地位。当特朗普禁止伊朗银行进入 SWIFT 网络时，总部设在比利时的 SWIFT 照办了，欧盟也默许了。[17]但这开创了一个潜在危险的先例，赋予了美国明显不容置疑的可以施加特别惩罚的权力，即一位作家所称的“金融驱逐”。[18]

美国一直非常积极地追查不服从美国制裁的全球银行。举几个例子：

- 巴克莱在 2010 年 8 月达成认罪协议，承认处理与古巴、伊朗和苏丹的违禁支付交易，并同意被没收 2.98 亿美元；[19]
- 2012 年 12 月，汇丰银行与美国司法部签署了一份延期起诉协议（DPA)，并支付了 19 亿美元罚款和没收款项，原因是为了规避美国制裁，汇丰银行从受制裁国家和当事方的违禁支付交易中剥离识别信息；[20]

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16 https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

17 https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

18 https://www.economist.com/finance-and-economics/2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy

19 https://www.justice.gov/opa/pr/barclays-bank-plc-agrees-forfeit-298-million-connection-violations-international-emergency

20 https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations

- 在迄今为止最大的一次银行追责诉讼中，法国巴黎银行因无视警告处理与伊朗、古巴和苏丹的冻结支付交易而被处以总额 89 亿美元的罚款；[21]以及
- 渣打银行于 2019 年 4 月签署了一份经修订的 DPA，并支付了超过 10 亿美元的罚款和没收款项，原因是其前员工在迪拜的非法支付交易。[22]

银行通常不愿冒险将这些案件送上法庭，因此他们会就认罪协议或 DPA 进行谈判，这为结果提供了确定性，并确保他们不会被列入“黑名单”，从而能够继续经营下去。但这种做法确实使美国的法律立场不受质疑（包括涉及美国长臂管辖权的法律立场），有可能进一步鼓励美国采取更加激进的执法行动。

此外，美国官员采取了一种战略性模糊的做法，故意在允许与被禁止的行为界限上制造不确定性，[23]因为他们知道这样做会扩大被禁止活动的范围。其结果是，银行往往采取一种过度合规的政策，以确保他们远离美国划定的已知界限，这进一步加强了美国在次级制裁方面的影响力。事实上，美国通过恐吓全球银行，使他们不仅必须遵守最低限度的强制性规定，还要遵守过度的合规规定，从而让它们成为美国外交政策强有力的执行先锋。

再加上美元在国际贸易中的主导地位（大约 50%到 80%的国际贸易是以美元计价的[24]），以及美国的立场--通过美国银行系统自行清算美元支付为支持美国对世界任何地方以美元计价的交易行使管辖权提供了足够的联系（美国法院认为这是美国银行系统的服务“出口”[25]），这个逻辑论证就闭合了。世界上很少有公司能够逃脱美国次级制裁和长臂司法管辖权。

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21 https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial

22 https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions

23 https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

24 https://www.swift.com/sites/default/files/documents/swift_bi_currency_evolution_infopaper_57128.pdf

25 See, eg, United States v Homa; United States v Banki

（五）制裁的预期成本和非预期成本

正如存在一级制裁和次级制裁一样，也存在由此产生的直接成本和附带成本，这两种情况下，两类制裁之间的区分界限很模糊。

直接成本显然是由受制裁国家和当事方承担的，但在美国直接制裁下失去与受制裁方商业机会的美国公司也会遭受直接经济损失，实质上是被迫补贴美国的外交政策。通过实施次级制裁，美国现在还要求外国公司支付同样的机会成本，以推进美国的外交政策目标。这些目标可能与这些公司所持的观点不同，或者实际上可能与其本国适用的政策立场和法律要求直接相悖。

其他成本来自于对次级制裁的反制措施，因为世界各国--不管是美国的朋友还是敌人，都在寻求重申其主权并降低与美国不对称的相互依存所带来的风险。这些反制措施包括试图通过阻断法令，以法律手段阻止美国次级制裁，以及通过创建与美国银行系统脱钩的替代支付系统来绕过美元霸权的努力，这种去美元化将逐渐削弱美国基于美国银行系统清算美元而主张的域外管辖权。

同样，中国不仅在寻求摆脱美国的技术独立，还在寻求全球技术领先地位。技术独立将使中国免受美国出口管制和某些次级制裁的管制，而技术领先地位可能从根本上改变实力平衡，并可能导致全球技术鸿沟。世界其他国家不得不选择美国/西方标准或中国标准，或为双重标准支付额外的成本。中国无法迅速或轻松地实现这两个目标中的任何一个，但如果过往只是序章，那么中国中期前景的未来不容小觑。

美国不会轻易放弃在这些领域的主导地位，也不应指望美国会因国际礼让或者甚至为了遵守超出其条约义务的国际原则，自愿拒绝利用其影响力来追求合法的政策目标，虽然一些外国评论家和批评家似乎建议美国应该这样做。另外，美国地位的明显主要挑战者——中国和欧盟，在能与美国竞争之前也还有很多工作要做，更不用说希望在任一领域中超越美国。

不过，我们可以提出一个有说服力的论点，即美国应该出于开明的利己意识而加强自我约束，认识到美国不能指望自己会永远保持前所未有的领导地位，因此应该寻求遵守一种行为标准，并希望最终的继任者也能遵循这种标准。2003 年[26]，美国总统克林顿在耶鲁大学的一次演讲中也表达了类似的观点，但鉴于美国两党在制裁问题上的普遍共识，如今很难找到任何一位现任美国政界人

[26] https://johnmenadue.com/kishore-mahbubani-what-happens-when-china-becomes-number-one/

士持有类似观点。

对美国来说更具现实政治意义的做法是关注世界各地日益加大的反制力度，即通过采取更为激进的反制措施，来抵制美国的次级制裁和域外管辖权。这些反制措施带来了真正的风险，即新的类似冷战的军备竞赛可能不仅在技术标准和供应链方面，还可能出现在相互竞争的法律和全球支付系统。[27]

建立多重全球支付系统来抗衡 SWIFT 需要时间和动力，而它们的成功最终将取决于替代性全球货币（如欧元、人民币、新央行数字货币或加密货币）的崛起，从而至少在一定程度上取代美元成为国际贸易的主要货币。尽管这些冗余的系统会带来额外的成本，但是它们也提供了一个可以应对与唯一的支付系统切断联系的风险对冲机制。这同样伴随着一个重要的警告：只要美元的重要性没有完全被其他货币超越，即使在一个存在多余的替代性全球支付系统和竞争性货币的世界中，理论上咄咄逼人的美国政府仍然可以利用其制裁切断被制裁者进入美国主导的金融系统的渠道，这仍可能严重阻碍全球银行和跨国公司的发展。

另一方面，更严格的阻断法令，全面实施并加强处罚，这可能会满足世界各地的民族主义情怀，抵制被视为美国明显滥用其当前领导地位的行为，但从实际情况来看，这些反制措施可能只会导致法律选择的僵局，跨国公司可能不得不选择遵守哪些法律，以及忽视哪些法律。即使是目前，基本上无能为力的封锁规则，也给跨国公司带来了更复杂的合规要求，给所有跨国公司带来了额外的合规成本。

这种局面在美方加强自我限制的情况下未来可能有所缓和，但美国当前的政治现实表明，美国在全球体系中发挥领导作用的大多数其他领域历来采取的普遍利他主义策略，不太可能在单边次级制裁和域外管辖权问题上体现出来。如果美国继续未能通过适当的多边磋商和协调寻求更好的平衡，我们可以预料到会出现更激进的反应，这可能是美国当前制裁政策遗留下来的不幸的长期后果。

[27] https://www.theatlantic.com/international/archive/2018/09/trump-un-iran/571240/

二、中国加入欧盟和其他各国阵营，采取强硬反制措施抵制美国过度制裁

--北京加码新的《反外国制裁法》，但欧盟和其他各国反制失败，中国能成功突破吗？

2016 年，时任美国财政部长的杰克·卢（Jack Lew）在演讲中论述了制裁的历史和演变。他认为，美国在全球金融体系中的领导地位是其制裁权力的来源，因此警告称：美国“必须认识到，过度使用制裁可能损害美国在全球经济中的领导地位，并且削弱制裁本身的效力。”

财政部长杰克·卢还指出了过度使用制裁特别是次级制裁可能付出的代价。他认为，这些举措会使外交关系紧张，破坏全球经济稳定，给美国境内外公司施加实际成本，而且最重要的是，可能招致“报复风险”。[28]

（一）中国加入（并且升级）制裁大战

中国全国人大常委会于 6 月 10 日通过了新的《反外国制裁法》，表明中国已经做好反击美国过度制裁的充分准备，证实了美国财政部长杰克·卢的警告。

据报道，中国全国人大常委会委员长栗战书责令立法人员必须在新法中表明中国决不放弃其合法权益的立场。他说：“中国政府和人民坚决抵制各种制裁和干涉。”[29] 有一位香港法律学者甚至更直接地指出，“合作是最佳选择，但美国并不这样认为。因此，反击是次优选择，例如出台新法。”[30]

《反外国制裁法》被视为中国完善其反制措施而使出的“最后一块拼图”。其他重要法规包括 2020 年 9 月颁布的《不可靠实体清单规定》（《UEL 规定》）、2020 年 10 月通过的《出口管制法》（ECL）

28[1] https://www.treasury.gov/press-center/press-releases/Pages/jl0398.aspx

29[2] China passes law to counter foreign sanctions, East Asia News & Top Stories - The Straits Times

30[3] https://www.reuters.com/world/china/china-passes-law-counter-foreign-sanctions-2021-06-10/

和 2021 年 1 月颁布的《阻断外国法律与措施不当域外适用办法》（《阻断法》）。此外，人们还不断呼吁推动在域外执行更多的中国法律，以创造公平的竞争环境，并让美国和其他国家“自食其果”。[31]

《反外国制裁法》为中国采用各种反制措施提供了更广泛的法律依据。此外，该法主要的实质性条款允许中国制裁那些参与对中国公民或企业采取或执行歧视性措施的个人或实体。这些人员将被列入反制清单，其在华资产将被查封或冻结，被禁止入境中国，并被列入“黑名单”禁止与中国人交易。

反制清单（或 ASL）类似于美国财政部海外资产控制办公室（OFAC）制定的特别指定国民和受阻人员名单（“SDN 名单”）。根据海外资产控制办公室实施的百分之五十控股规定，SDN 名单制裁可延伸适用于目标人员所在集团公司的其他实体；《反外国制裁法》规定，反制措施也可适用于目标人员的家属、雇主和产业链上下游所有公司。

中国此前曾宣布对多名美国和欧盟政要人士和其他组织实施制裁，因为这些人士和组织声称中国内地和香港多名官员在新疆和香港侵犯人权，并要求以此为由制裁这些官员。这些人士和组织现在可能会被列入反制清单。

因此，《反外国制裁法》中的新规定不应被视为该法名称所暗示的“反制裁杀手锏”，而应视为一种用作间接威慑手段的补充性反击措施。旨在直接抵消外国对中国实施的直接制裁和次级制裁的反制措施规定在《阻断法》中，而不是在《反外国制裁法》中，这种做法是效仿欧盟和加拿大采取的类似反制措施。

中国《阻断法》规定，中国境内人员（包括外国跨国公司的中国子公司）在域外对遭受美国制裁的第三国境内交易对方实施交易限制的做法是非法行为；此类规定旨在撤消外国对中国个人和企业的制裁，其他类似的“阻断法”也是同样如此。《反外国制裁法》进一步加强了《阻断法》规定的某些补救措施。

31[4] https://ph.news.yahoo.com/hong-kong-leader-carrie-lam-072013138.html

正如系列文章第一篇中所述，越来越受美国青睐的所谓“聪明”制裁可被视作精确制导的经济弹道导弹。以此类推，《阻断法》则可被视为反弹道导弹，旨在反击和破坏美国制裁。

但到目前为止，这些《阻断法》几乎全部于事无补，且在实际操作中，对阻止美国域外制裁的执行也毫无威慑效果。美国在实施制裁方面占据的强势地位牢不可破，至少短期内是如此，只要美国在全球金融体系中的主导地位保持不变。

（二）先前的反制裁措施 – 近乎完全投降的案例研究

欧盟和加拿大反制美国次级制裁的惨败记录充分说明，美国与其主要贸易伙伴国当前的非对称依附关系严重限制了这些国家对此实际期待实现的目的。[32]

例如，根据伊朗与所谓 P5+1 国家（中国、法国、德国、俄罗斯、英国和美国）在 2015 年签署的《联合全面行动计划》（JCPOA），欧洲公司可在新开放的伊朗市场上寻求各种商业机会（相比之下，美国公司在很大程度上仍被禁止与伊朗贸易）。但后来美国退出《联合全面行动计划》，特朗普政府在 2018 年 11 月重新对伊朗实施了“回弹”制裁，包括针对一系列行业增加新的次级制裁。美国的这一行动使欧盟公司与伊朗之间的交易处于危险境地。

欧盟官员对此义愤填膺，立即采取措施恢复其所谓的“阻断法规”，即欧盟理事会（EC）第 2271/96 号条例（《欧盟阻断法》）[33]，该法最初于 1996 年获得通过，但随后因美国在几个欧盟成员国、加拿大和其他国家的强烈抵制下做出让步而被搁置。[34] 根据《欧盟阻断法》的规定，就与伊朗之间的事务而言，欧盟公司不得遵照美国的制裁法律行事。英国、法国、德国和欧盟外长在一份联合声明中表示：“我们决定保护与伊朗进行合法贸易的欧洲经济运营商。”[35]

32[5] 虽然其他国家（例如墨西哥和俄罗斯）也已通过类似的反制裁法规，但在本文中，我们将着重讨论欧盟和加拿大法规，因为这些法规具有代表性，可为比较和分析提供依据。

33[6] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01996R2271-20140220

34[7] 见本系列首篇文章[链接]，了解更多背景信息。

35[8] U.S. to Restore Sanctions on Iran, Deepening Divide With Europe - The New York Times (nytimes.com)

尽管欧盟官员的声明措辞强硬，但数千家欧盟公司仍无视《欧盟阻断法》的最新增强版规定，毅然退出与伊朗之间价值数十亿美元的交易。一些非常知名的欧洲大企业选择服从美国次级制裁，无视欧盟反制裁法令，其中包括西门子（解除了价值 15 亿美元的铁路合同）、道达尔（放弃了对南帕尔斯气田项目的 20 亿美元投资）和空中客车（损失了对伊朗航空公司的飞机销售额 190 亿美元）。[36]

几个月后，即 2019 年 5 月，特朗普政府宣布，将首次全面实施被美国政府连续搁置 20 多年的《1996 年古巴自由和民主团结法》（LIBERTAD）（通常被称作《赫尔姆斯-伯顿法》）第三章规定。美国公民可以根据该法起诉那些“贩卖”被卡斯特罗政府没收的、属于美国原告所有之财产的人，并要求获得赔偿。

尽管美国长期禁止美国人与古巴交易，但加拿大人一直保持与古巴交易，因此《赫尔姆斯-伯顿法》第三章的实施对许多加拿大公司造成重大威胁。对于美国政策的突然转变，加拿大官员和欧盟官员一样感到震惊，并迅速采取措施重新实施加拿大的反制裁法即《外国域外措施法》（FEMA）[37]。《外国域外措施法》最初是为了反击美国反垄断法的域外执行，20 世纪 90 年代末该法被更新，以应对《赫尔姆斯-伯顿法》的实施对加拿大利益造成的威胁。

《欧盟阻断法》仅规定“有效、按比例和劝阻性的”非确定处罚，具体由相关成员国自行酌情裁定，但加拿大《外国域外措施法》规定，如果加拿大公司或个人无视《外国域外措施法》，实施符合《赫尔姆斯-伯顿法》规定的公司合规政策，或执行或遵守外国法院根据《赫尔姆斯-伯顿法》做出的判决，则应对此类公司（最高罚款 150 万加元）或个人（最高罚款 15 万加元和监禁 5 年）给予*刑事处罚*。但是，即使可能会面临这些刑事处罚，加拿大商界几乎无一例外地选择继续遵守美国的制裁规则，而无视加拿大阻断法的规定，且到目前为止也没有任何人被起诉。

36[9] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/. 如需了解更多名单，请见伊朗制裁（congress.gov）。

37[10] https://laws-lois.justice.gc.ca/eng/acts/F-29/FullText.html

（三）对比中国阻断法与欧盟、加拿大的反制措施

中国《阻断法》与《欧盟阻断法》及《外国域外措施法》有很多相同之处，因此在实际实施过程中会受到很多相同的限制。（此外，中国采取的各种反制措施中可能存在的一些技术问题，会在短期内给执法带来更多的挑战和障碍，相关内容会在本系列后续文章中予以探讨。）

尽管这些阻断法的具体规定各不相同，但其主要内容都大致相同。例如，与其他“阻断法”相同，中国《阻断法》也规定有对疑似或实际域外适用外国法律之行为的报告机制，禁止遵守或执行特定外国法律或其他措施，还规定有申请豁免遵守相关规则项下禁令的程序，以及个人通过诉讼要求赔偿因第三方遵守被阻法律而导致其遭受之损害的权利（也称作“追偿”权）。[38]

但是，与此前欧盟和加拿大的反制措施不同，中国《阻断法》并未详细列出所阻断的外国法律。中国《阻断法》规定了用于签发旨在阻止中国公司服从外国长臂管辖之命令的机制。一旦中国境内受影响的人发出通知，就可实施该机制。尽管上述所有阻断法规均看似旨在适用于外国的任何域外执法行为，但各方皆知，其在任何情况下的预期目标均为美国域外执行直接和次级制裁的行为。

中国《阻断法》目前仅规定了总体框架。迄今为止，中国尚未发布任何禁令或实施细则，但中国政府在解释和适用方面具有广泛的自由裁量权，这是中国法规的常见特征。因此，有很多问题还没有明确的答案，虽然新颁布的《反外国制裁法》增强和补充了《阻断法》，但并未阐明这些问题。

但有一点很明确，即中国选择颁布《阻断法》的时机是为了直接挑战下一届美国政府。为了强调该法，中国还采取了不同寻常的举措，即，在同一时间发布《阻断法》的官方英译本。

有些报道指出，尽管新的《阻断法》酝酿已久，其发布时间仍被提前了，因为即将上任的拜登

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38 “阻断法”用作反制措施，旨在反击传统意义上的美国次级制裁，尤其是美国海外资产控制办公室向那些与目标第三国境内被制裁方交易的非美国公民适用的制裁限制。在本系列文章中，在某些情况下，我们采用更为宽泛的次级制裁定义，其中包括限制再出口源自美国的技术，而很多评论人士会将此类限制归类为与美国有明显关联的直接制裁。一些法律学者建议使用更为宽泛的释义，以反映如下事实，即，此类限制本质上规定了外国人在美国领土外从事与美国仅有极少连接点的行为，因此这种释义产生了类似的实际效果，并引起除美国外其他各方的相同关注。

显然不会对中国采取更温和的立场[39]。正如一位前美国贸易高级官员私下所说的那样，这就好比中国走进与美国谈判的房间，从公文包中拿出枪，放在桌上说："我们现在可以谈判了。"

（四）为什么反制措施至今仍未奏效

欧盟和加拿大反制措施均以失败告终，是否还有其他招数可使，目前尚不得而知。为回答这个问题，我们必需先分析欧盟和加拿大反制措施为何无效。

首先分析《欧盟阻断法》。制裁专家认为，事实证明《欧盟阻断法》毫无效果，因为不遵守美国制裁的人会遭受毁灭性的惩罚；美国海外资产控制办公室一直积极执法，相关风险不可低估或忽视。而欧盟反制措施带来的实际风险几乎可以忽略不计。

例如（详见本系列第一篇文章[40]），不服从美国制裁的人会面临被禁止进入美国市场的风险，其含有敏感性美国技术的货物与服务全球供应链会被美国切断（例如华为和中兴），或其高管会遭受刑事诉讼（例如华为首席财务官孟晚舟）。此外，不服从制裁的人还可能会被禁止进入全球金融体系，并在大多数情况下导致其无法开展交易。

而《欧盟阻断法》没有明确规定可能的处罚，仅规定了行政罚款。因此，考虑到潜在风险有天壤之别，面临美国对伊朗重新实施的制裁和相关次级制裁时，欧盟跨国公司选择服从美国制裁是一种务实之举，可能也是唯一合理的选择。

此外，《欧盟阻断法》本身似乎也不具有可执行性。在过去几年中，欧盟公司在请求解除被禁交易时，只要能够提出除美国制裁影响之外的任何合法商业理由，即可规避禁令[41]。在这种情况下，没有任何证据证明发生了违反《欧盟阻断法》的行为。事实上，到目前为止，欧盟成员国似乎已承认《欧盟阻断法》的不可执行性，并对故意违规行为视而不见，不愿对已遭受美国次级制裁的企业再施加处罚。

39[12] https://www.scmp.com/news/china/diplomacy/article/3136676/china-speeded-work-anti-sanctions-law-after-joe-biden

40[13] [插入本系列第一篇文章的链接]

41[14] https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

但是，一些评论人士基于欧盟法院总检察长最近的非官方观点[42]，认为欧盟法院现在可能会采取更强硬的立场来执行《欧盟阻断法》。总检察长发表的观点是针对伊朗国家银行对德国电信的子公司 Telekom Deutschland GmbH 提起的“追偿”民事诉讼；伊朗国家银行在该起诉讼中声称，德国电信在特朗普政府重新对伊朗实施次级制裁后终止与 BMI 汉堡分公司之间的电信服务合同，违反了《欧盟阻断法》的规定。

总检察长认为，如果欧盟公司打算终止与伊朗交易对方之间的合同，则应适用《欧盟阻断法》，合同终止应宣布无效，除非欧盟公司能够证明，其是按照美国法院或行政命令而被迫采取该行动，或是完全出于经济原因，与美国制裁无任何关系。换言之，总检察长认为，德国法院可以要求德国电信解释终止合同的原因，并进一步要求其证明“并非因担心德国电信在美国市场的地位可能会受到负面影响而决定终止合同。”

如上所述，尽管总检察长的观点很有说服力，但并非官方意见。最终裁决将由受理案件的德国法院做出。但应注意，该案并不涉及德国政府的处罚，而是“追偿”案件。因此，总检察长的意见不可能产生任何明显的威慑效果，因为“追偿”案件涉及的损害赔偿金额通常非常小。在该案中，与伊朗国家银行签订的合同价格仅为每月 2000 欧元，而德国电信在美国有 5 万名员工，美国市场营业额占德国电信全球营业额的 50%。

这是“追偿”诉讼的典型特征：案件数量有限，且索赔金额很小。此外，在这种情况下，也有可能向美国海外资产控制办公室获得有限豁免，从而解决问题。所有这些风险都可控，但是，如果公司遭受美国制裁，则可能会面临灭顶之灾。因此，尽管按照总检察长的意见，欧盟运营商必需更为谨慎地提供其解除此类交易的依据，总体分析结果仍基本保持不变，即，美国制裁将会继续压制《欧盟阻断法》。

对加拿大境内公司而言，鉴于《外国域外措施法》规定有刑事处罚，应更多关注风险分析。此外，《外国域外措施法》明确规定，不得以服从美国制裁为由而决定解除交易，即使有与之无关的其他商业理由。但结果却与欧洲并无二致，几乎所有公司都服从美国制裁，无视《外国域外措施法》

42[15] https://curia.europa.eu/juris/document/document.jsf?text=&docid=241168&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2477201

的禁令。在这种情况下，加拿大政府不战而退，至今未采取任何执法行动。

这也是对现实市场的妥协，因为加拿大近四分之三的出口产品销往美国，加拿大公司不可能甘冒被美国市场拒之门外的风险。此外，一些专家认为，在这种情况下对加拿大公司施加刑事处罚的做法过于严厉，因此官员们不愿执行《外国域外措施法》，导致该法在事实上形同虚设。

欧盟和加拿大的遭遇反映了美国贸易伙伴面临的难题，即，如果反制措施施加的处罚太低（例如欧盟），企业会无视禁止服从美国次级制裁的禁令，甘愿承担适度行政罚款的风险；如果处罚太高（例如加拿大），官员可能不愿对本国公司执行反制措施。两种截然不同的路径却殊途同归，都一样不奏效。

（五）评估中国反制框架下的图景

鉴于上述国家执行的反制措施均未取得任何效果，中国能否寄希望于其最新的反制法律武器来取得更好的结果吗？

为检验这一提议，我们可基于珠海振戎一案考虑几种可能的情形。2019 年 7 月，美国以珠海振戎有限公司（ZZCL）在中国进口伊朗原油的豁免期届满后的 2019 年 5 月初开展涉及伊朗原油的重大交易为由，将该公司及其首席执行官李友民先生列入 SDN 名单[43]。美国的次级制裁旨在通过域外执行美国法律的方式限制珠海振戎有限公司与伊朗原油供应商之间的交易，这也正是《阻断法》旨在解决的问题。

如果在珠海振戎有限公司计划购买伊朗原油之时，《阻断法》已颁布实施，则该公司就可以美国次级制裁会禁止或限制其与伊朗方进行正常商业交易为由，事先通知中国相关部门（《阻断法》规定的“工作机制”）。相关部门收到通知即可进行审查。根据《阻断法》的规定，如果该工作机制的结果表明，美国制裁违反国际法、践踏中国主权、或侵犯珠海振戎有限公司和其他类似中国公司的合法权益，则可以签发禁令。

上文列出的《阻断法》相关规定是美国全球贸易伙伴反击美国制裁时最常用的理由：许多非美

43[16] SecondarySanctions_Final.pdf (atlanticcouncil.org)

国法律学者认为，美国直接或间接行使长臂管辖权有悖于国际习惯法；外国政府一直认为，美国的次级制裁（例如，旨在要求非美国公司遵守美国对伊朗的制裁）明显侵犯各国制定本国外交政策的主权；禁止与不遵守美国制裁的公司之间的交易，会损害其在其他方面的合法商业权益。

因此，中国政府可毫不费力地找到《阻断法》要求的理由来证明禁令的正当性。此类禁令会使珠海振戎有限公司或任何其他中国公司服从美国对伊朗之次级制裁的行为变成非法。换言之，《阻断法》规定的工作机制会触发审查，再基于审查结果签发禁令，其效果等同于将美国对伊朗的次级制裁列入《欧盟阻断法》的附件中。

到此一切顺利，但并非就此为止。根据《阻断法》签发的禁令无法阻止美国执行其次级制裁将珠海振戎有限公司列入 SDN 名单，一旦公司被列入 SDN 名单，其即被驱逐出美国市场和美元主导的全球金融体系。简言之，尽管根据《阻断法》签发的禁令会使珠海振戎有限公司或任何其他中国公司服从美国对伊朗交易之次级制裁的行为变成非法，但无法保护任何公司免遭美国做出的相关处罚。

事情发展到这个局面，所有欧盟和加拿大公司均纷纷缴械投降，选择遵守美国制定的游戏规则，尽管此举不符合相关阻断法的规定。

但中国还有一招是欧盟和加拿大都没有的，即中国的《不可靠实体清单规定》，该法是在效仿美国类似法规的基础上编写而成。《不可靠实体清单规定》将如何改变游戏情形，为一探究竟，我们接下来评估中国是否能够在特定情形下减弱 SDN 名单处罚造成的影响。如果中国能够做到，则就可削弱美国次级制裁的效力。

对于第一种情景，我们探讨涉及美国交易对手的情形：如果一家美国公司与 SDN 名单中的实体已建立合同关系，则其必需解除合同；如果其正在与被制裁实体谈判新交易，则必需停止谈判。

第二种情景涉及非美国交易对方。跨过银行和很多非美国跨国公司均倾向于不与 SDN 名单中的公司交易，尽管美国制裁法并未直接禁止此类交易。对银行而言，被驱逐出美国金融体系的风险通常会导致零容忍的合规问题，因此他们会避免与被制裁实体有任何关联。

对非美国公司而言，银行方面的小心谨慎会导致另一个实际问题，即，如果银行不处理其与 SDN 名单中所列公司之间的往来款项，则外国交易对方就无法向被制裁实体付款或接收被制裁实

体的付款，因此，他们也必需撤消与受制裁实体之间的现有交易，并不再与其开展新交易。

对于第三种情景，我们增加一种不同情形：假设媒体报道称，有一家中国实体违反美国次级制裁从伊朗购买原油，但美国海外资产控制办公室尚未将该公司列入 SDN 名单。

如果银行发出风险提示，并为谨慎起见，拒绝处理该实体的进出款项，导致美国公司终止与尚未受制裁的该中国实体之间的合同，则结果会如何呢？

如上所述，每一种情景都在《阻断法》的适用范围之外，这时就需要《不可靠实体清单规定》发挥作用。《不可靠实体清单规定》规定，如果外国公司“违反正常市场交易原则”，中止与中国实体之间的“正常交易”或歧视中国实体，导致相关实体的合法权益受到严重损害，则不论该外国公司在中国境内或境外，均可对其采取反击措施。

关键的法律问题是，在上述情景中，哪些反映出“正常市场交易原则”，哪些没有反映。

第一种情景描述了一个清晰的*强制性最低合规*案例，因为美国制裁法对美国公司具有直接约束力。尽管中国可根据《不可靠实体清单规定》针对这种情形采取措施，但目前大多数专家认为中国不太可能会这样做，因为这将会使美国公司陷入一种令其无法忍受的境地，即，仅仅由于遵守美国法律，就导致其在中国遭受毁灭性处罚，且这种处罚会让在华投资者们心灰意冷。

第三种情景描述的是*过度合规*案例（至少在银行方面是如此），这与第一种情景描述的*强制性最低合规*案例正好相反。中国政府可能会认为，*最低强制性合规*符合“正常市场交易原则”，而*过度合规*并非如此。

第二种情景兼有另外两种情景中的内容。在往来款项必需通过美国银行系统予以结算的情况下，非美国银行将无法为被制裁的交易方提供美元服务（通常情况下），这种情形可被归类为*强制性最低合规*。但这是否意味着非美国银行也无法向受制裁方提供任何其他银行服务，目前尚不清楚。根据受制于美国金融体系的所有银行当前采用的*过度合规*政策，SDN 名单中的实体和个人在大多数情况下甚至不能开设银行账户，即使与美国无任何关联的其他货币也是如此。

此外，如因银行拒绝提供银行服务，不论银行是根据相关法规行事还是由于过分谨慎，导致外国公司无法支付或接收与被制裁中国实体之间的合同款项，外国公司以此为由中止与该中国实体之

间的交易，则在这种情况下指责外国公司会有些强词夺理。

如果中国当局决定根据《不可靠实体清单规定》来反击过度合规行为，就可为大幅减少次级制裁造成的负面影响提供一个强有力的武器，这是因为，如果将外国公司（或银行）列入不可靠实体清单，就可在根本上禁止其在中国进行任何贸易和投资活动，这类似于根据 SDN 清单发布的禁止进入美国市场的全面禁令。换言之，中国可以像美国一样，利用其庞大市场的准入权进行奖励和惩罚。

但是，如果中国在反击美国制裁的过程中，过于激进地利用市场准入权作为谈判筹码，则可能会造成法律冲突僵局，导致外国跨国公司在美国市场和中国市场之间艰难抉择。如果中国以最强硬的姿态执行《不可靠实体清单规定》，不但处罚*过度合规*行为，也处罚*强制性最低合规*行为，则会导致局面分崩离析，所有当事人都会蒙受损失，中国自身也无法幸免。

（六）中国新反制措施的现实利益

因此，这种无异于同归于尽的国际贸易威胁，肯定会让双方均陷入不知采取何种行动的窘境。但另一方面，从欧盟和加拿大的实际情况来看，他们采取的反制措施只不过是折中之举，迄今为止的执行结果只会让美国官员坚信，他们在实施制裁的过程中不会遭受任何反击。

中国采用的最新反制法律武器不会立即打破权力平衡，因为对中美双方在贸易制裁措施和反制措施方面相对实力的实际评估结果表明，美国具备中国无法匹敌的非凡优势。简言之，尽管中国和美国均可利用各自庞大市场的准入权来促使遵守其法规，但只有美国能够切断公司和个人与全球金融网络和全球关键技术供应链之间的关联，此外，也只有美国能够利用美元在国际贸易中的主导地位来加强其域外管辖权。

但是，中国在反击美国次级制裁方面的实力强于欧盟或加拿大，因为中国的经济实力比加拿大强，内部凝聚力也远高于欧盟。

以下举例说明内部凝聚力在反击美国制裁方面的重要性。1996 年，欧洲各主要国家（与加拿大和其他西方国家协力）使得美国放弃实施古巴和伊朗制裁法案规定的次级制裁，但在 2018 年，

在特朗普政府重新实施对古巴和伊朗的制裁时，欧盟和加拿大却在大声抱怨后谦卑投降。

2019 年，欧洲外交关系理事会（ECFR）进行了一项重大研究，以评估自 20 世纪 90 年代末至 2010 年的二十多年期间发生的变化。报告中引述了如下事实：美国在该期间加强对全球银行的控制，并在事实上将其转变成专用执法机构；美国利用欧盟成员国之间的政治分裂获利；最后也是最重要的一点，1996 年，欧洲各公司高管们声明，如果政府要求他们无视美国制裁，他们会按要求行事，而到了 2018 年，舆论却发生了 180 度大转变，无人愿意甘冒被逐出全球贸易和金融体系的风险[44]。总而言之，在该期间，欧盟在与美国之间的制裁大战中一败涂地。

中国缺乏美国所具有的内在优势，因而无法在这些小规模贸易制裁冲突中采取攻势。但是，中国能够利用自己的最新法律武器，采取防御性姿态发挥自身优势。例如，今年 3 月，中国和伊朗宣布了一项为期 25 年的协议，根据该协议规定，中国应在银行、电信、港口、铁路、医疗保健和信息技术等领域投资 4000 亿美元，并在此基础上以极低的折扣价购买伊朗石油。[45]

拜登政府目前正在审查特朗普政府在退出《联合全面行动计划》后实施的次级制裁，并表示将重启《伊朗核协议》。但是，如果在较长的过渡期内继续实施次级制裁，以阻止欧盟公司重返伊朗，而中国却比其他发达国家抢先一步进入伊朗市场，则（或其他类似情形）可能会引爆制裁大战。

为预测事态将如何发展，我们只需在上述假定的反制措施情景中，用中国各相关行业的顶尖国有企业来代替珠海振戎有限公司或其他知名度较低的中国实体，然后再预测双方会采取哪些制裁措施和反制措施。

这将是一场耐力比拼赛，中国实际上是在观察美国是否胆敢将几十家中国大型国有企业列入 SDN 名单中；所有这些企业都会按照北京的指示全然无视美国的任何制裁，正如在 1996 年所有欧盟顶尖企业会按照欧洲政府的要求行事一样。

如果美国认为中国虚张声势，因此不顾一切地实施制裁，中国就会采取各种反制措施，根据具体情况首先处罚强制性最低合规行为或过分合规行为，从而在不引发经济大战的情况下让美国苦不堪言，直至实现解除部分制裁措施的目的。

44[17] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/
45[18] https://www.nytimes.com/2021/03/27/world/middleeast/china-iran-deal.html

（七）结束博弈－ 国际贸易去美元化

这将是一场高风险的地缘政治游戏，所有参与方都会面临很大的风险，且无法保证哪一方会最终如愿以偿。考虑到其中的利害关系以及中国对长期博弈的偏好，中国更有可能会谨慎行事，先探查美方行动中可能存在的漏洞，再根据具体情况逐步争取更大的优势，与此同时还向同样遭受美国过度制裁的其他美国贸易伙伴寻求（如可能）支持，以便施加足够的压力来改变现状。

归根结底，唯一真正有效的反制手段是通过降低美元在国际贸易中的主导地位，削弱美国对全球金融体系的掌控，最终从源头上削弱美国的制裁权。但是，如果没有一场会导致美元大幅贬值且不拖累全球经济的黑天鹅事件，则去美元化终将是最具挑战性的一战。

三、与美元脱钩是否能化解美国的次级制裁？

--美国域外管辖权取决于美元的主导地位，因此美国的全球影响力将持续存在，直至美元跌落神坛

国家货币印制权是一国政府拥有的最强大权力之一，而能够发行占据主导地位的全球货币或许是任何政府所能拥有的最大权力。[46]这一强大权力目前握在美国手中，而美国已利用美元的主导地位向世界其他地方推行其地缘政治目标。

美国单方面实施次级制裁的激进做法已经激起其盟友与对手都采取一系列的反制措施，试图削弱这些次级制裁的域外影响力。但要想取得效果，这些反制措施必须能够保护不服从制裁的非美国公司免遭美国可能对它们施加的严厉惩罚。

如我们所见[47]，阻断法基本上被证明是纸老虎，它更多的是代表一种政治姿态，并非有效的防御措施。中国或许处于一个有利的地位，可以针对察觉到的美国的过度制裁采取更全面的反制措施，但这需要运用高超的战术技巧，以免对外国投资产生“寒蝉效应”或导致其他意外后果。

从根本上讲，除非美元在国际贸易中的主导地位被削弱，否则美国就能一直扼制住全球金融系统，使所有反制措施都无效。所有货币最终都会消亡或贬值，但美元还始终独霸，短期内毫无衰退迹象。

然而，美国的地位并非牢不可破，世界各国政府和专家都在积极探索恢复全球金融体系秩序的各套方案，重塑当前严重偏向美国单边利益的失衡局面。

（一）消解“核选项”威胁

[46] Ray Dalio 访谈，https://www.youtube.com/watch?v=ZY-BzPDj868

[47] https://www.inhousecommunity.com/article/china-joins-eu-and-others-in-adopting-tough-counter-measures-to-push-back-against-perceived-us-sanctions-overreach/

美国各贸易伙伴都在评估，美国目前主导地位的潜在弱点之一就是巩固现有全球支付基础系统的独立性，以消除或降低美国部署大规模经济杀伤性武器所带来的严重威胁。

从澳门汇业银行一案中可以看出美国经济制裁的巨大威力。2005 年，美国财政部官员声称，澳门汇业银行涉嫌参与为朝鲜洗钱和伪造货币行为，并根据《爱国者法案》将澳门汇业银行列为“高度关注洗钱”银行。[48]该银行因此被切断了与美国和全球金融体系的联系。

制裁效果立竿见影，并具有戏剧性。此举犹如一石激起千层浪，其他区域性银行纷纷中止与澳门汇业银行之间的交易，担心自己不久也会成为美国的制裁对象，从而被驱逐出国际银行体系。最终，澳门当局接管该银行并对其展开调查。[49]

在过去 20 年里，美国财政部将十多家银行以及缅甸、瑙鲁和乌克兰银行列为“高度关注洗钱”银行，并先后五次命令美国银行终止与这些银行或银行系统之间的联系。[5]类似案例包括丹东银行和另外两家规模较小的中资银行，同样被指涉嫌为与朝鲜的交易提供便利。每次制裁都无异于向银行下发“死刑判决”。

只是到目前为止，所有被制裁银行的规模都相对较小，但这不能说明整体情况。美国法院裁定三家中国大型银行（交通银行、中国民生银行和上海浦东发展银行）藐视法庭，理由是这三家银行未能全面遵守美国财政部在对明正国际贸易有限公司（Minzheng International Trading Limited）业务交易进行调查时发出的传票；这一裁定可能导致这三家银行陷入不准进入美国金融体系的危险。[50]

此外，如本系列第 2 篇文章所述，美国切断了伊朗银行与 SWIFT 之间的联系，并积极向全球多家违反制裁规定的银行追究刑事责任。此举不过是美国对这些银行的间接威胁：即如果银行不接受认罪协议或暂缓起诉协议（DPA），他们也可能会被切断与美国和全球金融体系的联系。[51]

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[48] https://www.treasury.gov/press-center/press-releases/Pages/js2720.aspx

[49]https://www.ft.com/content/c1b4ead8-d261-11db-a7c0-000b5df10621;https://www.theguardian.com/world/2006/oct/13/tisdallbriefing.northkorea

[50] https://www.reuters.com/article/us-usa-trade-china-banks-idUSKCN1UQ03U

[51]https://www.forbes.com/sites/kenrapoza/2015/01/27/russia-to-retaliate-if-banks-given-swift-kick/?sh=40c79b51652e

更为严重的是，在 2014 年和 2015 年，美国及其欧洲盟国威胁要将俄罗斯踢出 SWIFT 体系；2017 年，美国财政部长史蒂文 姆努钦（Steven Mnuchin）也向中国作出类似威胁：如果中国不遵守联合国对朝鲜的制裁，就将中国踢出全球金融体系。[52]最近，欧洲议会通过了一项决议，该决议规定，如果俄罗斯侵犯乌克兰，就将其驱逐出 SWIFT 体系。[53]

如果小规模银行与美国和国际金融体系脱钩可以被视为金融 “死刑”，那么禁止俄罗斯或中国等大国进入 SWIFT 体系就可被视为经济意义上的“核战争”。俄罗斯官员多次声明，禁止其使用 SWIFT 体系的行为等同于“宣战”[54]，这会导致严重后果。

（二）增强 SWIFT 的独立性

欧盟威胁要利用 SWIFT 网络的接入权进行反制，这多少有些讽刺意味。随着特朗普政府再次向与伊朗交易的欧盟公司实施次级制裁，欧洲外交关系委员会（ECFR）认识到，美国对 SWIFT 的过度影响是欧盟企业面临的一个关键风险领域，因此建议欧盟成员国采取一致行动保护 SWIFT 的独立性。[55]

鉴于 SWIFT 的历史背景和治理方式，欧盟官员认为有必要采取措施来削弱美国对全球支付网络的控制，这一点具有双重讽刺意味。SWIFT（全称“全球银行间金融电信协会”）是根据比利时法律建立的合作公司，由十国集团（比利时、加拿大、法国、德国、意大利、日本、荷兰、英国、美国、瑞士和瑞典）央行和欧洲央行实施监管，其中比利时国家银行为主要监督者。[56]

SWIFT 在全球支付信息通信领域占据绝对的主导地位，没有任何机构能够取而代之。同样，尽管美国的全球贸易份额有所下降，但美元仍继续主导通过 SWIFT 网络促成的跨境交易。与此同

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52 http://themillenniumreport.com/2017/09/us-threatens-to-cut-off-china-from-swift-if-it-violates-north-korea-sanctions/

53 https://www.europarl.europa.eu/doceo/document/RC-9-2021-0236_EN.html

54 https://www.rt.com/russia/525271-swift-cut-spiral-sanctions/

55 https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

56 https://www.swift.com/about-us/legal/compliance-0/swift-and-sanctions

时，SWIFT 已完全融入美国银行网络，所有美元支付最终都是通过 SWIFT 网络进行，因此，如果美国切断了 SWIFT 的美元交易处理，那么 SWIFT 会陷入大面积关闭。

到目前为止，美国一直在利用其市场主导地位和政治地位迫使 SWIFT 作选择，但欧洲外交关系委员会提议让欧盟成员国敦促 SWIFT 改变对美国有利的局面，并利用 SWIFT 与美国银行系统的相互依存关系反击美国。欧洲外交关系委员会提议的一个方法是，让欧盟实施更为严厉的欧盟《阻断法案》，防止 SWIFT 或其他金融机构或机制遵从美国次级制裁，从而确保个别银行以及整个银行系统不会与 SWIFT 断开连接。通过采取这种“挑衅”的立场，欧盟很想试探美国继续实施包括禁止访问 SWIFT 在内的严厉次级制裁的决心。[57]

欧洲外交关系委员会还提出另外两种更为激进的方法。第一种是将 SWIFT 国有化，至少扬言要这么做。第二种是欧盟向国际货币基金组织寻求保护，避免 SWIFT 遭到美国单方面干预。

但是，欧洲外交关系委员会的提议旨在降低美国滥用对 SWIFT 的控制权对欧盟造成的负面影响，而这些方式被认为并不利于欧盟的发展。由于欧盟再次威胁将通过停用 SWIFT 的方法惩罚其地缘政治对手，目前尚不清楚欧洲外交关系委员会的提议是否会得到实际支持。

（三）建立 SWIFT 和美国银行系统的替代系统

推动 SWIFT 独立只是最大程度降低美国次级制裁的域外影响力的第一步。SWIFT 是为国际支付提供便利的金融信息报文服务，但它不处理交易的货币结算和清算业务。

由于美国境外的交易支付主要以美元计价，因此货币结算通常仍通过美国境内的代理银行完成，这触发了美国的管辖权。因此，为降低跨境美元支付可能受到美国制裁潜在影响的风险，必须切断与美国银行系统之间的联系。

一种选择是使用位于香港的清算所自动转账系统（CHATS）。CHATS 系统建立于 2000 年，以港元、美元、欧元和人民币结算交易，其用户涉及 200 多家金融机构。通过代理银行关系，这四种支持货币的交易结算可在整个亚洲地区和其他地区进行。

57 https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

在 CHATS 运行的四种货币结算系统中，美元结算系统使用时间最长，也最为重要。亚洲境内交易方可使用 CHATS 系统完成交易款项的实时支付，不会因时差而导致任何延迟；一些法律专家认为，通过 CHATS 系统结算美元款项可保护非美国交易方免受美国的长臂管辖，因为款项在香港结算，不会触及美国银行系统。[58]

但是，一些中国银行专家认为，就减少制裁风险这一目的而言，CHATS 系统仍不能被证明是美元结算渠道的理想替代方案。因为 CHATS 系统由国际银行运行，而这些银行在很大程度上依靠美国银行系统，因此这些银行在处理美国看来可能有问题的美元支付时可能会采取更为保守的做法。此外，据报道，在一些涉及与美国无关联的美元支付的案件中，美国当局以美元源自美国为由声称其享有管辖权。

即使 CHATS 美元结算系统具有上述重大隐患，但仍不妨碍其受欢迎程度。2019 年，该系统平均每月处理的交易量超过 57 万笔，平均每月交易额近 8,550 亿美元。与 2017 年相比，月均交易量和交易额分别增长 16.3%和 20.5%。但是，通过 CHATS 平台进行的美元交易量仍仅占美国境内美元交易总额的很小一部分。

因此，为了充分地对冲与 SWIFT 断连以及脱离过度依赖美元和美元清算可能造成的破坏性经济后果，俄罗斯和中国一直在开发自己的替代支付系统，并设法在全球范围整合这些支付平台。

俄罗斯支付平台称作 SPFS（为其俄语名称的首字母缩写，可译为金融报文传输系统）。2014 年，美国首次威胁要切断俄罗斯与 SWIFT 系统的连接，自此该平台一直处于开发过程中。俄罗斯官员曾表示，SPFS 的功能现已足够强大，即使俄罗斯被禁用 SWIFT，SPFS 也可保护俄罗斯免受干扰；并在 2018 年宣称，“国内使用该金融信息传输系统的用户数量已超过使用 SWIFT 的用户数量。”[59]

[58] 在孟晚舟引渡案中提出的相关论点。常见：https://asialawportal.com/2021/03/03/the-defense-of-huawei-cfo-meng-wanzhou-how-the-principles-of-the-rule-of-law-extend-fundamental-protections-to-non-u-s-companies-and-executives-subject-to-extraterritorial-jurisdiction/

[59] https://www.rt.com/business/442946-russias-analogue-of-swift/

尽管俄罗斯官员对外持乐观态度，但 SPFS 系统仍面临严峻挑战： SPFS 的交易成本最初远高于 SWIFT（尽管在 2018 年降低了交易费），但更为重要的一点是，该系统只能在俄罗斯境内使用。在过去几年中，俄罗斯已达成协议，将 SPFS 与中国、印度、伊朗以及欧亚经济联盟内计划直接使用 SPFS 的其他国家的支付系统连接起来。截至 2020 年底，来自亚美尼亚、白俄罗斯、德国、哈萨克斯坦、吉尔吉斯斯坦和瑞士的 23 家外国银行已接入 SPFS。

相比之下，SWIFT 的机构用户有 11,000 多家，遍布全球 200 多个国家和地区，他们在 2020 年通过 SWIFT 系统开展的交易量平均每天超过 3500 万笔。[60]因此，很多观察家都认为，SPFS 系统只能用作最后的补救手段，无法代替 SWIFT 网络。[61]

尽管中国几乎与俄罗斯同时着手建立本国的支付系统，但中国走得更远。中国在 2015 年引入人民币跨境支付系统（CIPS）平台。CIPS 是国际支付系统，与中国国内支付网络——中国现代化支付系统（CNAPS）相辅相成。这两大系统均由中国人民银行负责运行。

与 SWIFT 不同的是，CIPS 专注于提供支付清算和结算服务，CIPS 与 SWIFT 合作提供金融信息传输服务，为跨境支付提供便利。但为降低中国遭受美国制裁的风险，CIPS 同时还在开发独立的支付信息传输系统以代替 SWIFT，这样中国就可在必要时绕开 SWIFT。[62]

康奈尔国际贸易政策专家 Eswar Prasad 指出，中国“非常精明，不会在 CIPS 成熟之前挑战 SWIFT，但毫无疑问，总有一天挑战会到来。”[63] SWIFT 已察觉到 CIPS 的意图，SWIFT 中国区负责人早在 2016 年曾试图说服中国不要投资建立替代性支付信息传输网络，他们认为，中国没必要建立自己的金融信息传输“高速公路”，因为 SWIFT “高速公路”已经存在。[64]

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60 https://www.investopedia.com/articles/personal-finance/050515/how-swift-system-works.asp

61 https://www.forbes.ru/finansy-i-investicii/358573-natyanutaya-struna-vozmozhno-li-otklyuchenie-rossii-ot-swift

62 https://www.nbr.org/publication/chinas-ten-year-struggle-against-u-s-financial-power/

63 Eswar S. Prasad《Gaining Currency: The Rise of the Renminbi》（牛津：牛津大学出版社，2017 年）第 116 页

64 https://www.thebanker.com/Global-Transaction-Banking/Swift-dips-into-China-with-CIPS?ct=true

当然，如果美国能命令 SWIFT 封锁高速公路的入口，事实上 SWIFT 高速公路的存在对中国就毫无益处。因为 SWIFT 还未表明愿意拒绝美国（现在甚至是欧盟）对于切断地缘政治对手访问通道的指令，中国理所当然认为，建立一个独立的替代性支付基础平台是必要的投资，不论成本多少。

作为一个新启用的平台，CIPS 在拓展其全球影响力方面已取得了巨大的进步。CIPS 从零起步，在过去六年中获得了 1,100 多家用户，遍及近 100 个国家，主要分布在亚洲（共有 867 家用户，其中 522 家用户在中国境内），其余分布在欧洲（147 家）、非洲（39 家）、北美（26 家）、大洋洲（20 家）和南美洲（17 家）。[65]总体而言，CIPS 全球网络比俄罗斯 SPFS 平台更强大，但与 SWIFT 网络相比，其覆盖范围仍非常有限，仅占 SWIFT 用户数量的十分之一。

在结算和清算服务等核心业务方面，CIPS 也经历了爆炸式增长，2016 年至 2019 年期间，交易量和交易总金额均增长近 700%。但交易金额相对还是不太大，2019 年全年总额还不到 5 万亿美元。相比之下，纽约清算所银行同业支付系统（CHIPS）只需三个工作日就能完成同等金额的交易。即使是 CHATS 香港美元结算系统，其完成的交易金额也比 CIPS 超出一倍多。

（四）欧元和人民币是否能将美元打下神坛？

从以上数据可以看出，目前 CIPS 在跨境支付中仍然是一个小角色，但这也反映了 CIPS 有意推动和促进人民币国际化的事实，因此 CIPS 的发展与人民币国际化是相互依存的。由于人民币在国际贸易中尚未显著削弱美元的主导地位，这就阻碍了 CIPS 平台的地域覆盖范围、交易体量和交易金额的增长。

尽管中国是全球最大出口国，出口额占全球出口总额的 13.2%，[66] 但人民币在通过 SWIFT 系统进行的所有国际支付中所占的比例不到 2%，排名于美元、欧元、英镑、日元和加元之后，屈居第六。[67]美国以出口额占比 8.7%位列全球第二，但正如前文所述，50%到 80%的国际贸易均以美元计价。

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65 https://www.cips.com.cn/cipsen/7068/7047/48084/index.html

66 https://www.wto.org/english/res_e/statis_e/wts2020_e/wts2020chapter06_e.pdf

67 https://www.swift.com/sites/default/files/documents/swift_bi_currency_evolution_infopaper_57128.pdf

事实上，中国跨境贸易支付中仅有 20%使用人民币结算，[68]这意味着，即使在与中国相关的跨境支付交易中，中国也未能有效地推广使用人民币，而这本该是中国的优势。而美元不仅用于美国相关交易，而且也广泛应用于与美国无关的各种国际交易中。

我们还注意到，1960 年，美国在全球经济产出中所占份额达到 40%的峰值，但到 2019 年，该比例降至 24%，降低了近一半。同期，中国占全球 GDP 的份额翻了两番，从 4% 增至 16%。[69]尽管美国在全球经济中的地位显著下降，但美元仍保持其在国际上不成比例的主导地位这一事实表明，全球主导货币的影响力不会迅速或轻易被削弱。反之亦然，中国在全球 GDP 中所占份额的增加，并不会自动导致人民币在全球贸易中的接受度或影响力相应增加。

这对中国而言利弊兼有。鉴于美元在全球的持续强势地位，中国（和世界其他各国）仍会受制于美国的长臂管辖。此外，考虑到人民币在国际上的弱势地位，即使中国境内有影响力的人士呼吁中国采取更多的长臂法规以反击美国在域外过度执行单边次级制裁的行为，这也不会产生任何实际威胁，因为中国无法像美国使用美元那样通过使用人民币来扩大其国际影响力。

美元很可能会继续保持其主导地位，除非因外部事件或自身造成的损害而被削弱。一些评论人士认为，新冠疫情造成的经济动荡，以及特朗普和拜登政府为了让美国走出疫情造成的经济困境而采取的大规模刺激性支出，可能会危及美元的优势地位。[70]然而，此前有关美元贬值或暴跌的预测（包括在 2008 年金融危机之后的预测）迄今均未应验。

美国加州大学伯克利分校著名经济学家和货币历史学家 Barry Eichengreen 认为，美元的弹性可归功于美元作为全球储备货币所享有的优势。但也可归功于玛格丽特•撒切尔（Margaret Thatcher）所信奉的“TINA”原则：别无选择。[71]

68 https://timesofaddu.com/2021/02/15/are-global-economies-de-dollarizing/

69 https://www.visualcapitalist.com/u-s-share-of-global-economy-over-time/

70 https://www.cfr.org/backgrounder/dollar-worlds-currency

71 https://www.theguardian.com/business/2020/aug/13/forget-doom-laden-headlines-the-dollar-has-not-gone-into-terminal-decline

（五）冲击全球货币王座地位的两大货币是欧元和人民币，但两者各有各的问题

欧元是广泛使用的第二大储备货币，约占全球外汇储备的 20%。但是，欧盟各国的财政部都“各自为政”，导致对欧元资产的控制权分散在各欧盟成员国手中，而且没有统一的欧元债券市场。

人民币不能在资本账户中完全自由兑换，因此对于金融市场而言，其开放性或流动性不够。还有人士担心，人民币完全可兑换可能会不符合中国政府目前对人民币的控制水平。人民币仅占全球外汇储备的 2%，同样远低于中国在全球经济总量中所占的份额，这反映了很多人都因中国金融政策和控制相对不透明性而不愿持有大量人民币。

得益于美元在国际贸易和金融领域的主导地位，对各国而言美元成为最安全和最有吸引力的储备货币。因此，除非出现一个引爆点，导致人们对美元的信心大幅下降，同时欧元或人民币又能被证明是同等或更优的替代货币，否则美元将很难轻易被替代。

大国要确保拥有自己强大的货币，[72]因此，中国正在力争让人民币承担更重要的角色。大多数评论人士都认为，中国可以毫不费力地在亚洲各国和“一带一路”沿线国家实现这一目标，因为其在这些国家的经济和文化影响力最大。

据摩根士丹利分析人士预测，考虑到外国投资者在中国境内持有的资产不断增加，到 2030 年，人民币在全球储备中所占的份额将会达到 10%，成为位列美元和欧元之后的第三大货币。如[73]果中国能够劝说更多的贸易伙伴将人民币用作中国进出口交易的结算货币，那么在同一时期内，人民币的国际使用量可能会增长到类似的两位数水平。

在这种情况下，我们可能会步入 Eichengreen 十多年前预测的多极化、多储备货币世界，在那里他设想美元、欧元和人民币都是“重要的国际和储备货币”。[74]这样的环境必定会加快 CIPS 支付系统的发展，使其更有实力与 SWIFT 对抗，而随着欧元和人民币使用量的增加，更多人就会放弃使用美国银行系统。

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72 https://www.nbr.org/publication/chinas-ten-year-struggle-against-u-s-financial-power/

73 https://www.cnbc.com/2020/09/04/chinas-yuan-rmb-to-become-third-largest-reserve-currency-by-2030-morgan-stanley.html

74 https://aric.adb.org/grs/papers/Eichengreen.pdf

在这样一个多币种、多极化的世界，只要不进一步发生使人们对美国财政状况完全丧失信心的黑天鹅事件，美元仍有可能在三种货币中占据主导地位。理论而言，美国仍能够威胁将他国“逐出”美国和全球金融体系，但由于使用可靠的替代交易货币对美国银行系统进行规避变得更加容易，美元的主导地位将受到严重削弱。

事实上，在这种情况下，继续过度使用单边次级制裁和长臂执法只会进一步减少对美元的使用，从而可能加快美元主导地位的衰落。从实践角度来看，这种多极化世界很可能会消除美国的制裁，而不会导致新的取代美元的货币霸主崛起。

（六）数字化颠覆是否能改变国际货币游戏规则？

在未来十年，随着人民币升值和全球货币重新平衡，可能会出现另一种替代方案。它与数字货币崛起有关—在这种情况下， 数字化颠覆者可能不是比特币或其昔日竞争对手，而是央行数字货币（CBDC）。这一领域，中国处于领先地位。

2020 年，中国在国内多个城市试点发行数字人民币，并在过去几个月又将试点扩大到其他城市，使中国处于央行数字货币发展最前沿。其它数十家央行也在考虑开发其央行数字货币。[75]据报道，日本和韩国紧跟中国步伐，欧盟则预计在未来四到五年内推出央行数字货币。[76]而美国最初并未急于开发央行数字货币，但目前正积极与麻省理工学院合作开展相关研究。[77]

政府对央行数字货币的重视可以理解，因为这样不仅可以让政府以一种新的、更强大的数字形式保持对货币的控制权，还可同时打击不受政府控制的去中心化金融数字货币（例如比特币）。央行数字货币是由国家央行发行和管理的真实国家货币，与传统货币相同，只是采用数字形式而已。但政府可利用这种数字形式追踪资金和交易，打击洗钱、逃税和其他非法交易。

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75 https://www.economist.com/finance-and-economics/2021/02/20/bitcoin-crosses-50000

76 https://theconversation.com/chinas-digital-currency-could-be-the-future-of-money-but-does-it-threaten-global-stability-160560

77 https://beincrypto.com/fed-chairman-powell-on-cbdc-its-better-to-get-it-right-than-be-first/

中国的数字人民币最初是与支付宝和微信支付等现有数字支付平台并行推出的，这些平台在中国的使用率远高于西方类似系统。但据预测，数字人民币最终也会用于跨境交易，尤其是在东盟和“一带一路”地区的交易。

基于央行数字货币的交易完全独立于现有银行系统运行，因此，央行数字货币成为挑战美元霸权的备选手段 —— 其无需使用 SWIFT 信息传输系统；无需通过美国商业银行完成交易；而且伴随着多种央行数字货币的相继推出（以及美国目前在央行数字货币研发方面的落后），以美元结算的交易在全球贸易中的主导地位可能会下降。

很多知名评论人士都认为，开发数字人民币的主要目的是规避美国制裁。[78] 但这是所有央行数字货币的共有特征，并非数字人民币所独有。数字货币是在各国央行各种动机的共同作用下产生的最新颠覆性技术，其最重要的附带好处是削弱美国次级制裁。这一结果不仅深受被美国制裁的目标国家的欢迎，所有因美国次级制裁而被殃及的其他国家（包括美国的很多亲密盟友）也会对此欢欣鼓舞。

但是，个人和企业采用数字人民币和其他央行数字货币的时间和数量仍不确定，而且在国际贸易中推广使用数字人民币将会遭受当前在国际范围使用人民币时所面临的相同限制。管理相关汇率风险在很大程度上仍将依赖于支付条款和对冲与掉期期权。

但还有另一个关键因素需考虑，即将数字人民币与一个更加全面的国际贸易数字化平台整合为一体的潜力。《Cashless, China’s Digital Currency Revolution》一书的作者 Richard Turrin 认为，数字人民币标志着中国进入一个全新的数字生态系统，即以中国为中心的跨境智能物流系统，其将 5G、区块链和数字人民币技术集于一身，从而允许来自东亚和“一带一路”地区的采购方能够通过数字化方式下达采购订单、确保贸易融资、清关和实时跟踪货运信息。[79]

[78] http://www.niallferguson.com/journalism/finance-economics/dont-let-china-mint-the-money-of-the-future；https://americanaffairsjournal.org/2021/02/carrie-lams-problem-and-ours-chinas-state-backed-digital-currency/

[79] https://www.youtube.com/watch?v=cHQFCCkR2bg

（七）管理当前冲突

在这样一个拥有多种央行数字化货币的多极化世界，美国不再全方位控制全球金融体系。各国不会再面临被逐出 SWIFT 的风险，因为 SWIFT 不再重要，甚至可能最终彻底消失，除非它能重新改良，以一种增值的方式适应崭新的央行数字化货币世界。在此环境下，金融制裁丧失威力，拥有最佳一体化支付与交割平台的市场将成为赢家。

但是，支付端这种势不可挡的创新进程不会弥合中美/中西标准之间潜在的技术鸿沟，这种鸿沟受到美国当前实施的技术禁令的威胁，现在中国又可能以报复的形式造成这种鸿沟。此外，摆脱当前由美元主导的全球金融体系尚需时日。

在此期间，法律冲突僵局的威胁对跨国企业构成了实际和当前的危险，因为阻断法和其他反制措施迫使跨国企业抉择他们将遵守哪些法律，以及他们将有意违反哪些法律。与此同时，尽管全球银行继续执行过度遵守美国制裁法要求的政策，但跨国企业将需要审视其与银行之间的关系并评估相关风险。

事实的真相是，政府对美国次级制裁的反制措施旨在打着保护本国企业的旗号重新宣示主权。但是，正如通过实施直接和次级制裁来执行美国外交政策的成本由企业和个人通过业务损失和合规管理成本增加的方式承担一样，反制措施的部署也只会进一步增加跨国企业的风险和成本，而未必总能兑现保护承诺。

四、穿越雷区--因反制措施导致的潜在法律冲突僵局

--阻断法和其他反制措施让跨国企业和全球银行陷入无法摆脱的困境，并导致其法律风险和合规成本不断增加

1997 年 3 月，加拿大温尼伯市一家沃尔玛超市经理下令下架 48 件单价为 13 加元的男式睡衣，无意中掀起一场国际风波。此举为何会引起轩然大波？因为这些睡衣均为古巴制造。

美国在此前一年通过了《赫尔姆斯-伯顿法》，以此加强对古巴的禁运力度，该制裁始于 1958 年，即在古巴革命结束之际富尔亨西奥·巴蒂斯塔（Fulgencio Batista）政权倒台之前。此外，最有争议的一点是，《赫尔姆斯-伯顿法》将美国禁运的领土适用范围扩大到适用于与古巴进行贸易的外国公司。

与美国对古巴采取的强硬立场相反，加拿大保持着继续外交关系的政策，因此加拿大公司也始终维持着与古巴的贸易关系。加拿大官员对《赫尔姆斯-伯顿法》做出了愤怒地回应，因为该法案侵犯了加拿大制定本国外交政策的主权；1996 年秋，加拿大修订了《外国域外措施法》，其中规定，加拿大公司遵从美国对古巴禁运制裁的行为是非法的。

沃尔玛超市经理可能认为，不会有人注意到古巴制造的衣服被下架一事，但是，当加拿大境内 135 家沃尔玛超市随后下架了数千件古巴睡衣时，加拿大主流媒体报道了该事件，从而激起了加拿大公众的反美情绪。当《温尼伯自由报》援引该经理的话称，沃尔玛是一家美国公司，而美国法律禁止销售古巴睡衣时，这一言论导致争议发酵。[80]

加拿大官员公开谴责古巴睡衣下架一事，并宣布将根据《外国域外措施法》进行调查。财政部长 Paul Martin 称："希望国内公司遵守加拿大法律，并按照加拿大道德规范行事。这一立场不容置疑。"[81]

迫于巨大的公众和政治压力，沃尔玛加拿大公司做出了让步。该公司在一份简短的新闻稿中表

[80] https://www.csmonitor.com/1997/0310/031097.intl.intl.5.html
[81] 同上。

示，经过与加拿大官员商讨等一系列“全面审查和协商”后，将重新上架古巴睡衣。该公司称，这一决定旨在表明“我们致力于满足加拿大市场的预期”。[82]

沃尔玛加拿大公司恢复销售古巴睡衣的做法可能安抚了加拿大当局的怒火（当局并未按照《外国域外措施法》采取进一步措施），但却让其美国母公司陷入尴尬境地。沃尔玛总部在几小时后发表声明称，其加拿大子公司故意无视美国母公司关于要求其遵守美国法律和停止销售所有古巴货物的指示。这也促使美国财政部对外宣称其正在“审查”沃尔玛的行为，并宣布将实施禁运。[83]

正如《纽约时报》在关于该事件的报道中指出的那样，母公司与子公司采取不同的立场可能是深思熟虑后的决定，因为“这使得加拿大子公司能够坚持自己遵守加拿大法律，也使得美国公司能够坚持其遵守美国法律的立场。”[84]

但是，沃尔玛加拿大公司迫于加拿大当局的压力的做法仍让美国官员感到不快。Marc Theissen，现为《华盛顿邮报》的专栏作家，时任参议院外交关系委员会发言人兼委员会主席参议员 Jesse Helms 的高级顾问，他形容加拿大发生的这场闹剧已经达到了“荒谬的程度”，他很疑惑，“难道加拿大已变得像苏联那样，由政府规定企业可以在货架上摆放哪些产品吗？”[85]

对于 Theissen 先生的反问，答案当然是否定的。试图规定加拿大企业可以在货架上摆放哪些产品的并非加拿大而是美国。

（一）中国的《阻断法》是纸老虎，还是卧虎？

古巴睡衣事件只是美国执行《赫尔姆斯-伯顿法》和《对伊朗和利比亚制裁法案》（有时称作《达马托法案》）而引发的全球斗争中的一场小冲突；前述两项法案均于 1996 年生效，且均可适用于美国公司和外国公司。

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82 https://www.nytimes.com/1997/03/14/business/wal-mart-canada-is-putting-cuban-pajamas-back-on-shelf.html

83 同上。

84 同上。

85 https://www.csmonitor.com/1997/0310/031097.intl.intl.5.html

正如本系统前几篇文章所述，为了应对包括加拿大和欧盟等美国最亲密盟友在内的全球多个国家对美国根据《赫尔姆斯-伯顿法》和《达马托法案》实施域外次级制裁的强烈反对，在当时，美国做出了很大程度的让步。

但是，当特朗普政府在 2018 年重新实施这些次级制裁时，全球环境已发生变化，人们痛苦地认识到，《欧盟阻断法》和加拿大《外国域外措施法》只不过是纸老虎，根本无法与美国金融制裁的巨大威力相抗衡，因为美元在国际贸易中占据绝对主导地位，且美国银行体系是全球金融系统的核心所在。

如前文所述，在欧盟公司普遍屈服于美国次级制裁的威胁后，欧洲外交关系委员会（ECFR）针对欧盟可能会受制于美国直接和间接制裁的各个薄弱环节进行了全面重新评估。欧洲外交关系委员会于 2019 年 6 月发布了题为《应对次级制裁的挑战（Meeting the Challenge of Secondary Sanctions）》的评估报告[86]。欧洲外交关系委员会在该报告中承认，由于欧盟成员国对 2018 年“回弹”制裁的消极反应，美国才没有将欧盟视为挑战美国单边制裁的威胁。加拿大对美国最近次级制裁同样的无效反应，显然也让加拿大陷入同样的弱势地位。

但是，欧洲外交关系委员会注意到，美国官员将中国视为全球制裁大战中更强大的对手，因为中国可能会采取更为激烈和更有凝聚力的行动，反击全球许多国家一致认为的美国滥用其在全球金融体系中主导地位的行为。

尽管事实可能如此，但中国在过去几个月采取的一系列反制措施处于刚起步状态，因此，切勿指望中国的反制措施会立即给美国制裁一记猛击。据报道，中国官员仍在研究更好地部署最新反击措施的方法与时机，甚至可能目前还无法向中国境内的受影响方提供指导意见。这对于中国的重大新立法而言很常见，即在认真执行之前，通常先进行一段时间的市场观察、进一步讨论和对比分析，有时需要一到两年甚至更长时间。

因此，尽管《欧盟阻断法》和加拿大《外国域外措施法》因其未能实际部署执行这些反制措施（在一番猛烈但无效而终的外交恫吓之后）而变得迟钝，但相比之下，中国的全面反制措施目前之所以是迟钝的，是因为它仍处于孕育阶段。其他反制措施已被确凿的证明毫无威慑效果（至少目前

[86] Meeting the challenge of secondary sanctions – European Council on Foreign Relations (ecfr.eu)

如此），但中国的反制措施还有待观察，可能也是纸老虎，但也有可能是一只伺机而动的真老虎。

（二）阻断法（即使当前不实施）增加跨国企业的合规风险

这些反制措施尚未执行的这一事实，对中外跨国企业来说并不令人欣慰。世界各国关于阻断域外执行次级制裁的法规都已成文，且政府的执法姿态也会发生改变。此外，如果没有相关政府当局针对合规例外情形提供的保护，则跨国企业政策通常都会将遵守黑信法的规定作为最基本的要求。

这就是阻断法造成的两难处境：除非提供豁免，否则就会将跨国公司置于一个不可能的境地——不得不遵守相互矛盾的法规。正如沃尔玛加拿大公司古巴睡衣一案一样，按照黑信法，遵守美国制裁就会导致违反加拿大法律。

加拿大至今并未执行《外国域外措施法》，这一情况只会让事态变得更加复杂，这是因为，如果加拿大采取更为强硬的执法态度，则加拿大公司（包括外国公司的加拿大子公司）的董事会和高级管理层可能会面临《外国域外措施法》规定的个人刑事处罚。此外，这家加拿大公司还可能面临刑事处罚，其中包括最高达 150 万加元的罚款，但更为重要的是，刑事定罪可能会导致公司无法获得政府合同并面临由此引起的很多其他不利后果，因此，从受托责任角度而言，高级管理层也不可忽视这些问题。正如诺顿罗氏集团（Norton Rose Fulbright）渥太华办事处的国际贸易法律专家 Alison Fitzgerald 在其关于《外国域外措施法》的评论中所指出的那样，“《外国域外措施法》规定不得遵守美国对古巴制裁法，事实上是将加拿大与古巴外交关系之间的金融和法律风险转移给加拿大企业。”[87]

《欧盟阻断法》也会造成相同的冲突，尤其是在最近欧洲法院总法律顾问就该法的解释和适用提出指导意见之后，这种冲突更加严重，因为该意见采用了更为严格的分析方法。正如本系列第 2 篇文章所述，目前尚不清楚欧盟各成员国官员和法院是否会遵照总法律顾问对法规的严格解读来行事，以及是否会像加拿大《外国域外措施法》一样，施加《欧盟阻断法》规定的刑事处罚，尽管该

87 https://www.nortonrosefulbright.com/en/knowledge/publications/60af4e56/between-a-rock-and-a-hard-place-canadian-companies-face-increased-risks-following

法并未禁止这种做法。同样，由于这种不确定性以及更严格执法的可能性，跨国公司必须在相关情况下考虑遵守《欧盟阻断法》，并在合适时予以规避。

中国的最新反制裁法规也是如此。中国尚未做好充分的部署准备，因此不清楚最终将如何执行，但无论是现在还是以后都不可忽视。

正是这种会陷入法律冲突僵局的风险，让国际贸易制裁专家注意到，阻断法（至少当前制定和执行的阻断法）不仅未解决任何问题，反而制造了无数难题。各国政府将阻断法用作反制措施来保护本国公司，但事实上，此类法规只不过是一份政治声明。从实际情况来看，与所反击的美国制裁相比，阻断法让受制裁公司的处境雪上加霜。

更糟糕的是，阻断法事实上仅被用于威胁处罚该法声称要保护的那些企业。这就是阻断法的内在根本矛盾。

中国也许能够更好地部署最新反制措施，使其灵活性和效力均超过欧盟和加拿大到目前为止已采取的反制措施，但这场游戏风险很高，每一项措施不仅会遭遇与预期相同的反击，通常也会导致无法预料的其他后果，此外还有可能导致事件进一步升级。

（三）反制措施潜在风险矩阵图总体框架

鉴于中国执行最新反制措施的不可预知性以及其具有的现实影响，我们必须评估中国境内企业可能会面临的相关责任风险。

在这方面，要特别注意，不同性质的实体受反制措施影响的程度各不相同。可能会受中国最新反制措施影响的实体类型包括国有企业、私营企业、中国境外的外国跨国企业、外国跨国企业的中国子公司、国内银行以及中国运营的全球金融机构。

风险矩阵图中的另一类风险包括美国可能向中国企业施加的主要制裁类别。为便于讨论，我们着重关注以下三类：次级制裁、SDN 名单和实体清单。美国（和非美国）制裁也有其他重要类型，但分析有必要予以简化，这种方法应足以突出强调某些关键点。

本系列第 2 篇文章中，我们概述了几种情景，以说明中国最新反制措施的若干重要方面。现简

述如下：

- 根据《阻断法》规定，中国当局可以阻止中国公司遵守美国次级制裁，但并不能阻止美国使用 SDN 名单，并以违反美国次级制裁为由将中国公司及其高管“列入黑名单”。
- 如果美国将中国企业和个人“列入黑名单”，全球银行和很多跨国企业可能会切断与被制裁人员的联系。在某些情况下，这是法律规定（强制性最低合规），但在其他情况下，这远远超出了法律规定（过分合规）。《中国阻断法》没有规定其将如何消除这种脱钩在全球范围产生的影响。
- 为了保护中国公司至少在一定程度上免遭此类影响，中国可在特定情形下实施《不可靠实体清单规定》，威胁禁止那些采取过分合规立场的外国企业（更具体而言，外国银行）进入中国市场。但是，中国的这种报复性措施也会有导致制裁大战升级和招致意外后果的风险。

完成对次级制裁和 SDN 名单的初步基准分析后，接下来分析实体清单下的技术禁令。严格而言，《阻断法》不适用于这一情景。但除此之外，中国并没有任何其他制裁手段来阻止美国和非美国供应商遵守美国技术禁令，因为这些交易方除遵守之外别无选择——美国供应商必须履行其法定义务，而非美国供应商如不遵守，则其获得美国基础技术的通道会被切断，这可能会造成毁灭性影响。

但是，中国媒体报道称，联邦快递可能是首批被列入不可靠实体清单的实体之一，因为其转移了本应投递给华为的 100 多个包裹。这家全球货运巨头声称，延误是由于美国当局额外施压，要求检查包裹内物品，以确保它们不受制于美国技术禁令的限制。[88] 该公司以“操作错误”为由为转移华为包裹一事道歉，并已起诉美国政府，挑战其所谓的“监管”所有出口包裹内的“物品”是“不可能完成的任务”。

在这种情况下，将联邦快递列入不可靠实体清单意味着事态严重升级，并会造成直接的法律冲突僵局，因为对该公司而言，该行为仅构成强制性最低合规，而不是过度合规。在联邦快递占据中

88 https://www.dailymail.co.uk/news/article-7288827/FedEx-HSBC-Flex-likely-foreign-firms-Chinas-unreliable-entity-list-State-media.html

国物流市场份额近 55%[89] 的市场背景下，且被转移的包裹数量又很少，如果中国采取如此强烈的报复性行动，这种过激反应可能会对在华外国企业产生明显的寒蝉效应，也会损害中国企业的利益，至少在近中期如此。[90]

（四）评估在华跨国企业相关风险

接下来我们分析跨国企业在这些情况下面临的潜在风险。在这种情况下，区分中国境外美国公司、美国公司在华子公司、中国境外非美国公司以及非美国公司在华子公司是很重要的。对于美国公司的在华子公司，重要的是要确认美国向海外子公司施加的具体制裁内容（如古巴禁运和伊朗制裁的情况）。

另一方面，中国最新实施的《阻断法》适用于在中国注册的公司，而不适用于外国公司，甚至国有企业/私营企业的海外子公司，而《不可靠实体清单规定》与之相反，仅适用于中国境外的外国公司，而不适用于其在华子公司。

尽管《阻断法》从法律角度适用于外国跨国企业在华子公司，但在事实上，在华子公司似乎不太可能会遭受该法规定的任何处罚。根据其条款，《阻断法》仅适用于中国境内企业因美国次级制裁[91]而被禁止或限制与受制裁国家内交易方交易的情况。但是，对于中国境内企业因其他原因而不

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89 https://realmoney.thestreet.com/investing/stocks/fedex-foul-up-could-provide-opportunity-to-competitors-in-china-14973159

90 据报道，由于汇丰银行（HSBC）在华为财务总监孟晚舟一案起因事件中扮演的角色，其可能会成为被列入不可靠实体清单的头号对象。相关内容将会在本系列下一篇文章会予以探讨。《不可靠实体清单规定》事实上构成对全球银行的严重威胁，特别是过分合规行为，这种行为在银行合规实践中很常见。此外，报道还称，为华为制造 5G 基站的 Flex 公司可能会成为被列入不可靠实体清单的第三家实体，因为该公司基于对技术禁令影响力的评估扣留了价值 1 亿多美元的产品。据媒体报道，自 2020 年秋季起，被扣留产品中有一半以上已经交付，并在协商其余产品交付事宜。参见 https://www.dailymail.co.uk/news/article-7288827/FedEx-HSBC-Flex-likely-foreign-firms-Chinas-unreliable-entity-list-State-media.html。同样，在这种情况下，将 Flex 公司列入不可靠实体清单是过激之举，基于以上正文中所做的各项分析，这很可能会引发因技术禁令导致的供应中断。

91 如本系列前几篇文章所述，《阻断法》适用于外国域外执法行为，但在实际执行中，该法仅针对美国次级制裁。

参与或无意参与此类交易的行为，这些规则就不太适用。

此外，其他阻断法还遭遇到更大的挑战——交易方为了避免与美国最新实施的次级制裁相冲突，不得不解除现有交易。在这种情况下可以推定，退出交易在很大程度上或至少在部分程度上是由于次级制裁所致，但也正如前文所述，事实证明这实际上是不可能的，此外，目前尚不清楚总法律顾问最近在欧洲发表的意见是否会改变这种局面。

要判断一家公司是否仅仅因为次级制裁而拒绝与受制裁交易方开展新的交易，这很难断定，且在大多数情况下可能也是不可能做到的，因为除遵守制裁这一考虑因素以外，公司选择争取或不争取特定商业机会的其他理由不计其数。

中国境内大多数跨国企业子公司未与受制裁国家交易，也无交易计划。除非中国当局采用更为严格的框架，要求那些决定不与受美国制裁的交易方开展新交易的企业提供更明确的商业理由（这看似极不可能），否则《阻断法》不应规定报告义务。无论如何，中国实施《阻断法》是为了保护中国公司，而不是处罚不与受美国制裁国家的交易方进行交易的在华外国子公司。

但是，在外国公司终止与那些受美国 SDN 名单或实体清单制裁的中国交易方之间的合同安排方面，风险矩阵会有所不同。正如上文和本系列前几篇文章所述，在针对此类合同终止行为的处罚方面，《不可靠实体清单规定》会区别对待强制性最低合规和过度合规行为，但即使如此，预计此类报复性措施仍会仅限于一定数量和范围，以避免事态进一步升级。

如上文所述，《不可靠实体清单规定》仅针对外国公司，因此没有提及跨国企业在华子公司为终止与中国境内受制裁交易方之间的合同而采取的行动。这可能是一个没有任何区别的联合环境下的条款，但是，如果在华子公司是按照外国母公司的指示行事，则《不可靠实体清单规定》可能会对此另做不同规定，这种情况下，我们可以回到上文分析中提到的《不可靠实体清单规定》下的一般责任风险。

本系列下一篇文章将会更加详细地探讨银行面对此类美国制裁可能会面临的风险，但此时或许值得注意的是，尽管与企业相比，过度合规行为在银行中更为普遍，但不同银行采取的总体合规立场可能基于各种复杂的考虑因素，且均可反映银行因与全球金融系统的相互关联性以及美元在该体系中的主导地位而面临的特定风险。

（五）风险缓解方案和策略

中国近期通过的《阻断法》、《不可靠实体清单规定》以及其他制裁和反制措施在全面实施之前可能仍处于正常酝酿阶段，但这并不意味着没有直接的实际影响。

相反，这一整套法律与法规的通过表明，中国当局在中短期内有意并且愿意反击甚至报复美国和其他国家直接或间接影响中国企业和个人的过度制裁行为。因此，我们可以预期，很多中国当事方会看到这一信号，即《阻断法》支持不得在中国执行任何外国制裁法这一普遍主张，尽管这一主张可能不会在所有情况下都得到法律法规的充分支持。

毫无疑问，目前采取的轮廓框架需要完善补充，中国在这方面的执行情况也需要阐明。另外，合规政策和相关合同条款不可完全照搬照抄外国先例，不可一字不改地直接在中国适用，这也是毫无疑问的；所有此类政策和条款必须根据中国最新反制裁法律制度下的最新法规予以更新。

此外，尽管《欧盟阻断法》 和加拿大《外国域外措施法》的执行状况可能与中国最新反制措施的最终执行和实施态势有所不同，但从解决这些司法管辖区潜在法律冲突僵局风险的最佳实践中可以汲取的教训也许对中国也是有用的。

这些问题可能会在各种情况下出现，需要采取的缓解措施可能因受影响方的性质而异。下文将简要概述一些更重要的背景情形和考虑因素。在每种情形下，各方均需要进行进一步分析和审查，以针对具体情况制定解决方案。

（六）合规政策和相关合同条款

外国企业和银行必需审查其在华分支机构和子公司的合规政策，确保其中没有与中国最新法规不一致之处。正如上文沃尔玛加拿大公司一案所表明的，这通常意味着外国母公司和中国子公司需要采用不同形式的合规政策，并且中国子公司所采取的政策必需明确规定，中国实体将尽可能在不自相矛盾的情况下，遵守外国和国内制裁和反制裁制度。外国公司签订的跨境合同以及外国公司在华子公司境内交易的下游合同的合规性相关规定，也应当按照类似的方式进行审查和修订。

如果在华外国子公司的政策和做法是由外国母公司决定的，这就产生了一个问题，即公司政策

是否可以被视为《阻断法令》的“其他措施”，旨在阻止“外国立法”和“其他措施”的域外适用。目前，评论人士对此所持的观点不同。但值得注意的是，加拿大《外国域外措施法》规定，要求加拿大公司遵守美国制裁法的企业政策将被纳入《外国域外措施法》的禁令范围，因此这也不太可能会在《中国阻断法》的禁令范围之外，具体取决于中国官员做出的最终解释。

在银行协议和保险政策方面，其他考虑因素可能会提供一些保护作用，具体取决于所采用的法律解释。例如，欧洲法律专家建议，某些与制裁相关的条款作为贷款融资或索赔支付的允许条件仍可强制执行，并引用了 2018 年一家英国法院的一项裁决，该裁决拒绝认定保险合同中的该等条款无效，理由是该等条款生效将违反《欧盟阻断法》。但是，该案涉及的保险政策条款时间早于《欧盟阻断法》的更新，而对于在阻断法最新修订版生效之后签署的银行协议或保险政策文件中的此类合规条款，法院可能会做出不同的判决。[92]

另一个可能产生相关问题的领域是，中外合资合同也必须根据 2020 年初生效的《外商投资法》(FIL)予以修订。根据《外商投资法》的规定，旧的外商投资企业(FIE)法律法规被废除，所有中外合资企业(JVs)和外商独资企业(WFOEs)现在都要遵守《公司法》规定的公司治理要求。在过渡期间，《外商投资法》生效之前注册的 50 多万家外资企业均应在 2024 年底之前修订其企业基本文件，确保符合《公司法》规定。因此，中外合资企业必须按照前文所述的相同方式，审查并修订其合资协议中的制裁合规条款。

（七）交易对手方的筛查和尽职调查

本系列文章着重通过分析少量类型的制裁来阐明广泛适用的原则，但事实上，仅美国一国就实施了无数制裁措施，联合国、欧盟和其他国家也执行了大量的制裁，所有这些制裁均需跟踪。在很多情况下，例如在一个典型的买卖商业交易中，不仅需检查买方和卖方是否被列入制裁名单中，而且还要检查交易链上下游所有其他参与方（包括货运人、承运人和港口）是否被列入此类名单。

最后，还有必要审查商品以及支付货币和渠道。在未进行充分供应链尽职调查的情况下采购受制裁产品可能会招致处罚。例如，2019 年，由于 ELF 化妆品公司向中国供应商采购的 150 多批假

[92] https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

睫毛产品中含有从朝鲜采购的原料，因此导致该公司被处罚 1 百万美元。正如 2019 年美国制裁专家 Perry Bechky 在北京国际仲裁中心所做陈述中指出的那样，即使 ELF 公司“对产品含有从朝鲜采购的原料一事毫不知情”，海外资产控制办公室（OFAC）还是会进行罚款处罚。据曾任海外资产控制办公室官员的 Bechky 称，ELF 公司随后不仅开始审查供应链（包括检查供应商银行记录），还“要求供应商签署海外资产控制办公室合规证明”。[93]

因此，供应链审查对企业而言是重大挑战，访问在线数据库以验证公司供应链和业务伙伴的可靠性是一项必不可少的工作。[94] 但是，如果说这一任务让企业心生畏惧，则银行面临的筛查挑战更加艰巨，因为银行事实上承担第一线执法职责，如其未能完全履行这些职责，可能会受到严厉处罚。因此，正如一位全球银行家向《经济学人（*The Economist*）》杂志所称，全球银行的合规成本每年可高达数十亿美元。[95] 多位专家指出，中国大型银行也在大幅度增加合规力度，以确保其通过美国银行系统处理美元业务的渠道不会被切断。

在华为半导体芯片被禁之后，中国科技企业对国内外供应商进行了积极的筛查，追溯各个层面的部件和子部件供应商，甚至是这些部件供应商所用技术和设备的供应商，以确定其供应链是否容易遭受类似的美国技术禁令。这导致中国科技企业在合规管理方面的投入大幅增加，首先确保他们知道哪些产品和部件可以或不可以销售给实体清单中所列交易方（例如华为）；其次，如果供应商因使用受美国管制之技术而遭受类似禁令，则确保自己能够与这些供应商脱钩。[96]

（八）对并购交易的影响

制裁合规审查也出现在并购交易尽职调查的背景下。特别是美国投资者，尤其需要谨慎确保在交割前解决所有不遵守美国制裁法的潜在问题。这需要对所有交易、交易对手方和技术许可进行全

[93] https://works.bepress.com/perry_bechky/25/

[94] 参见，例如 https://professional.dowjones.com/risk/

[95] https://www.economist.com/finance-and-economics/2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy

[96] https://asia.nikkei.com/Spotlight/The-Big-Story/US-China-tech-war-Beijing-s-secret-chipmaking-champions

方位审查，以识别出潜在风险问题。[97]

但是，如果为使新收购的公司遵守美国制裁法律，目标公司在交易结束前达成的某些问题交易在交易结束后进行平仓，这可能会违反相关的阻断规则。欧洲的两个案例说明了潜在风险。

第一项是 2007 年美国投资者 Cerberus 收购奥地利银行 BAWAG。为了使该银行符合美国制裁法，BAWAG 银行在收购完成前关闭了 100 多个古巴公民的银行账号。奥地利当局对此展开调查，评估该行为是否违反奥地利关于实施《欧盟阻断法》的规定。由于可能会遭受罚款，Cerberus 立即向美国当局寻求豁免，并获得了批准，允许 BAWAG 银行恢复这些古巴公民的银行账号。因此，奥地利当局才结束调查并且未采取任何措施。[98]

在 KKR 公司收购荷兰软件公司 Exact 的交易中，也出现了类似情形。在收购完成后，Exact 公司终止了与位于库拉索岛的 PAM 公司签署的经销合同，PAM 公司在古巴主要从事软件产品经销活动。PAM 公司随后以违反合同为由对 Exact 提起法律诉讼，并声称，《欧盟阻断法》禁止 Exact 公司解除合同。海牙地区法院在 2019 年 6 月做出了有利于 PAM 公司的判决，判定 Exact 公司不得解除合同。但该法院并未特意明确以《欧盟阻断法》作为判决依据，因为法院认为，可基于其他理由要求 Exact 公司履行合同，无需以违反《欧盟阻断法》为由。

但是，该判决导致 Exact 公司和 KKR 公司陷入技术上违反《赫尔姆斯-伯顿法》的尴尬境地。如果美国当局追究 Exact 公司的这一违法行为，Exact 公司可能会以海牙法院判决的形式为外国主权强制抗辩，辩称它不应承担责任。尽管以这种辩护反击美国执法行动的结果如何尚不清楚，但一些法律学者仍认为，从海外资产控制办公室和美国法院的最近判决来看，这种辩护的成功几率不会很高。[99]

此外，为了加强执行《欧盟阻断法》，欧盟委员会已于近期发出一则通讯，其中提议应当对欧洲境内的美国投资进行更为严格的投资审查，如果在此类收购交易完成后，位于欧盟的目标公司可

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97 https://globalinvestigationsreview.com/guide/the-guide-sanctions/first-edition/article/sanctions-issues-arising-in-corporate-transactions

98 https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

99 同上。

能被要求遵守美国域外制裁的话。[100] 可以想象，类似的标准可能会被纳入对华投资的审查中，但是这些措施是否会严重影响美国执行其次级制裁，目前还不得而知。

（九）解除有问题交易的最佳做法

如前所述，根据“封锁规则”采取的绝大多数执法行动和“反击”措施都是在涉及限制性交易的合同终止的情况下发生的。对于打算退出与受制裁交易对手的现有交易的外国当事方，可能也需要承担根据 UEL 条款产生的潜在责任。这可能出现在中方被添加到 SDN 名单或实体清单的情况下，或（如上文所述）在并购交易的情况下。

为了减少在适用阻断法和其他反制措施的情况下可能会面临的责任，交易方必须以书面形式载明终止交易的原因，列出各种可容许的商业考虑因素，但不可提及是为了遵守美国制裁法规。

出于类似原因，在出现不符合美国制裁法的情形时，最好通过协商谈判达成退出方案，而不是行使合同规定的终止权（如上所述，考虑到中国最新反制措施可能产生的效果，这些合同需要予以审核和修订）。解除交易的商业理由可以列在解约协议的文首以及相关信函中。

双方签署的解约协议中还应包含相关弃权条款、赔偿义务和其他担保承诺。以这种方式解除交易时，很可能需要支付赔偿款项，但在大多数情况下，此类款项可被视为合规成本以及在反制措施实施情形下的保险费。

（十）谨慎对待特殊目的载体

中国交易方历来将通过名义股东协议间接控制的具有特殊目的载体(SPVs)视为一种可能性的变通手段，以便在与受制裁国家的交易方开展特定交易时规避美国制裁，但从中兴通讯和华为案件来看，这种策略风险很高。[101] 使用这种特殊目的载体结构会引起银行以及作为交易对方的中外跨

[100] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0032&qid=1611728656387

[101] https://asialawportal.com/2021/03/10/learning-from-the-huawei-cfo-meng-wanzhou-case-what-chinese-and-other-non-u-s-companies-and-executives-should-do-to-limit-exposure-to-criminal-liability-in-the-u-s/

国企业的警觉。

但有一个重要的例外，即由政府赞助和支持的特殊目的载体，例如欧盟的 INSTEX 系统。INSTEX（全称“贸易互换支持工具”）由欧盟设立，旨在促进与伊朗之间的获准交易。这是一种替代性支付系统，涉及以物易物的形式，避免了跨境支付，因此可以说是不在美国制裁范围之内。

该系统运行方式如下：欧盟供应商 EU-1 向伊朗客户 IRAN-1 销售货物和服务，因此 IRAN-1 应向 EU-1 付款。与此同时，伊朗供应商 IRAN-2 向欧盟客户 EU-2 销售产品，因此 EU-2 应向 IRAN-2 付款。根据 INSTEX 系统中的混合型“以物易物”模式，这两笔交易无需跨境支付，而是由 EU-2 将其应付给 IRAN-2 的款项支付给 EU-1，IRAN-1 将其应付给 EU-1 的款项支付给 IRAN-2。[102]

这为 2021 年 3 月签署的为期 25 年的大规模中伊交易协议提供了一个可能的有趣模式，该协议涉及中国向伊朗投入高达 4000 亿美元的基础设施投资，以此以极低的折扣价进口伊朗石油。[103] 如果使用基于 INSTEX 模式的特殊目的载体，就只需伊朗基础设施项目业主向伊朗原油供应商付款，中国石油采购方向中国基础设施项目承包商付款，无需以美元甚至人民币进行跨境支付。

实际上，迄今为止， INSTEX 系统的效用有限，仅用于美国“急速回弹”次级制裁未涵盖的人道主义交易，例如农业产品、药品和医疗产品销售。该系统尚未扩展到其他类型的受限制交易，此外，据报道，大多数欧盟私营企业都不愿冒着公然违反美国次级制裁的风险去使用 INSTEX 系统，因此，该工具效果如何仍有待时间检验。[104]

但这可能正是中国可能愿意为之放手一搏的试验，中国可能含蓄或明确威胁称，如果美国企图干涉，中国将采取反制措施，包括根据《阻断法》和《不可靠实体清单》（如可能）采取的反制措施。在这种情况下，美国和其他西方国家应进行谨慎评估，因为这可能会引发直接法律冲突僵局，导致上文所述的各种风险。

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102 https://www.managementstudyguide.com/instex-payment-system.htm

103 https://www.nytimes.com/2021/03/27/world/middleeast/china-iran-deal.html

104 Lohmann_Extraterritorial U.S. Sanctions_ Only Domestic Courts Could Effectively Curb.pdf; Meeting the challenge of secondary sanctions – European Council on Foreign Relations (ecfr.eu)

（十一）为即将到来的制裁大战做好准备

中国通过一系列新的反制措施向外界发出了明确信号：对于美国过度使用制裁来强迫他国优先遵守美国外交政策的做法，中国将予以反击。这场大战可能不会一触即发，但外国和本国公司与银行必须为即将到来的法律冲突做好准备。

不同行业、背景和能力的外国和本国交易方均会加入这场冲突。大型跨国企业和全球银行已经拥有实力雄厚的合规资源和系统，但鉴于其他国家采取的阻断法均毫无效力，所以他们应对制裁与反制裁冲突的经验仍很有限。中国在这一领域中发起新的挑战，但正如上文沃尔玛加拿大一案所表明的，无论是中国市场还是外国市场，法律、外交和信誉方面的风险会无处不在。

另一方面，中国国有企业、私营企业和银行的合规经验和能力参差不齐。顶级企业遭遇到迄今为止最大的风险，因此在过去五年里逐步增强其合规政策。正如一位专家所称，华为遭到美国制裁是因为其在过去十年中，前五年里与伊朗开展的交易，而不是因为在后五年里开展的交易，这反映了：华为和其他中国顶级企业以及面向全球的中国顶级银行在相对较短的时间内在遵守制裁方面取得了重大进展，目前在这方面正接近外国同行水平，且在很多情况与他们不相上下。

但再往下看，更广泛的中资企业群体甚至其他一些中资银行对合规风险的认识都远远落后，这反映在其在合规管理资源的投入上也相应滞后。在这个制裁与反制裁日益升级的新时代，任何开展国际交易的中国企业都不可能侥幸躲过此劫。

在这个过程中，我们也越来越明显地看到，不仅国内企业与外国企业在很多情形下在利益和忠诚方面有冲突，国内企业与全球性银行（包括中国的全球性银行）之间在很多情形下也会有冲突。从最近披露的加拿大引渡华为首席财务官孟晚舟一案可以看出，在双方均面临制裁风险加剧的情况下，银行与客户之间的关系充满变数。

为了提前终结全球两大经济体之间的经济冷战，企业（或许特别是中国企业）应更深入地认识全球银行合规管理政策的影响因素，以及这些因素为什么会导致本应合作的双方相互对抗，这一点至关重要。我们将在下一篇文章探讨这些关系变化。

五、忠诚度分裂案例：在制裁与反制裁风险加剧的情况下，银行成为制裁焦点

--汇丰银行在华为首席财务官孟晚舟案起因事件中扮演的角色，证明了银行及其企业客户在潜在的法律冲突对峙背景下面临的法律和商业风险

2013 年 8 月，华为首席财务官孟晚舟（华为创始人任正非的女儿）等一行在一家香港饭店的包间会见了汇丰银行的代表。会议旨在讨论路透社在 2012 年 12 月下旬和 2013 年 1 月的报道所提出的问题，这些报道声称华为与 Skycom 之间有令人不安的密切关系，报道称，Skycom 在伊朗开展受美国制裁限制的商业活动。这些报道引起汇丰银行的警觉。

当时，汇丰银行向华为全球扩展业务提供银行服务的时间已有约 15 年。据报道，华为是汇丰银行环球资金管理部的二十大客户之一[105]。正如孟晚舟在其报告中所称，汇丰银行非常了解华为，且从公开文件来看，该行职员与华为财务人员多年来一直保持着和睦甚至友好的关系。但是，媒体关于华为通过 Skycom 与伊朗交易的报道使两者关系陷入危险境地。

香港会议上，孟晚舟在其 PPT 文件中概述了华为内部合规政策和规范，并详述了华为与 Skycom 之间的关系[106]。华为团队还表示，汇丰银行在贸易合规方面具有丰富经验，并表明，华为期望向汇丰银行学习，以进一步提升自身合规规范。

华为代表团当时可能还不知道，那时的汇丰银行已面临严重的合规问题。2012 年 12 月初，即在路透社首次报道的三周之前，汇丰银行与美国司法部签署了《暂缓起诉协议》（DPA），并承认多年来，其违反美国制裁法规，以恶劣的方式开展了大量非法支付交易。根据《暂缓起诉协议》，汇

[105] http://en.people.cn/n3/2020/0724/c90000-9714596.html

[106] 详见 https://asialawportal.com/2021/02/19/tracing-the-origins-of-the-case-againsthuawei-cfo-meng-wanzhou-how-global-banks-extend-the-reach-of-u-s-extraterritorial-jurisdictiondirectly-and-indirectly-impacting-the-global-expansion-of-chin

丰银行支付了近 20 亿美元的罚款和没收款，解雇了多名高管，推迟或收回了其他高管的奖金补偿，并按照要求实施了更为严格的合规管理体系，该体系由直接向美国政府报告的独立合规监察员监督。[107]

这样看来，华为代表团如此信任汇丰银行所谓的丰富合规经验，其合理性并没有那么充分。据知情人士透露，华为在随后几个月甚至几年里，独立采取了额外的重大举措来加强其合规政策。而且迄今为止，华为显然并未因在香港会议之后的行为违反制裁法规而被列为制裁目标。事实上，如果不是因为汇丰银行进一步的严重渎职，目前针对孟晚舟和华为的指控可能永远不会被提起。

（一）汇丰银行合规问题与华为形成对抗关系

在香港会议之后，汇丰银行进行了进一步内部审查。从汇丰银行的角度来看，这是一个严重的事件，因为汇丰银行本身违反了美国制裁的罪行以及《暂缓起诉协议》的条款。

汇丰银行在随后数月针对华为“声誉和监管问题”进行了多次风险评估，基于对相关事实和情形的充分考虑，该行全球风险评估委员会于 2014 年 3 月决定继续保持与华为之间的银行业务关系。其后不久，汇丰银行向华为出具了一份承诺函，其中列出拟议的 9 亿美元信贷融通条款，并在大约一年后的 2015 年，参与了向华为提供 15 亿美元银团贷款的项目。

直至 2016 年秋季，自那次命运攸关的香港会议之后整整三年，双方的银行业务关系仍在继续，没有出现进一步明显的复杂情况。据当时新闻报道，美国检方正考虑就汇丰银行外汇交易部门的行为对该行提起新的刑事指控[108]。如果新的指控成立，汇丰银行的行为可能就构成违反《暂缓起诉协议》，在这种情况下，该行会面临更为严厉的处罚，包括（在最严重的情形下）被切断与美国银行系统之间的联系，这对汇丰银行全球业务而言是致命打击。

为遵守《暂缓起诉协议》，在美国检方的直接压力下，汇丰银行进一步调查了华为在伊朗开展

[107]http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations

[108]https://www.bloomberg.com/news/articles/2016-09-07/u-s-said-to-weigh-hsbc-charge-that-couldupend-2012-settlement

的交易以及华为与 Skycom 之间的关系[109]。该行在内部调查过程中发现了孟晚舟在 2013 年 8 月会议上展示的 PPT 文件。2017 年，美国当局指定的汇丰银行独立合规监察员将该调查结果连同其他一系列资料交给了美国司法部。基于汇丰银行的调查结果，美国检方声称，孟晚舟的 PPT 文件中有“大量不实陈述”，构成银行欺诈，这也是美国司法部起诉孟晚舟一案的核心内容。

根据法律规定和实际要求，汇丰银行别无选择，只能配合美国司法部调查华为。据路透社报道，汇丰银行发言人罗伯特·谢尔曼（Robert Sherman）称：“汇丰银行向美国司法部提供的信息是根据正式要求提供的，包括大陪审团传票、《暂缓起诉协议》规定的信息提供义务或类似法律义务提供信息的其他义务。”[110] 一方面，不遵守美国司法部的正式要求会构成违反《暂缓起诉协议》，而另一方面，配合调查可使汇丰银行在五年期限结束后的 2017 年成功摆脱美国司法部根据《暂缓起诉协议》提出的所有指控。因此，汇丰银行别无选择，只能履行法律义务来保护自身利益，即使这意味着交出其最大客户之一的相关信息。

（二）了解银行内在的利益冲突

从加拿大孟晚舟引渡待决案的法庭文件来看，华为当时并没有充分认识到由于美国对全球银行和全球银行系统的压制以及《暂缓起诉协议》的规定导致汇丰银行面临的内在利益冲突。此外，华为大概也没有预料到，对汇丰银行自身违法行为的刑事调查会触发一系列事件，从而导致对华为及其首席财务官的刑事指控，而与此同时，汇丰银行面临的所有指控却全部被撤消。

一般而言，客户有合理的预期，即银行将对他们的信息保密。事实上，法院和监管机构一直承认，此类保密义务构成银行与其客户之间协议的默示条款[111]。有些企业可能会认为，其与银行之间的通信受到某种类似于律师与当事人之间特权的保护。企业和银行之间的沟通与律师和当事人之间的沟通一样，都会涉及机密专有信息，因此，确保银行客户向银行坦诚提供此类信息，且无需担心

[109]https://www.reuters.com/article/us-usa-china-huawei-tech-insight/long-before-trumps-trade-warwith-china-huaweis-activities-were-secretly-tracked-idUSKCN1QN2A

[110] https://www.reuters.com/article/us-huawei-hsbc-exclusive-idUSKCN1QF1IA

[111] 参见，例如 https://www.inbrief.co.uk/personal-finance/bank-obligations-to-customers/ and http://www.coucounis.com/index.php/en/news-insights/publications-articles/77-bankconfidentiality-a-dying-duty-but-not-dead-yet

银行会擅自披露信息，这一点至关重要。而银行同样依赖于客户信息的完整性和准确性，以做出明智的借贷决定。因此，银行保护客户敏感信息机密性的承诺，可促进这种有助于相互信任的坦诚沟通。

但是，银行的保密义务并非是绝对义务。例如，英国法律规定，英国银行可在下列情形下披露客户信息：法律强制要求其披露；公共义务要求其披露；银行为保护自身利益不得不披露；或客户同意银行披露其信息[112]。这在某些方面与律师当事人保密特权的犯罪/欺诈例外情形相似[113]，在金融制裁和反洗钱法规越来越严格的大背景下，为了更广泛的保护公众利益，银行保密义务在很多情形下都会被削减。[114]

因此，一旦涉及制裁合规，就不存在保护客户与银行之间沟通的保密特权。事实上，在这种情况下，应当理解银行有义务向主管当局披露潜在的不合规交易。银行方面由此产生的矛盾以及银行利益与义务冲突所导致的紧张局面，可能会影响企业与其全球银行合作伙伴之间的沟通，此外，考虑到汇丰银行已签署《暂缓起诉协议》，且当局已指定一名独立的合规监察员负责监督该行的合规管理系统，这种紧张关系在本案中更加明显。

这是企业和高管在与银行进行所有沟通时必须牢记的关键动态，并且通常情况下，企业必须采取更为严格的方法来审查提交给银行的信息。必须始终恪守严格透明和准确的政策。为了掩盖潜在的敏感问题而进行不准确的沟通会带来很大的风险。

（三）汇丰银行--进退两难

但与此同时，银行仍需向客户保证，其会在法律允许的最大范围内，严格维护客户信息的机密性。如果银行不能在这一点上给予客户充分的安抚，客户对银行的信任就会被削弱，从而可能对银行声誉和业务造成无法挽回的损害。

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[112] 同上。

[113] https://www.americanbar.org/groups/litigation/committees/trial practice/articles/2014/spring2014-0414-crime-fraud-exception-attorney-client-privilege/

[114] http://www.coucounis.com/index.php/en/news-insights/publications-articles/77-bank confidentiality-a-dying-duty-but-not-dead-yet

这就是为什么在本案中，汇丰银行在上述公开声明中非常谨慎地阐明，其是被迫回应美国司法部的“正式要求”，目的显然是使该行正好符合客户信息保密义务一般规定的例外情形，从而可按法律规定披露信息。

但在孟晚舟引渡案审理过程中，汇丰银行一再被拖回聚光灯下，由于其力求平衡中美双方的不同要求和期望，因而一再成为公众瞩目的焦点。例如，在 2020 年夏天，孟晚舟的律师基于如下理由反对引渡，即，美国检方提交的案件记录（ROC）中遗漏了 2013 年在香港饭店所开会议中演示的 PPT 文件关键内容，该行为构成诉讼程序滥用。尽管案件记录的编写人是美国司法部，并不是汇丰银行，但中国主要媒体仍将矛头对准汇丰银行。

《中国日报》的刊文，将汇丰银行称作政治化起诉的“帮凶”，并指出一些观察人士认为汇丰银行在孟晚舟一案中“扮演极不光彩的角色”，这“破坏了其作为值得信赖的合作伙伴的信誉。”[115] 《人民网》谴责汇丰银行通过“设置陷阱”的手段“陷害”华为，声称汇丰银行“夸大数据，隐瞒事实。”[116]

为了平息中国民众对汇丰银行（该行在中国大陆和香港所获的利润占其全球利润的一半[117]）不断高涨的激愤抨击，汇丰银行通过其官微账号直接向中国客户发布了一份声明。该声明称，汇丰银行“并未促使华为调查案。2016 年年底在汇丰银行卷入此案之前，美国政府早已开始调查华为。”此外，该声明还称，“汇丰银行对华为没有任何敌意，也没有‘陷害’华为”。[118]

尽管汇丰银行的声明与公开报道的案件事实大体一致，但远远不足以安抚中国境内的批评人士。《环球时报》援引中国权威分析人士的评论称，汇丰银行的声明“牵强”和“没有说服力”。该报道还指出，中国对汇丰银行的负面情绪普遍上升，其中援引了观察人士的如下评论，即，汇丰银行“在中国人心目中的声誉已经恶化”，且中国各大企业可能不再愿与汇丰银行有业务往来。[119]

[115] https://www.chinadaily.com.cn/a/202007/24/WS5f1ae50ca31083481725bf86.html
[116] http://en.people.cn/n3/2020/0724/c90000-9714596.html
[117] [插入引文]
[118] https://edition.cnn.com/2020/07/27/business/hsbc-huawei-conflict/index.html
[119] https://www.globaltimes.cn/content/1195604.shtml

（四）新证据让公众了解银行内部合规审查程序

孟晚舟的律师提出若干理由质疑加拿大引渡程序，但在辩方陈述中反复使用的一项理由是，案件记录不足以证明银行欺诈。

为支持上述抗辩理由，孟晚舟的律师在香港另行提起诉讼，迫使汇丰银行提供 2013 年 8 月的为调查媒体对华为的指控所召开的会议之后所开展的审查程序性质和范围相关的内部文件。最后双方就该案达成和解，汇丰银行根据法院命令提供了所要求的文件，但法院命令禁止公开披露这些文件。

随后，孟晚舟的律师试图在加拿大引渡程序中提出上述新证据。该过程分为两个步骤：

- 首先，孟晚舟的律师要求加拿大法院通过发布禁令来封存这些文件。该请求是根据香港法院命令的规定提出。加拿大法院拒绝了该请求，理由是不符合“公开庭审”原则，因为该原则要求法庭程序公开进行，并对公众和媒体开放。[120]

- 法院还驳回了关于在孟晚舟引渡程序中使用汇丰银行新证据的请求。法院裁定，新证据与最终是否定罪相关，但该问题将在审判阶段审理，而不是引渡阶段。[121]

总而言之，结果并非在意料之外，但从表面来看，孟晚舟的律师提出的两项请求均被驳回，现实情况可能更加微妙。孟晚舟方要求封存汇丰银行的文件是得到香港法院的同意并且 “受合同约束”[122]，但加拿大法院拒绝了该申请，导致该证据被公开披露。总体而言该结果对华为和孟晚舟有利，因为新证据让人怀疑银行欺诈指控证据的充分性，并暗示汇丰银行或美国司法部在本次诉讼中有所隐瞒[123]。因此，即使法庭在引渡程序中不考虑该证据，相关信息也已成为公共记录的一部分，

[120] 加拿大法院驳回华为首席财务官关于在美国引渡案中禁止公布新证据的请求 | 路透社

[121] 华为执行官孟晚舟在美国引渡案中失去关键证据支持 | CBC 新闻

[122] Meng Wanzhou is ‘contractually bound’ to try to keep HSBC evidence secret in extradition case, lawyers say | South China Morning Post (scmp.com)

[123] 在此阶段，美国检方只需做最低限度的陈述来满足相对较低的引渡门槛，因此，在案件继续进行的情况下，美国司法部会在后续阶段提交相关指控的其他证据。同理，尽管在本引渡程序中，孟晚舟的律师提交的一些证据构成其抗辩核心内容，辩方在该阶段提交的这些证据仍不完整。在本文中，我们提供了孟晚舟的法律顾问提出的部分论据；辩方律师到目前为止已创建了一个更完整的记录，但可能会在审理阶段遭到检方反驳。

并会影响公众对该案件是非曲直的看法。

从分析角度而言，该证据清晰地展示了汇丰银行在路透社报道华为与 Skycom 之间的关系后进行的内部审查过程，这有助于阐明一个从银行客户角度来看可能不透明的过程。该证据还强调指出了银行针对其现有客户制定的“了解客户”合规义务的持续性，以及在平衡和银行主要客户的长期合作与通过“了解客户”义务及制裁合规来保护银行利益的两者关系时，银行内部面临的潜在冲突。

（五）了解客户--对银行与客户的高风险提议

在详细分析新证据之前，为进一步了解背景信息，我们在下文简要概述了银行“了解客户”义务的性质和范围。

在《银行保密法》（BSA）规定的协议显然不足以检测出用于资助 9·11 袭击事件的资金走向之后，《爱国者法案》制定了“了解客户”义务[124]。根据《爱国者法案》，所有金融机构（包括证券公司、保险公司、转账平台和银行）均须实施反洗钱计划(AML)，包括验证客户身份[125]。2016 年，美国财政部下属的金融犯罪执法局(FinCEN)发布了最新的客户尽职调查规则(CDD)，对《银行保密法》中的反洗钱/了解客户规则进行了修订，要求相关金融机构另外采取措施来识别和验证法人客户的自然人受益人身份，以阐明并强化所适用的客户尽职调查程序。

在接受新客户的过程中，“了解客户”流程通常包括如下内容：（1）客户身份识别程序（CIP），对个人而言，包括收集和验证身份文件和居住证明，对法人客户而言，包括收集和验证公司注册文件、确认受益所有人以及审查该实体建立的业务关系性质与目的，以确定风险状况；（2）客户尽职调查（CDD），包括审查客户是否受到制裁、是否被列入政治公众人物名单、以及是否有负面媒体报道；（3）在出现危险警报时，增强型尽职调查（EDD），以对更高等级的风险进行评估。[126]

对大多数个人客户而言，“了解客户”流程在几个工作日内即可完成[127]，但轶事证据显示，对于

[124] https://www.jumio.com/kyc-in-banking/

[125] https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/tompki.pdf

[126] https://medium.com/@Deepakamirtharaj/the-complete-guide-to-understand-know-your customer-kyc-5dd1c16614c4

[127]

较复杂的情形，该流程可能需要几个月才能完成。在某些管辖区，对于没有业务记录但想开设银行账户的初创公司而言，“了解客户”流程和相关要求会给其带来极难攻克的障碍。

此外，如同汇丰银行针对路透社的报道进行调查一样，金融机构有义务持续监控客户交易，以识别并报告可疑交易，并基于风险情形维护并更新客户信息。[128]

2020 年对金融机构的罚款总额为 106 亿美元，其中对违反了解客户/反洗钱合规规定的金融罚款占 99%。2020 年对金融机构的罚款总额比 2019 年多 27%。自 2008 年起，执法部门对违反反洗钱和制裁规定的金融机构所施加的罚款总额超过 466 亿美元。[129]

仅从违反海外资产控制办公室（OFAC）制裁计划的情形来看，自 2010 年以来，被罚款的银行已超过 35 家，其中最低罚款为美国通洋银行（Trans Pacific National Bank）因违反对伊朗制裁而被处罚的 12,500 美元，最高罚款为法国巴黎银行（BNP Paribas）因违反对古巴、伊朗和苏丹的制裁计划而被处罚的 89 亿美元[130]。被制裁的银行包括许多全球知名金融机构，例如加拿大皇家银行（ABN Amro）、巴克莱银行（Barclays）、富国银行（Wells Fargo）、摩根大通公司（JP Morgan）/摩根大通银行（JP Morgan Chase,）、德国商业银行（Commerzbank AG）、法国兴业银行（Societe Generale）、渣打银行（Standard Chartered）、荷兰国际集团（ING）、东京三菱银行（Bank of Tokyo-Mitsubishi）、德意志银行（Deutsche Bank）、美国银行（Bank of America）、法国农业信贷银行（Credit Agricole）、贝宝支付公司（PayPal）、西联汇款（Western Union）和汇丰银行（HSBC）。[131]

因此，“了解客户”流程对银行和其他金融机构而言显然是一项高风险任务，此外，随着制裁措施的激增和执法行动的增加，银行愈发成为一线监督和准执法行动中的重点监管审查对象。流程一旦出错，银行会遭受严厉处罚。

此外，从汇丰银行案例中可以看出，在涉及合规问题时，银行为保护自身利益（同时间接保护

[128] https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule
[129] https://www.fenergo.com/fines-report-2020/
[130] https://www.refinitiv.com/content/dam/marketing/en_us/documents/infographics/fines-for banks-that-breached-us-sanctions-infographic.pdf
[131] 同上。

公众利益）不得不采取的措施可能会让当局将矛头对准银行客户。因此，银行客户也必须理解“了解客户”流程。在这方面，在孟晚舟引渡案中公开的新证据为我们提供了重要启示。

（六）汇丰银行知晓哪些内情，何时获知的这些内情？

孟晚舟银行欺诈指控案的核心问题基于如下指控，即，孟晚舟在其 PPT 文件就华为与 Skycom 的关系向汇丰银行做了严重虚假陈述，银行由于信赖该虚假陈述而将其自身置于进一步违反制裁的风险中。孟晚舟的代理律师称，新证据极大削弱了前述指控，因为新证据证明，在汇丰银行对路透社报道的事实进行内部调查之时，该行高管已充分了解华为与 Skycom 关系的性质。[132]

在 PPT 文件中，华为表示，其与 Skycom 的合作是“正常的商业合作”，而且“作为华为的商业伙伴，Skycom 与华为一起在伊朗进行销售和服务。”华为进一步承认，正如路透社报道，华为曾经是 Skycom 的股东，孟晚舟之前曾是 Skycom 董事会成员，但华为后来卖掉了 Skycom 的股份，孟晚舟也已退出该董事会。华为还在该文件的下列文字下划线以示强调：“华为与 Skycom 之间是正常且可控的业务合作关系，以后也不会改变。”[133]

美国检方指控称，尽管华为已出售其直接持有的 Skycom 股份，但华为仍通过对 Canicula 的控制间接控制 Skycom。Canicula 是一家中介控股公司，其通过非公平交易从华为手中收购了 Skycom 股份，因此，该 PPT 文件虚假陈述了事实。检方还指控称，汇丰银行根据这些虚假陈述，继续保持与华为之间的银行业务关系，因此可能因处理违反美国制裁法的付款而面临民事或刑事处罚。[134]

这些指控不能凭空评估。由于汇丰银行与华为是长期合作关系，汇丰银行已经掌握华为以及所有与该集团关联公司相关的详尽信息。汇丰银行本应已对与集团有业务往来的每一家公司进行了全面的了解客户/反洗钱尽职调查，因此，当该行决定继续保持与华为的银行业务关系时，其并非完

[132] 本部分所列事实来自相关法庭文件。

[133] 关于 PPT 文件详细内容，请见 https://asialawportal.com/2021/02/19/tracing-the-origins-of-the-case-against-huawei-cfo-mengwanzhou-how-global-banks-extend-the-reach-of-u-s-extraterritorial-jurisdiction-directly-andindirectly-impacting-the-global-expansion-of-chin

[134] https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei cfo-wanzhou-meng-charged-financial

全或甚至主要依赖于该 PPT 文件。汇丰银行还根据适用法律的规定，进行了进一步尽职调查，以更新“了解客户”相关信息。

正如孟晚舟的律师在其提交的法庭文件中所述，汇丰银行的内部记录证明，路透社的两篇报道很快引起该行警觉，并在该行内部传阅。考虑到华为是汇丰银行全球最大的客户之一，且该行在几周之前才签署了《暂缓起诉协议》，对合规风险非常警觉，因此该事件被视为高度重要的紧急事件，相关内部往来信函也抄送给了银行各位高管。

内部正式调查在几天之内启动。汇丰银行很快便确认：Skycom 主营地位于伊朗，成立于 1998 年，其全部股份由 Canicula 持有，唯一董事是一名华为员工；Skycom 和华为的地址相同，Skycom 和 Canicula 在该行均开设有账户，且均被纳入该行内部信息报告系统的华为组群。汇丰银行还在其内部电邮中将 Skycom 称作“华为关联方”。此外，该行还立即联系华为，安排关闭 Skycom 和 Canicula 账户，这也是该行对华为对这些实体的实际控制权的又一次含蓄承认。

导致事件变得紧急的另一个原因是，汇丰银行是向华为提供 15 亿美元的未决银团贷款的牵头银行。因此，该行风险委员会于 2013 年 5 月 14 日首次对该事件进行审查，与其全球银行与市场部门、亚太全球银行与管理委员会（“声誉风险委员会”）召开了会议。基于最新的“了解客户”报告，该行内部团队人员表示，他们“对制裁给予充分考虑感到很满意”，并且声誉风险委员会批准了继续执行于 2013 年 8 月宣布的银团贷款。

上述所有内部审查的时间均早于华为代表团在香港饭店举行的会议，华为代表团就是在那次会议上演示了 PPT 文件的中文原版。在那次会议过去几周后，华为向汇丰银行提供 PPT 文件的英文版，该英文版被转发给汇丰银行相关管理人员，其中包括全球风险委员会和客户甄选委员会的成员。汇丰银行的一位高管在其内部电邮中表示，他对华为在该 PPT 文件中所述的为贸易合规做出的努力很满意。

之后，汇丰银行对这些事项又进行了三次风险审查：

- 2013 年 11 月 28 日亚太客户甄选委员会（“客户甄选委员会”）会议；
- 2014 年 3 月 18 日再次召开声誉风险委员会会议；和

• 2014 年 3 月 31 日召开的全球风险解决委员会（“全球风险委员会”）会议。

11 月 28 日客户甄选委员会会议上提交的报告与为 5 月 14 日声誉风险委员会审查准备的报告基本相似，但补充了如下内容，即，客户关系管理团队认为，与华为交易带来的声誉风险是“可接受的”。

在那次会议之前的电邮中，负责编写报告的团队成员曾讨论是否将 PPT 文件添加在需要提交给委员会的报告中，但由于委员会成员太多，他们最终决定不添加。该团队认为，只要指出华为政策符合所有适用法律和制裁要求，并描述华为实施的内部控制，就足以阐明相关问题。此外，在会议召开之前，该团队又附了一封与报告草案相关的电邮，表明可应要求提供 PPT 文件的复件。

基于所提交的文件，客户甄选委员会决定保持与华为的合作关系。随后开展的两项风险审查流程相同，结果也相近，即，银行各级管理人员一致认为，继续保持与华为合作所带来的声誉风险是可接受的。

从汇丰银行高管基于该行内部“了解客户”审查结果所获得的信息来看，即使没有华为的 PPT 文件，该行仍有足够的信息查明华为与 Skycom 之间的关系。此外，正如孟晚舟的代理律师强调所指，PPT 文件中称与 Skycom 之间的关系由华为“控制”，这似乎与该行最新的“了解客户”审查结果一致。从汇丰银行内部文件来看，所有事实都表明，Skycom 实际上就是华为的关联公司，且记录表明，汇丰银行是基于这一理解采取行动的。

此外，即使用更狭隘的眼光看待该行高管当时已知晓的相关事实[135]，该行可获得的所有信息也足以使其注意到相关问题，其完全可以在必要或合适情形下开展进一步调查。比较汇丰银行在路透社首次报道后几个月内开展的“了解客户”更新尽职调查，与该行在三年多后按照美国司法部的要求进行的调查（当时该行签署的《暂缓起诉协议》面临被撤销的威胁）。据报道，在三年多后进行的调查中，汇丰银行内部调查员开展了 100 多次审查，审核了近 300,000 封电邮，并分析了多年的金融交易。这表明，只要该行认为有必要，完全可以在 2013 年至 2014 年部署更多的职员开展进一步调查。

[135] 在孟晚舟引渡案中，对于知晓华为与 Skycom 关系的该行高管的级别问题，双方各执一词。根据法庭记录，只有初级管理层人员知悉，但孟晚舟的法律顾问提供的文件表明，有非常高级别的管理层人员直接参与其中，因此他们了解内情；对于涉及银行全球重要客户的备受瞩目的案件，这种情形可以预料到。

如上所述，在随后按照美国司法部的要求开展调查的过程中，PPT 文件被发现，但早在决定继续保持与华为的银行业务关系时，该银行管理层就已经知道该文件的存在。据报道，该行在随后开展的内部调查也发现了相关证据，可证明华为继续通过获得华为资金支持的中介控股公司间接控制 Skycom。关于为 Canicula 提供资金支持的细节并没有在幻灯片中明确披露，但在最初的风险评估时汇丰银行就已经知道华为和 Skycom/Canicula 之间的联系，查询公共记录和银行交易记录就可以找到 PPT 文件中遗漏的其他细节。

起诉书中称，如果汇丰银行当时知道全部实情，就不会与华为继续保持银行业务关系，该行可能因此陷入违反制裁法规的危险中。如果孟晚舟被引渡，这些事实问题和法律问题将会在审判阶段解决。

但是，如果审判庭认为，根据法律规定，华为提交的文件不足以构成银行欺诈，则可能会引发如下问题，即，汇丰银行是否会承担因没有开展充分“了解客户”的尽职调查而应承担的责任（假设该行基于其当时记录中记载的信息，决定继续保持银行业务关系，从而实际违反了制裁法规）。

对于这一点，从最新的书面证据来看，银行内部负责华为关系的关系管理团队可能有意通过不在风险审查报告中附上 PPT 文件以及不进一步询问华为与 Skycom/Canicula 之间关系的细节来简化审查流程。如上所述，种种迹象均表明，银行管理层了解并接受这两家公司实际上均受华为控制这一事实；汇丰银行要求华为关闭账户，即表明其希望消除潜在风险，以便继续保持与华为之间更广泛的合作关系。

这反映出与银行之间自然存在的紧张关系 – 银行必须遵守适用的制裁法规，但又希望与重要客户保持有利可图的业务关系，因此其会在合法范围内努力平衡这两个目标。但这是一个微妙的平衡行为，说明了一个值得强调的基本原则：如果银行太过于看重客户关系的维护，不履行适用法律法规义务，则可能会付出遭受制裁处罚的沉重代价。因此，如果银行的声誉和持续生存能力在特定情形下处于危险中，它总是会在合规或者是过度遵守合规方面出错。

在本案中，美国司法部放弃对汇丰银行的所有可能的指控（包括违反“了解客户”相关规定的行为），而是基于在最初风险审查时似乎已为汇丰所知或可获得的信息，仅以银行欺诈罪起诉华为和

孟晚舟[136]。因此，这似乎是美国司法部基于对事实和法律的评估，有选择地行使起诉自由裁量权。但这可能也在更宏观地层面上反映了中美关系，在这种情形下，与华为相比，汇丰银行会被视为更合意的一方。

（七）跨国银行是中国反制措施的焦点

如上所述，无论如何，是美国司法部，而不是汇丰银行，对针对华为和孟晚舟的指控承担最终责任。此外，尽管汇丰银行在中国市场吹嘘其起源于香港和上海的中国传统，但这家总部设在英国的银行在中国仍被视为一家外国银行，因此，汇丰银行很容易成为中国专家批评的目标，因为其在该案中所扮演的角色，以及对汇丰银行在该案中的动机和行为的怀疑。

这一波谴责浪潮对汇丰银行而言可谓雪上加霜，因为当时中国正准备在 2020 年 9 月颁布实施《不可靠实体清单规定》，该法规是中国最新反制措施的重要组成部分。《不可靠实体清单规定》主要针对符合下列情形的外国实体，即，违反“正常的市场交易原则”，对中国交易方采取“歧视性措施”，严重损害中国交易方合法权益。[137]

毫无疑问，一些中国国内权威人士认为，汇丰银行的行为完全符合《不可靠实体清单规定》拟禁止的行为的范围。《环球时报》2020 年 9 月援引专家评论称，鉴于汇丰银行在孟晚舟案中扮演的角色，该银行可能会是首批被列入不可靠实体清单的外国实体之一[138]。一旦该行被列入清单，其可能会遭到一系列严厉处罚，这在很大程度上可能会将该银行列入中国的“黑名单”。[139]

目前还没有外国实体被列入不可靠实体清单，但这并不影响一些中国大企业采取单方面措施。2020 年 11 月，世界最大的钢铁公司即中国宝武钢铁集团将汇丰银行列入黑名单，声称该银行是高风险贷款人[140]。但随后不久，交通银行称其与该贷款人之间的 16 年合作“非常完美”，汇丰银行持

[136] 起诉书中指控了其他刑事罪行，但不在本文讨论范围内。
[137] 《不可靠实体清单规定》第 2 条
[138] https://www.globaltimes.cn/content/1201612.shtml
[139] 《不可靠实体清单规定》第 10 条
[140] https://www.theepochtimes.com/worlds-largest-steel-company-blacklists-hsbc-in-retaliation-for huawei-case_3883940.htm

有交通银行 19%的股份[141]。汇丰银行在中国贸易金融领域的强势地位也被视为应对可能会面临的反对声音的重要缓冲，因为将银行从一家公司的现金管理系统中剥离，可能比将其列入资本市场“黑名单”要困难的多，尤其是在中资银行目前还不具备处理多种类型贸易融资交易的条件下。[142]

如果中国以汇丰银行按照美国司法部的正式文件要求行事为由，将其列入不可靠实体清单，则此举很可能会被国际社会视为不必要的挑衅，并会对中国境内其他外国银行以及依赖于这些银行在中国开展业务的外国投资者产生寒蝉效应。如本系列前几篇文章所述，汇丰银行配合美国司法部调查华为在伊朗交易活动的行为，可被视为“强制性最低合规”，从而更可能会被视为符合《不可靠实体清单规定》规定的“正常的市场交易原则”标准。

但是，外国银行普遍存在的潜在弱点是“过分合规”倾向。外国制裁专家认为，很难量化过分合规会引发多大的问题，但大家一致认为，这是全球银行广泛存在的重大问题。银行面临的挑战是，允许行为与禁止行为之间的界线模糊不清，且往往是美国当局有意为之，此外，由于违法罚款太高，金融机构避险的本能反应是尽可能避开这条模糊的界限，这导致银行失去一些业务。但考虑到潜在惩罚的程度，从他们的角度来看，这仍然是一个理性的业务决定。真正的负担落在了无法合法经营业务的企业身上。一位专家私下指出，银行正变得越来越谨慎，为减少潜在的制裁风险，不断扩大过度合规的范围。

这种过度合规行为可能会被中国当局视为不符合“正常的市场交易原则”，从而可能触发《不可靠实体清单规定》规定的潜在责任。对此类违规行为的处罚可根据具体情形而定，因此可合理预测，中国当局会在某个时间点，选择一个合适的目标做试验，以有限的方式反击“过度合规”。

如果处理得当，这可能会推动外国银行向美国当局施压，要求其为非美元业务甚至是非受限美元业务开辟一些更明确的安全港。光是这一举措就能大大缩小美国制裁的影响范围，并可鼓励那些与中国一样强烈反对美国单边次级制裁的其他国家要求其国内银行采取类似行动。

[141] https://www.nasdaq.com/articles/hsbcs-weak-investment-bank-softens-china-backlash-2021-06-28
[142] 同上。

（八）反向尽职调查 – 了解银行（KYB）

很多中国银行也采取了类似的过度合规的姿态，并在某些情况下采取极端手段，拒绝向受到甚至有限制裁的中国实体提供任何银行服务。

但是，与大多数中国金融机构有合作关系的道琼斯风险与合规中国区负责人 Johnson Ma 称，“中国银行正在寻找更多的更为复杂的方式提供非受限服务。”根据海外资产控制办公室的 50%规则的规定[143]，200 多家中国公司或个人被列入 SDN 清单，Johnson Ma 认为这意味着可能会有几千家中国实体或个人受到影响。因此，正如 Johnson Ma 所指出的，需要通过某些方式满足非受限服务要求，目前更多的中国银行都似乎在寻找一种方法，可以在不承担过度合规风险的情况下平安穿越美国制裁的雷区。

另一方面，一些中国银行业专家指出，中国各家银行风险状况不尽相同，某些情况下，银行可能因为合规管理成本高于潜在收益而拒绝开展某些在美国制裁下并未被严格禁止的业务。这可能是一个简单的成本效益分析，而非过度谨慎。

这表明银行客户可能希望对银行进行尽职调查，以评估其风险情况并了解其合规管理政策和实践如何运作。从本质上讲，这其实是银行“了解客户”审查的反向审查，即，由银行客户开展的“了解银行”或 KYB 评估。

例如，尽管华为与汇丰银行有长期业务合作关系，但如果华为知悉该行因自身严重违反制裁规定而已签署《暂缓起诉协议》时，其可能已经考虑采取某些措施来减少如下风险，即，美国当局迫使该行提供不利于华为的证据，华为多年以来在若干领域也一直遭到美国施加的巨大政治压力。同理，其他银行（包括中国国内银行）的客户也应评估其银行风险情况，并制定相关计划，以免自身或交易对方被制裁，导致对正常交易产生不利影响。

评估目的并非是寻找会主动隐瞒非法交易的银行伙伴。从华为和中兴制裁案以及其他引人注目的合规案件来看，中国企业以及中国政府目前已认识到适当合规管理的重要性，不认真对待合规问

[143] 关于海外资产控制办公室 50%规则的详细规定，请见 https://www.inhousecommunity.com/article/us-secondary-sanctions-provoke-strong-backlashamong-friends-foes-around-world/

题的金融机构也不会成为用于其他目的的高效或可靠的合作伙伴。

银行企业客户的首要目标是确保获得合法且不受限制的银行服务，不会因不适当的过度合规而受到不合理限制。中国当局的平行目标可能是让跨国银行更慎重地确定其合规范围，避免美国制裁的适用范围超出其条款规定，从而使银行在过度合规和不受限制地进入中国市场之间做选择。

到目前为止，美国已成功将全球银行变成其制裁政策的前线执行者，但中国也许能够在有限的试点案例中巧妙实施《不可靠实体清单规定》中的反制措施，以遏制过度合规，使银行重新权衡其风险分析，从而改变整体局面。

不论制裁与反制之间的最初小规模冲突将如何发展，全球银行显然都会成为焦点。因此，全球银行可能最终都不可避免地会成为帮助各国政府制定下一步制裁/反制措施的参与者。

I. US Secondary Sanctions Provoke Strong Backlash Among Both Friends and Foes Around the World

The US Currently Occupies a Position of Extraordinary Asymmetrical Leverage, But Its Unilateral Approach Entails Broader Geopolitical Risks

As the world's leading superpower, the US may have unmatched military strength, but in recent decades the US has preferred to weaponize economic sanctions as its instrument of choice to project power and influence around the globe.

Economic boycotts, blockades and other trade sanctions have a long history dating back millennia. Sanctions became a more prominent tool of economic statecraft in the second half of the 20th century as the US and other Western countries saw financial and trade pressures as preferable to warfare as a means to enforce the new post-war global order, allowing countries in a position of economic power to achieve many of the same geopolitical ends without having to put boots on the ground and troops in harm's way.

Sanctions may be imposed on a multilateral or unilateral basis, but the US is the single indispensable player in the global sanctions game, with the most expansive sanctions coverage and the most aggressive and effective enforcement capability. Without the US, multilateral sanctions have no real teeth, and acting alone the US can still effectively impose its will on companies and individuals around the world to compel them to play by its rules.

The power of US sanctions arises from the confluence of US dominance in terms of undisputed military, economic and technological leadership in a world which is globally-interconnected to an unprecedented

degree. The centrality of the US role in the international order, and more particularly the dominance of the US dollar globally, allows the US an unparalleled reach and acts as a leverage multiplier on an exponential scale.

But this unchecked power to levy sanctions inevitably has met with strong opposition from across the globe, not only from governments and businesses targeted by US sanctions but also by those in third countries whose foreign policy and business interests are curtailed by US secondary sanctions. The EU and Canada and other nations traditionally aligned with the US have led the pushback up to this point, and now China has entered the fray, increasing the risk of geopolitical confrontation as well as increasing the compliance risks for multinational companies.

In this part one of this series, we will briefly outline the history of US secondary sanctions, the basis of the assertion by the US of extraterritorial jurisdiction and why it is in the unique position to enforce the same, something other countries may aspire to do but as a practical matter cannot do to any meaningful degree. In following installments in this series, we will explore in more detail the counter-measures being undertaken by other countries, specifically looking at the blocking statutes adopted by the EU, Canada and China (now supplemented by China's new Anti-Sanctions Law) as well as efforts to work around US long-arm jurisdiction through de-coupling from the US dollar in international trade transactions.

A. The Rise of Smart Sanctions

Over the last few decades, the US has ramped up its utilization of sanctions while at the same time enhancing their effectiveness and refining their precision. Economic embargoes and blockages

historically had been criticized as being too blunt an instrument, often not only impacting targeted bad actors but also indiscriminately inflicting serious harm on innocent bystanders. In many cases, this was considered to be fundamentally at odds with the stated humanitarian or human rights objectives of the sanctions, but even where sanctions were designed to address national security objectives, the human costs were often seen as excessive.

Madeleine Albright, US Secretary of State under President Clinton, exemplified the apparent indifference on the part of the US to the human suffering caused by sanctions when she stated in a 1996 interview with the influential US television news program "60 Minutes" that even if (hypothetically) the trade embargo against Iraq under Saddam Hussein had resulted in the deaths of half a million Iraqi children, "the price is worth it."[144]

In the aftermath of the 9/11 terrorist attacks in 2001, the US devised new "smart" sanctions that were more targeted and more powerful. Under related legislation and executive orders, penalties were imposed on designated persons in sanctioned countries as well as on non-state actors such as terrorist organizations and drug cartels. Such designations are made by the Office of Foreign Assets Control (OFAC) under the US Treasury Department, and the targeted parties are set out on the List of Specially Designated Nationals and Blocked Persons (SDN List), which is one of several sanctions lists maintained by OFAC.

For designated persons with few ties to the US, it may appear at first blush that being included on the SDN List may have little to no practical effect, and in some cases such a designation may be worn as a

144 https://www.washingtonpost.com/opinions/five-myths-about-sanctions/2014/05/02/a4f607b6-d0b4-11e3-9e25-188ebe1fa93b_story.html#:~:text=%20%20%201%20Sanctions%20never%20work.%0AFifteen%20years,%E2%80%9Cmore%20pain%2C%20more%20gain%E2%80%9D%20when%20it...%20More%20

badge of honour by persons who openly oppose US foreign policy and proudly flout US-imposed rules that the US seeks to enforce beyond its own borders.

However, in other cases, SDN designation can have a crushing impact. All US-controlled assets of the designated parties are frozen, and a blanket ban is imposed on all investment, trade or credit transactions of any type between any US person and an entity or individual listed on the SDN List. Moreover, under OFAC's fifty percent rule, such list-based sanctions also apply to any entity that is fifty percent or more owned by a listed entity or individual.[145]

Even more devastating for the targeted persons, many non-US parties, particularly foreign banks, may similarly refuse to deal with parties on the SDN List out of fear of being blacklisted themselves. Thus, the combination of the fifty percent rule and the broader shunning of the targeted persons by major non-U.S. banks and many other non-US parties has a powerful cascading effect, allowing the tentacles of US sanctions to extend down the chain through the targeted person's financial empire, potentially cutting all members of the group off from the entire US dollar-denominated and US dollar-dominated global financial system, thereby choking off key sources of revenue around the world.

This precision-guided economic ballistic missile has been deployed in a range of scenarios, targeting a wide spectrum of bad actors, from terrorist organizations and their sponsors, to drug traffickers and related facilitators, and also to government officials and state-owned enterprises deemed by the US to be engaged in human rights violations, breaches of anti-proliferation protocols and other acts in contravention of international law or otherwise contrary to US foreign policy and national interests.

[145] See https://www.ustreas.gov/ofac

The potential range of targets for SDN designation is set at the discretion of the particular US administration. For example, President Trump prohibited transactions with Petroleos de Venezuela, S.A. and the government of Venezuela, affecting, among other things, profit distributions together with securities and loan transactions connected to the government of Venezuela.[146] In 2018, the Trump Treasury Department placed certain Iranian banks on the SDN List,[147] resulting in their being denied access to the global SWIFT payments network.[148] In 2020, the Trump administration imposed sanctions on various high-ranking officials in China and Hong Kong in respect of claimed human rights violations in Xinjiang and Hong Kong.[149] More recently, President Biden imposed sanctions on Russian officials and enterprises in connection with claimed cybersecurity attacks and election interference.[150]

B. Leveraging US Technology Leadership

The SDN List is not the only weapon in the US arsenal of economic measures that can target foreign companies around the world. The Bureau of Industry Security (BIS) under the US Commerce Department administers two additional lists: The Denied Persons List and the Entity List. The Denied Persons List consists of individuals and companies that have been denied export and re-export privileges generally by BIS. The Entity List includes entities deemed to be involved in activities that threaten the national security or foreign policy interests of the US, such as the sale of U.S.-sourced dual-use

146 https://www.hg.org/legal-articles/ofac-list-in-the-usa-sanctions-and-consequences-47906

147 https://sanctionsnews.bakermckenzie.com/ofac-designates-iranian-entities-and-banks-as-specially-designated-nationals-and-fincen-issues-advisory-on-irans-illicit-and-malign-activities-and-attempts-to-exploit-financial-systems/

148 https://www.reuters.com/article/us-usa-iran-sanctions-swift-idUSKCN1NA1PN

149 "US sanctions Chinese officials over Xinjiang 'violations'", *www.bbc.com*. July 9, 2020; "Treasury Sanctions Individuals for Undermining Hong Kong's Autonomy". United States Department of the Treasury. 7 August 2020. .

150 https://www.internationaltradeinsights.com/2021/04/biden-administration-imposes-new-russia-sanctions-and-establishes-framework-for-future-expansion-of-russian-sanctions-regime/

technology to countries subject to sanctions. Exports of certain sensitive US-sourced technologies to the entities so listed would be subject to license restrictions.

Similarly, re-export of products containing controlled US-sourced technology and software is also subject to license requirements under the US Export Administration Regulations (EAR). This re-export ban applies to designated products made in the US or products made anywhere in the world which incorporate not less than 25% of the controlled US-origin technology, and where the end user is based in a country designated as a state sponsor of terrorism (specifically, Cuba, North Korea, Iran and Syria), the threshold for triggering the re-export license requirement drops to only 10%.[151] For certain specified items, the de minimus level is set to 0%, constituting a total ban on re-exports.

Exemptions to the restrictions on US persons entering into transactions with companies or individuals included on the SDN List or Entity List may be obtained under general or special licenses, but such licenses typically are strictly limited in order to avoid undermining the objectives and effectiveness of the relevant sanctions program.

While the SDN List provides for a blanket ban on all transactions with the sanctioned party, the restrictions under the Entity List are limited to transactions involving the controlled US-sourced technology. However, as a practical matter, for companies that depend on access to such US-sourced technology, in many cases being "blacklisted" on the Entity List can be tantamount to an economic death penalty.

That was the nearly case when China's ZTE violated the terms of its prior plea deal in 2018 and was

[151] https://www.bis.doc.gov/index.php/documents/licensing-forms/4-guidelines-to-reexport-publications/file

slapped with a seven-year ban on acquiring specified US-sourced technology, which would essentially have shuttered its global Android mobile handset business since it would no longer be able to bundle the popular Google App Store, Gmail and YouTube apps with the base Android system. Had Trump not intervened in order to keep the then pending US-China trade negotiations on track, ZTE might not have survived.[152]

In 2019 the US also placed Huawei on the Entity List and further hit the Chinese telecom equipment giant with a ban on the purchase of semiconductor chips incorporating sensitive US technology. As a result, Huawei handset sales are projected to fall from a high of 170 million units in 2020 (when Huawei was still utilizing chips purchased and stockpiled prior to the ban taking effect), ranking third globally behind Samsung and Apple for that year, to only 45 million units in 2021, which will drop it to seventh place overall.[153] The company posted a 16.5% decline in overall revenue year-on-year for Q1 2021,[154] compared to a 3.8% increase for 2020, driven primarily by strong sales in China, which offset declining international sales.[155]

C. Secondary Sanctions – An Exercise of Raw Geopolitical Power

The US actions against Huawei have dealt the company a serious but not fatal blow. While the US is well within its rights to control exports of its sensitive technology by US technology companies, in this case the US has gone well beyond this, by enlisting technology companies from around the world to play

[152] :
https://asialawportal.com/2021/03/03/the-defense-of-huawei-cfo-meng-wanzhou-how-the-principles-of-the-rule-of-law-extend-fundamental-protections-to-non-u-s-companies-and-executives-subject-to-extraterritorial-jurisdiction/

[153] https://technode.com/2021/01/06/huawei-to-fall-to-seventh-place-in-2021-global-handset-rankings-report/

[154] https://www.cnbc.com/2021/04/28/huawei-reports-16point5percent-drop-in-revenues-in-first-quarter.html

[155] https://www-file.huawei.com/minisite/media/annual_report/annual_report_2020_en.pdf

along and shut Huawei out of the US-dominated global semiconductor supply chain.

This is the essence of, and demonstrates the immense power of, US sanctions: the US leverages its technology leadership and its dominant position in the global financial system to restrict conduct not only on the part of US persons but also companies and individuals outside of the US. While there are some important technical distinctions between secondary sanctions under OFAC rules and the re-export bans for sensitive US-sourced technology under the EAR, in both cases the US couples an expansive view of the reach of its long-arm jurisdiction with strong-arm tactics designed to compel foreign parties to conform to US foreign policy or risk forfeiting access to the US financial system or US technology.

Two early examples of secondary sanctions arose under the Cuban Liberty and Democratic Solidarity Act (LIBERTAD), more commonly known as the Helms-Burton Act, and the Iran and Libya Sanctions Act (ILSA), sometimes referred to as the D'Amato Act, both of which came into effect in 1996 and were designed to prevent both US *and foreign companies* from engaging in certain transactions with Cuba, Iran, and Libya.

The attitude of the US was summed up in this remarkably blunt statement by Senator D'Amato, who was the principal sponsor of the ILSA: "Now the nations of the world will know they can trade with them [Iran and Libya] or trade with us. They have to choose."[156]

The US rationale for imposing secondary sanctions is straight-forward. US companies and individuals are blocked from conducting the prohibited transactions under the direct sanctions imposed by the US.

[156] Jerry Gray, Foreigners Investing in Libya or in Iran Face U.S. Sanctions, N.Y. TIMES (July 24, 1996), http://www.nytimes.com/1996/07/24/world/foreignersinvesting-in-libya-or-in-iran-face-us-sanctions.html.

If foreign competitors are not similarly restricted and step into the vacuum created by the withdrawal of US companies (a process known as "backfilling"), then US companies will lose business to their foreign competitors while at the same time US policy objectives may be blunted or frustrated completely. So from a US perspective, secondary sanctions are seen as a type of "anti-circumvention" measure.

There is a broad bipartisan consensus among US politicians supporting increasingly aggressive imposition of sanctions. This is not just a position taken by Republican presidents but also by Democrat presidents, and not just by the executive branch but also (perhaps even more particularly) by the Congress – they all are enthusiastic proponents and purveyors of US unilateral sanctions (although Trump was an outlier by any measure in terms of going it alone, often without even the fig leaf of nominal consultation and coordination with Western allies).

The US political class is keenly aware of the unrivalled economic power the US possesses, and they are not hesitant to exercise it to go after those they regard as bad actors to achieve US foreign policy objectives. Moreover, they are all too willing to demand that the rest of the world fall in line even if they do not share the same views on geopolitical ends or means.

D. The US Against the World

When it comes to such secondary sanctions, the US has friends but no allies, at least no willing allies. The entire world is united in their objections to what is universally decried as a blatant overreach on the part of the US and an abuse of its dominant position in the global system.

Legal scholars challenge US unilateral secondary sanctions on the grounds that the related exercise of

extraterritorial jurisdiction contravenes core principles of customary international law.[157] More fundamentally, governments around the world, including many of the closest partners of the US, protest the extraterritorial elements of US secondary sanctions as an infringement of their sovereignty.[158]

In response to the 1996 US sanctions against Cuba (under the Helms-Burton Act) and Iran and Libya (under the D'Amato Act), a WTO case was brought against the US by Canada, several European countries and others. In addition, Canada, the EU and others adopted blocking statutes, making it illegal for their nationals to comply with US sanctions orders. As a result of this pressure campaign, the US eventually agreed to waive enforcement of certain of the more objectionable extraterritorial aspects of these acts, and in respect of Iran, re-engaged with its Western counterparts to forge a consensus approach in parallel with its own continuing unilateral sanctions program.

That broad consensus among the leading Western nations in terms of approach to sanctions continued through the Obama years even as the US administration expanded the use of enhanced secondary sanctions.[159] But when Trump reversed course in 2018 and reimposed sanctions on Cuba and Iran, including additional secondary sanctions, countries around the world once again complained loudly, and the EU and Canada dusted off their old blocking rules from twenty years earlier. However, this time they found that their complaints and counter-measures were largely ineffectual in the face of the potential massive economic penalties under the US secondary sanctions, and in an act of almost universal capitulation, companies around the world bowed to the US edicts.

The calculation was simple – most large multinational companies cannot afford to lose access to the US

[157] https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

[158] https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1854&context=wilj,

[159] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

market by running afoul of US secondary sanctions. More importantly, no company, regardless of size, can afford to be labelled as a sanctions violator and risk being cut off from the global banking system.

US dominance of the global financial system is so complete that it occupies a position of extraordinary asymmetrical leverage. When the US under Trump barred Iranian banks from the SWIFT network, Belgium-based SWIFT complied and the EU acquiesced.[160] But this set a potentially dangerous precedent, giving the US apparent unquestioned authority to impose the extraordinary penalty of what one writer has termed "financial excommunication."[161]

The US has been very aggressive going after global banks for failure to comply with US sanctions. To cite just a few examples:

- Barclays entered a plea deal in August 2010, admitting to processing prohibited payment transactions with Cuba, Iran and Sudan, and agreeing to forfeitures in the amount of US$ 298 million; [162]

- in December 2012, HSBC signed a deferred prosecution agreement (DPA) with the US Department of Justice, and paid US$1.9 billion in fines and forfeitures for stripping identifying information from prohibited payment transactions with sanctioned countries and parties in an effort to evade US sanctions rules;[163]

- in the largest bank prosecution to date, French bank BNP Paribas was assessed fines

[160] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

[161]https://www.economist.com/finance-and-economics/2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy

[162]https://www.justice.gov/opa/pr/barclays-bank-plc-agrees-forfeit-298-million-connection-violations-international-emergency

[163]https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations

totalling US$8.9 billion for processing blocked payments with Iran, Cuba and Sudan in disregard of warnings;[164] and

- Standard Charted Bank entered into an amended DPA in April 2019 and paid fines and penalties in excess of US$1 billion for illegal payment transactions with Iran made by its former employees in Dubai.[165]

The banks typically are not willing to risk taking these cases to trial, so they negotiate a plea deal or a DPA. This provides certainty as to the result and ensures that they are not "blacklisted" and so are able to remain in business, but such an approach does leave the US legal position unchallenged (including with respect to US long-arm jurisdiction), potentially further emboldening the US to take ever more aggressive enforcement actions.

In addition, US officials have adopted a practice of strategic ambiguity, intentionally creating uncertainty as to the line between permitted versus proscribed conduct,[166] knowing that this has the effect of expanding the scope of proscribed activities. As a result, banks have tended to adopt a policy of *over compliance* to ensure that they stay well outside the known lines drawn by the US, which further strengthens the US hand in respect of secondary sanctions. In effect, by cowing the global banks into not just minimum mandatory compliance but *over compliance*, the US has enlisted them as powerful front-line enforcers of US foreign policy.

Add to this the dominance of the US dollar in international trade transactions (somewhere between 50 to

[164] https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial

[165] https://www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions

[166] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

80 percent of international trade is invoiced in US dollars[167]) and the US position that clearing of US dollar payments through the US banking system on its own provides a sufficient nexus to support US jurisdiction over US dollar-denominated transactions anywhere in the world (US courts have deemed this to be an "export" of services on the part of the US banking system[168]), and the circle is complete. Few companies anywhere in the world can escape the reach of US secondary sanctions and long-arm jurisdiction.

E. The Intended and Unintended Costs of Sanctions

Just as there are direct sanctions and secondary sanctions, there are direct costs and collateral costs arising therefrom, and in both cases the lines separating the categories are blurred.

Direct costs clearly are borne by the sanctioned countries and parties, but US companies which lose out on business opportunities with sanctioned counterparties under direct US sanctions also suffer direct economic losses, essentially being forced to subsidize US foreign policy. By enacting secondary sanctions, the US now also requires foreign companies to pay the same opportunity costs to advance US foreign policy objectives which they may not share or which indeed may be directly contrary to the applicable policy positions and legal requirements in their home jurisdictions.

Other costs take arise from counter-measures to secondary sanctions as countries around the world, both friends and foes of the US, seek to reassert their sovereignty and to reduce the risks associated with asymmetric interdependence with the US. Such counter-measures include attempts to block US

[167]https://www.swift.com/sites/default/files/documents/swift_bi_currency_evolution_infopaper_57128.pdf

[168] See, eg, United States v Homa; United States v Banki

secondary sanctions by legal means via blocking rules, as well as efforts to circumvent US dollar hegemony by creating alternative payment systems which are de-coupled from the US banking system, which de-dollarization would tend to erode US assertion of extraterritorial jurisdiction on the basis of clearing of US dollars through the US banking system.

In a similar vein, China is seeking to develop not just technological independence from the US but global technological leadership. Technological independence would free China from the reach of US export controls and certain categories of secondary sanctions, while technological leadership could fundamentally shift the balance of power and potentially could result in a global technological divide, with the rest of the world having to choose either the US/Western standard or the China standard or pay the additional costs for a dual-standard approach. China cannot achieve either of these objectives quickly or easily, but if past is prologue, then the prospects for China's outlook over the medium term cannot be lightly discounted.

The US will not readily cede its dominant position in any of these areas, nor should it be expected that the US will voluntarily decline to utilize its leverage to pursue legitimate policy goals simply in the name of comity among nations or even in deference to principles of customary international law which go beyond its treaty obligations, as some foreign commentators and critics seem to suggest it should do. Moreover, the apparent leading challengers to the US position, China and the EU, have much work to do before they can compete with let alone hope to surpass the US in any one of these areas.

However, a persuasive argument can be made that the US should exercise more self-restraint out of an enlightened sense of self-interest, recognizing that the US cannot expect that it will retain its unprecedented position of dominance in perpetuity and so should seek to abide by a standard of conduct which it would hope an eventual successor would also follow. President Clinton expressed similar

sentiments in a speech at Yale in 2003,[169] but given the prevailing pro-sanctions bipartisan consensus in the US, one would be hard pressed to find any current US politician espousing similar views today.

A more *realpolitik* approach for the US would be to take note of the growing campaign around the world to push back against US secondary sanctions and extraterritorial jurisdiction through the adoption of more aggressive counter-measures. These counter-measures create a real risk that a new Cold War-like arms race could develop not just in respect of technology standards and supply chains but also in the form of competing legal and global payment systems.

Creating multiple global payment systems to rival SWIFT would take time to set up and gain traction, and their success ultimately will depend on the rise of alternative global currencies (e.g., the Euro, Yuan, new Central Bank Digital Currencies or crypto-currencies) to displace the US dollar at least in part as the primary currency of international trade. While such redundant systems would entail additional costs, they also offer the promise of a hedge against the risks of being cut off from the sole legacy system. This comes with an important caveat: So long as the US dollar was not entirely eclipsed in importance by the other currencies, an aggressive US administration theoretically could still use its sanctions power to cut off access to the US-dominated financial systems, which could still severely handicap global banks and MNCs even in a world with redundant alternative global payment systems and competing currencies.[170]

On the other hand, stronger blocking statutes, fully implemented with enhanced penalties, may satisfy nationalistic impulses around the world to push back against what is viewed as clear abuse by the US of its current dominant position, but as a practical matter such counter-measures may only result in a

[169] https://johnmenadue.com/kishore-mahbubani-what-happens-when-china-becomes-number-one/

[170] https://www.theatlantic.com/international/archive/2018/09/trump-un-iran/571240/

choice-of-law stalemate, where multi-national companies may have to choose which laws they will obey and which laws they will ignore. Even the current, largely impotent, blocking rules introduce much higher levels of complexity for multinational companies, which imposes additional compliance costs on all MNCs.

Such prospects should mitigate in favour of more self-restraint on the part of the US, but current political realities in the US suggest that the generally altruistic approach historically adopted by the US in most other areas of its leadership role in the global system may be less likely to be manifested in respect of the question of unilateral secondary sanctions and extraterritorial jurisdiction. If the US continues to fail to seek a better balance through appropriate multi-lateral consultation and coordination, we can expect even more aggressive responses, which may turn out to be the unfortunate lasting legacy of current US sanctions policies.

II. China Joins EU and Others in Adopting Tough Counter-measures to Push Back Against Perceived US Sanctions Overreach

Beijing Raises the Stakes with New Anti-Sanctions Law, But Can China's Counter-measures Succeed Where the EU and Others Have Failed?

In 2016, Jack Lew, then serving as US Treasury Secretary, gave a speech in which he discussed the history and evolution of sanctions. After describing the US leadership position in the global financial system as the source of the power of US sanctions, he then issued this warning: The US "must be conscious of the risk that overuse of sanctions could undermine our leadership position within the global economy, and the effectiveness of our sanctions themselves."

He went on to identify several potential costs of overuse of sanctions generally and secondary sanctions specifically: Such measures, Secretary Lew said, can strain diplomatic relations, destabilize elements of the global economy, impose real costs on companies in the US and abroad, and perhaps most importantly, they carry a "risk of retaliation." [171]

A. China Enters (and Escalates) the Sanctions Battle

With the adoption of its new Anti-Sanctions Law by the National People's Congress Standing Committee (NPCSC) on June 10, China has demonstrated that it is fully prepared to retaliate against what it perceives as US sanctions overreach, confirming the prescience of Secretary Lew's warning.

[171] https://www.treasury.gov/press-center/press-releases/Pages/jl0398.aspx

NPCSC Chairman Li Zhanshu is reported to have told lawmakers that the new law shows that China will never relinquish its legitimate rights and interests. "The Chinese government and people will resolutely counter various sanctions and interference," he said.[172] A Hong Kong-based legal scholar was even more direct, noting, "Cooperation is the best option but the U.S. doesn't want it. So retaliation, such as with this new law, is the second best option."[173]

The Anti-Sanctions Law is considered to be "the last piece of the puzzle" to complete China's arsenal of sanctions counter-measures. Other key pieces include the Provisions on the Unreliable Entity List issued in September 2020 (UEL Provisions), the Export Control Law adopted in October 2020 (ECL), and the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Laws and Other Measures issued in January 2021 (Blocking Rules). At the same time, there are persistent calls to push for extraterritorial enforcement of more of China's laws to even the playing field and give the US and others "a taste of their own medicine."[174]

The Anti-Sanctions Law provides a broad legal foundation for all of the various weapons in China's arsenal of sanctions counter-measures. In addition, the principal new substantive provisions of the law allow China to sanction individuals or entities involved in making or implementing discriminatory measures against Chinese nationals or enterprises. Such persons so designated will be listed on the Anti-Sanctions List and may have their assets in China seized or frozen, be denied entry into China and be "blacklisted" from doing business with Chinese persons.

The Anti-Sanctions List (or ASL) thus is generally analogous to the US List of Specially Designated

[172] China passes law to counter foreign sanctions, East Asia News & Top Stories - The Straits Times

[173] https://www.reuters.com/world/china/china-passes-law-counter-foreign-sanctions-2021-06-10/

[174] https://ph.news.yahoo.com/hong-kong-leader-carrie-lam-072013138.html

Nationals and Blocked Persons (SDN List) administered by the Office of Foreign Asset Control (OFAC) under the US Treasury Department, but while the SDN List sanctions can extend to other entities in the targeted person's overall group of companies under OFAC's fifty percent rule, under the Anti-Sanctions Law the counter-measures can also be imposed on family members as well as employers and all companies up and down the chain.

China had previously announced sanctions against numerous prominent US and EU politicians and other organizations for their roles in promoting sanctions against Chinese and Hong Kong officials for alleged human rights violations in Xinjiang and Hong Kong. These presumably will now be transferred to the ASL.

Consequently, the new provisions included in the Anti-Sanctions Law should not be viewed as "sanctions killers" as such, as the name of the new law may suggest, but more as additional ammunition for retaliation as a means of indirect deterrence. The counter-measures which are designed to directly neutralize direct and secondary sanctions imposed by foreign countries against China are found in the Blocking Rules, which are modelled after similar counter-measures adopted by the EU and Canada, rather than in the Anti-Sanctions Law itself.

As is the case with other similar "blocking rules," China's Blocking Rules are designed to nullify foreign sanctions against Chinese individuals and enterprises by making it unlawful for persons in China (including China subsidiaries of foreign MNCs) to give effect to the extra-territorial enforcement of restrictions on dealings with counterparties in third countries subject to US sanctions. The Anti-Sanctions Law further reinforces certain remedies under the Blocking Rules.

As noted in Part 1 of this series, so-called "smart" sanctions, which are increasingly favoured by the US, can be considered to be the economic equivalent of precision-guided ballistic missiles. By way of extension of that analogy, "blocking rules" can be considered to be the equivalent of anti-ballistic missiles, intended to shoot down and disable US sanctions.

However, to date, all of these "blocking rules" have been almost completely ineffectual and have had little to no deterrent effect on US sanctions extra-territorial enforcement as a practical matter. The US has consolidated such a strong position in terms of sanctions enforcement as to be almost unassailable, at least in the near term so long as the US dominance of the global financial system remains unchallenged.

B. Prior Sanctions Counter-measures – A Case Study in Near Complete Capitulation

The dismal track record of EU and Canadian counter-measures vis-à-vis US secondary sanctions amply illustrates how the current asymmetrical interdependent relationship between the US and its major trading partners severely limits what countries can realistically expect to achieve in this regard. [175]

For example, under the 2015 Joint Comprehensive Plan of Action (JCPOA) entered into by Iran and the so-called P5+1 (China, France, Germany, Russia, the UK and the US), European companies had pursued a range of business opportunities in the newly reopened Iran market (US companies, by comparison, were still largely banned from deals with Iran). But in connection with the subsequent US withdrawal from the JCPOA, in November 2018 the Trump administration reimposed "snap-back" sanctions on Iran, including the addition of new secondary sanctions across a range of industry sectors. This action by the

[175] While other countries (such as Mexico and Russia) have passed similar anti-sanction rules, in this article we will focus on the EU and Canadian statues as these appear to provide a representative basis for comparison and analysis.

US put these Iranian deals by EU companies in jeopardy.

EU officials were outraged and took immediate steps to resurrect its so-called "blocking statute," Council Regulation (EC) No 2271/96 (EU Blocking Statute),[176] which had been first passed in 1996 but then left dormant when the US backed down in response to aggressive pushback by several EU Member States, Canada and others.[177] Under the EU Blocking Statute, EU companies were prohibited from complying with the US sanctions laws in respect of Iran. "We are determined to protect European economic operators engaged in legitimate business with Iran," the foreign ministers of Britain, France, Germany and the European Union said in a joint statement.[178]

Notwithstanding this strongly worded statement by top European officials, thousands of EU companies voted with their feet by promptly exiting Iranian deals worth billions of US dollars, ignoring the requirements of the newly enhanced EU Blocking Statute. Some of the more notable examples of major European companies which opted to submit to US secondary sanctions in defiance of the EU anti-sanctions edicts included Siemens (which unwound a US$1.5 billion railway contract), Total (which walked away from a US$2 billion investment in the South Pars gas field project), and Airbus (which lost US$19 billion in aircraft sales to Iran Air).[179]

A few months later, in May 2019, the Trump administration announced that it would, for the first time, after more than 20 years of waivers by successive US administrations, fully implement Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, commonly known as the

[176] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01996R2271-20140220

[177] See Part 1 in this series for further background.

[178] U.S. to Restore Sanctions on Iran, Deepening Divide With Europe - The New York Times (nytimes.com)

[179] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/. For a more extensive list, see Iran Sanctions (congress.gov).

Helms-Burton Act. This would allow US nationals to sue to recover damages from any person who "traffics" in property belonging to the US claimant that was expropriated by the Castro government.

While the US had long imposed an embargo on US persons doing business with Cuba, Canadians had continued to trade with Cuba, so the implementation of Title III of the Helms-Burton Act posed a significant threat to many Canadian companies. Like their EU counterparts, Canadian officials were alarmed at the sudden reversal in US policy, and promptly took steps to renew the implementation of Canada's anti-sanctions law, known as the Foreign Extraterritorial Measures Act (FEMA).[180] FEMA was originally adopted to push back against the extraterritorial enforcement of US antitrust laws and had been updated in the late 1990s to address the threats to Canadian interests under Helms-Burton.

Unlike the EU Blocking Statute, which provides only for unspecified "effective, proportional and dissuasive" penalties at the discretion of the relevant Member States, Canada's FEMA provides for potential *criminal penalties* for Canadian companies (fines of up to C$ 1.5 million) or individuals (fines of up to C$150,000 and up to five years imprisonment) who disregard the requirements of FEMA by, *inter alia*, giving effect to corporate compliance policies consistent with, or enforcing or abiding by foreign court judgments entered pursuant to, the provisions of the Helms-Burton Act. Even in the face of such potential criminal penalties, the Canadian business community has almost without exception continued to comply with the US sanctions rules, effectively disregarding the requirements of the Canadian blocking statute, with apparent total impunity as to date there have been no prosecutions.

C. Comparing China's Blocking Rules to the EU and Canadian Counter-measures

[180] https://laws-lois.justice.gc.ca/eng/acts/F-29/FullText.html

China's Blocking Rules share many of the same features as the EU Blocking Statute and FEMA, and as such they may be subject to many of the same limitations in terms of practical implementation. (In addition, as we will explore in later articles in this series, there may also be some technical points in the broad array of counter-measures adopted by China which may present additional challenges and obstacles in terms of enforcement in the near-term.)

Certain elements are common to all of these blocking statutes, although the details vary. For example, as with the other "blocking rules," under China's counter-measures there is a mechanism for reporting the threatened or actual extraterritorial application of foreign laws, a prohibition against compliance with or enforcement of specified foreign laws or other measures, a process for applications for exemptions from the prohibitions under the rules, and private rights of action to seek recovery of damages resulting from actions of third parties resulting from compliance with the blocked laws (sometimes referred to as a "claw back" right).[181]

However, unlike the prior EU and Canadian anti-sanctions counter-measures, China's Blocking Rules do not include an annex specifically listing the foreign laws to be blocked. Rather, the China Blocking Rules provide a mechanism for issuing orders prohibiting companies in China from submitting to the long-arm jurisdiction of foreign countries. This mechanism is triggered by a notice from an affected person in China. Even though all of these blocking rules on their face are designed to have general application to purported extra-territorial enforcement of laws from any foreign country, it is understood

[181] "Blocking rules" serve as counter-measures to US secondary sanctions as traditionally defined, specifically the application of OFAC sanction restrictions to non-US persons in respect of their dealings with sanctioned parties in the targeted third country. In this series of articles, we have in some cases adopted a more expansive definition of secondary sanctions to include restrictions on re-export of US-sourced technology, which many commentators would classify as direct sanctions, having a clear nexus to the US. This more expansive interpretation has been suggested by some legal scholars to reflect the fact that such restrictions essentially regulate conduct by foreign persons outside of the US with only a tenuous territorial nexus to the US, and so have similar practical effect and raise similar practical concerns on the part of non-US parties.

that the intended target in each case is US long-arm enforcement of direct and secondary sanctions.

The China Blocking Rules currently provide only a general framework. To date, no prohibition orders or implementation rules have been issued, and as is characteristic for Chinese regulations generally, there is broad scope for discretion on the part of Chinese authorities in terms of interpretation and application. Consequently, there are many questions for which there are not yet clear answers, and while the new Anti-Sanction Law supports and supplements the Blocking Rules, it does not clarify these points.

One thing that does seem clear, however, is that the timing of the issuance of the China Blocking Rules was intended as a direct challenge to the incoming US administration. To underscore the message, China took the unusual step of releasing an official English translation of the Blocking Rules at the same time.

Some reports suggest that while the new Blocking Rules had been in the pipeline for some time, the timing of their issuance was pulled forward after it became apparent that the incoming Biden administration would not take a softer line with China.[182] As one former senior US trade official noted privately, it is as if China came into the room for talks with the US, took a gun out of its briefcase, placed it on the table and said, "We are now ready to start negotiating."

D. Why Anti-Sanction Counter-measures Have Not Worked (So Far)

The question is, in light of the failure of the EU and Canada counter-measures, are there any bullets in the gun? To answer this question, we first need to assess why the EU and Canadian counter-measures have

[182] https://www.scmp.com/news/china/diplomacy/article/3136676/china-speeded-work-anti-sanctions-law-after-joe-biden

not worked.

We start with the EU Blocking Statute. According to sanctions experts, the EU Blocking Statute has proven to be ineffective for the simple reason that the penalties for non-compliance with US sanctions are potentially devastating, and since OFAC has been aggressive in pursuing enforcement actions, such risks cannot be discounted or disregarded. On the other hand, the related risks under the EU counter-measures are almost negligible as a practical matter.

By way of illustration (as described in more detail in the first article in this series[183]), parties that do not comply with US sanctions run the risk that their access to the US market may be blocked; they may be cut off from global supply chains of goods and services incorporating sensitive US-sourced technology (as in the case of Huawei and ZTE); or their senior managers may be subject to criminal prosecution (as in the case of Huawei CFO, Meng Wanzhou). Moreover, sanctions violators may effectively be banned from the global financial system, in many cases making it virtually impossible to do business.

By comparison, under the EU Blocking Statute, while the potential penalties are not specified, only administrative fines are likely. Consequently, given the extreme disparity in potential risks, the decision to comply with US sanctions represented a pragmatic, perhaps the only reasonable, choice for multi-national companies in the EU in the face of the re-imposed US sanctions against Iran and related secondary sanctions.

In addition, it appears that the EU Blocking Statute may effectively be unenforceable in its own terms.

183 https://www.lexology.com/library/detail.aspx?g=84f1f477-ad07-4063-9964-c6a030779bb7

Over the last few years, EU companies have been able to maneuver around the prohibitions merely by being able to point to any legitimate commercial reason for unwinding the banned transaction other than the impact of the US sanctions.[184] In such a case, there has been no basis to establish that a violation of the EU Blocking Statute has in fact occurred. In fact, it appears that so far EU Member States have in effect conceded the unenforceability of the EU Blocking Statute and are turning a blind eye to obvious intentional violations, not wanting to add the insult of fines to the injury of lost business under the US secondary sanctions.

However, some commentators have suggested that courts in the EU may now adopt a much more aggressive enforcement posture in respect of the EU Blocking Statute, citing the non-binding opinion[185] recently issued by the Advocate General (AG) of the EU Court of Justice. The AG opinion was solicited in connection with a "claw back" civil action for damages brought by Bank Melli Iran (BMI) against Telekom Deutschland GmbH, a subsidiary of Deutsch Telecom (DT), alleging that in violation of the requirements of the EU Blocking Statute, DT terminated its telecommunications services contract with BMI's Hamburg branch after the Trump administration re-imposed secondary sanctions vis-à-vis Iran.

The AG opined that where an EU company purports to terminate a contract with an Iranian counterparty, the EU Blocking Statute will apply, and the contract termination should be declared void, unless the EU company can demonstrate that it was compelled to take such action pursuant to an official US court or administrative order or that such action was motivated by purely economic reasons with no concrete link to the US sanctions. In other words, the AG's view was that it may be appropriate for the German court to require DT to explain the reasons for the termination and possibly go so far as to demonstrate that "the decision to terminate the contract was not taken for fear of possible negative repercussions on [DT's

[184] https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

[185] https://curia.europa.eu/juris/document/document.jsf?text=&docid=241168&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2477201

position in] the US market."

As noted above, this AG opinion is non-binding, although it may have persuasive value. Ultimately it will be for the referring German court to make the final decision. However, it is important to note that this case does not involve penalties imposed by the German government but arises in the context of a "claw back" case. As such, this AG opinion is unlikely to have any significant deterrent effect because the potential damages in a "claw back" case typically are very modest in amount. In this case, the value of the contract with BMI was only 2,000 Euros per month, while DT has 50,000 employees in the US, and the US market accounts for 50 per cent of DT global turnover.

This is typical of such "claw back" actions generally: They have been limited in number, and the claimed damages have tended to be very modest. Moreover, in such cases it may be possible to receive a limited exemption from OFAC, which resolves the issue. All of these are manageable risks, while if a company is hit with US sanctions, it may be the equivalent of a corporate death penalty. Consequently, while EU operators will need to document the basis for their decisions to unwind such transactions more carefully in light of the AG opinion, the overall analysis remains essentially unchanged – US sanctions are expected to continue to trump the EU Blocking Statute.

For companies in Canada, the risk analysis should be the cause of substantially more concern given the existence of potential criminal penalties under FEMA. Moreover, the provisions of FEMA expressly state that the intention to comply with US sanctions cannot form any part of the decision to unwind a transaction, even if there are other unrelated commercial bases for the decision. However, again the result has been the same as in Europe – virtually 100% compliance with US sanctions notwithstanding the prohibition under FEMA. In this case, it appears that Canadian authorities surrendered in advance without a fight, failing to take any enforcement actions to date.

This again appears to be a concession to the realities of the marketplace – nearly three-fourths of all Canadian exports go the US, so Canadian companies cannot risk being barred from the US market. Moreover, some experts suggest that imposing criminal penalties on Canadian companies under such circumstances would be unduly harsh, so officials have not been willing to enforce those provisions of FEMA, rendering it toothless as a practical matter.

As such, the EU and Canada experiences illustrate the conundrum faced by US trading partners – if penalties under sanctions counter-measures are too low (as in the EU), companies will ignore the prohibitions against compliance with US secondary sanctions and take the risk of modest administrative fines, but if penalties are too high (as in Canada), officials may be unwilling to enforce the anti-sanctions rules against their own companies. Two opposing approaches leading to the same impotent result.

E. Assessing Scenarios Under China's Anti-Sanctions Framework

Given this rather unpromising history of ineffectual counter-measures enforcement elsewhere, can China realistically expect to achieve a better result with its new anti-sanctions legal toolkit?

To test this proposition, we can consider some potential scenarios based generally on the Zhuhai Zhenrong case. In July 2019, the US placed Zhuhai Zhenrong Company Limited (ZZCL) and its CEO Youmin Li on the SDN List for engaging in a significant transaction involving Iranian crude oil after the expiration of China's exemption for such purchases in early May 2019.[186] This is precisely the situation the Blocking Rules were designed to address – US secondary sanctions purporting to restrict the transaction between ZZCL and the Iranian crude oil supplier through extra-territorial enforcement of US laws.

[186] SecondarySanctions_Final.pdf (atlanticcouncil.org)

If the Blocking Rules had been in place and ready to be deployed at the time of the proposed ZZCL purchase of the Iranian crude oil, ZZCL could have notified the relevant Chinese authorities (the "working mechanism" under the terms of the Blocking Rules) on a pre-emptive basis that the US secondary sanctions purported to prohibit or restrict ZZCL from engaging in normal commercial transactions with its Iranian counterparty. This notice would then trigger a review. Under the terms of the Blocking Rules, if the working mechanism found that the US sanctions violated international law, encroached on China's sovereignty, or infringed on the legitimate rights and interests of ZZCL and other similarly situated Chinese companies, then a prohibition order could be issued.

These elements listed in the Blocking Rules as noted above form the most common grounds for objections to US sanctions cited by US trading partners around the world: The exercise of direct and indirect long-arm jurisdiction by the US is regarded by many non-US legal scholars to violate customary international law; foreign governments have consistently maintained that US secondary sanctions, which purport to require non-US companies to comply with US sanctions against Iran (for example), manifestly infringe on their sovereign right to set their own foreign policy; and banning transactions with companies which refuse to comply with US sanction rules by definition interferes with their otherwise legitimate commercial rights and interests.

As a result, Chinese authorities could easily find a basis under the Blocking Rules to justify issuance of a prohibition order. Such a prohibition order would make it unlawful for ZZCL or any other company in China to submit to the restrictions under the US secondary sanctions vis-à-vis Iran. In other words, this notice mechanism under the Blocking Rules would trigger the review that would then result in a prohibition order that would be the functional equivalent of the listing of the US secondary sanctions in respect of Iran in the annex to the EU Blocking Statute.

So far so good, but that would not be the end of the story. Such a prohibition order under the Blocking Rules would not be able to block US action to enforce the secondary sanctions by adding ZZCL to the SDN List, and once a company is added to the SDN List, it is cut off from the US market and the US dollar-denominated global financial system. In short, a prohibition order under the Blocking Rules would make it unlawful for ZZCL or any other Chinese company to comply with the US secondary sanctions with respect to Iran transaction, but such a blocking order would not protect any of them from the resulting penalties imposed by the US.

It is at this point in the analysis that all European and Canadian companies capitulated, opting to comply with the rules of the game set out by the US notwithstanding the fact that so doing was illegal under the applicable blocking rules.

But China has additional weapons in its arsenal, which neither the EU nor Canada have at their disposal – China has the UEL Provisions, which China copied from the US, and then adapted. To see how the UEL Provisions may change the state of play, we now turn to our scenarios to assess whether China can blunt the impact of the SDN List penalties in certain cases. If China can do so, this will weaken the effectiveness of US secondary sanctions.

For our first scenario, we address the situation involving a US counterparty: If a US company had a pre-existing contractual relationship with an entity placed on the SDN List, then they would need to unwind it, and if they were negotiating a new deal with the sanctioned entity, they would need to terminate the negotiations.

A second scenario involves non-US counterparties. Even though they are not directly required to do so

by US sanctions laws, global banks and many non-US MNCs have also tended to back away from dealings with companies on the SDN List. For banks, the risk of being cut off from the US financial system has in many cases resulted in a zero-tolerance compliance posture, where they avoid getting anywhere close to the line vis-à-vis sanctioned entities.

For non-US companies, this caution on the part of the banks presents an additional practical concern – if the banks will not process payments to/from a party on the SDN List, then foreign counterparties cannot make/receive payments to/from the sanctioned entity, and accordingly they may also need to unwind existing deals and decline to proceed with new deals with the sanctioned entity.

For our third scenario we add one further variation: Assume that according to media reports, a Chinese entity purchased crude oil from Iran in violation of US secondary sanctions, but OFAC has not yet added the company to the SDN List. What happens if banks flag the report and out of an abundance of caution decline to process payments to/from the entity, and as a result, a US company terminates its contract with the not-yet-sanctioned Chinese entity?

As noted above, in each of these scenarios, we are already outside of the scope of application of the Blocking Rules, and this is where the UEL Provisions may come into play. The UEL Provisions set out measures which may be taken against foreign companies which, either inside or outside of China, take actions to suspend "normal transactions" with or otherwise discriminate against a Chinese entity "in violation of normal market transaction principles" resulting in serious damage to the legitimate rights and interests of affected entity.

The key question as a legal matter may be which of the scenarios above reflect "normal market

transaction principles" and which do not.

The first scenario presents a clear-cut case of *minimum mandatory compliance* since US sanctions laws are directly binding on US companies. While under the plain language of the UEL Provisions, China could take action in such circumstances, most experts currently take the view that China is unlikely to do so, as that would put US companies in the impossible situation of facing potentially devastating penalties in China for simply complying with applicable US law, which could have a chilling effect on foreign investment in China generally.

In contrast, however, the third scenario above presents an example of possible *over compliance* (at least on the part of the banks) rather than *minimum mandatory compliance* as in scenario 1. Chinese authorities could take the view that *minimum mandatory compliance* is consistent with "normal market transaction principles" while *over compliance* is not.

The second scenario may be a bit of a hybrid situation. Non-US banks will not be able to provide US dollar services for sanctioned parties to the extent that (as would typically be the case) such payments would need to clear through the US banking system, so this could be classified as *mandatory minimum compliance*. It is not clear, however, that this means that non-US banks cannot provide *any* other banking services to the sanctioned person. Under the current policy of *over-compliance* adopted by virtually all banks which have any exposure to the US financial system, entities and individuals on the SDN List in most cases cannot even open a bank account, even for other currencies which will not involve any nexus to the US.

On the other hand, it is hard to fault the foreign company in either scenario 2 and 3 for terminating its

dealings with the sanctioned Chinese entity on the grounds that it would not be able to make or receive payments under the contract due to the banks' refusal to provide banking services to such party, whether the bank was required to do so or did so out of an overabundance of caution.

If Chinese authorities elect to use the UEL Provisions to push back against perceived over-compliance, this would provide a powerful tool to reduce a significant portion of the negative impact of secondary sanctions enforcement, because if a foreign company (or bank) is placed on the UEL, then it can essentially be barred from all trade and investment activities with China, similar to the blanket ban under the SDN List in respect of access to the US market. In other words, like the US, China can use access to its massive market as both a carrot and a stick.

However, if China tries to use market access as a bargaining chip in too aggressive a manner to counter US sanctions, it creates the potential for a conflicts of law stalemate, where foreign MNCs are forced to choose between the US market and the China market. And if China adopts the most aggressive enforcement posture under the UEL Provisions, and penalizes not just *over compliance* but also *minimum mandatory compliance*, then it all falls apart, and everyone loses, including China.

F. What Can the New China Counter-measures Realistically Achieve?

Consequently, the threat of the international trade equivalent of mutually assured economic destruction provides a natural constraint on what actions each side will be willing to take. But on the other hand, as we have seen from the EU and Canadian examples, counter-measures that are no more than half-measures have to date only persuaded US officials that their sanctions enforcement position is virtually immune to attack.

China's adoption of its new anti-sanctions toolkit will not immediately change the balance of power, as a realistic assessment of the relative strengths of the US and Chinese arsenals in terms of trade sanctions measures and counter-measures confirms that the US maintains extraordinary advantages which China cannot match. Stated simply, while China and the US can both leverage access to their massive markets to induce compliance, only the US can cut companies and individuals off from the global financial networks and key global technology supply chains; and only the US can exploit the dominance of the US dollar in international trade to enforce its assertion of extra-territorial jurisdiction.

However, China may be in a much stronger position than the EU or Canada in terms of pushing back against US secondary sanctions because it has much greater economic heft than Canada, and much higher levels of internal cohesion than the EU.

By way of illustration of the importance of internal cohesion in pushing back against the US position, in 1996 leading European governments (working in concert with Canada and other Western nations) were able to get the US to back down on the implementation of secondary sanctions under the Cuba and Iran sanctions acts, but in 2018 when the Trump administration reimposed the Cuba and Iran sanctions, EU and Canada complained loudly then meekly surrendered.

In 2019 the European Council on Foreign Relations (ECFR) undertook a major study to assess what had changed in the intervening twenty-plus years from the late 1990s to the late 2010s. Among the factors cited in the report: the US had over that period tightened its grip on the global banks, effectively turning them into private enforcers; the US took advantage of the political fragmentation of the EU Member States; and finally, and perhaps most importantly, in 1996 European company executives indicated that if their governments told them to ignore US sanctions, they would do so, while in 2018 the consensus had shifted 180 degrees – no one was willing to take the risk of excommunication from the global trade and

finance system.[187] In sum, over that period the EU had effectively ceded the sanctions battle completely to the US side.

Because it lacks the built-in advantages that the US enjoys, China cannot go on the offensive in these trade sanctions skirmishes. China may, however, be able to utilize its new toolkit in a defensive posture to its advantage. Case in point – in March China and Iran announced a massive 25-year deal, pursuant to which China pledged to invest US$400 billion in various sectors, ranging from banking, telecommunications, ports and railways to health care and information technology, in exchange Iranian oil at steeply discounted prices. [188]

The secondary sanctions imposed by the Trump administration as part of its withdrawal from the JCPOA may currently be under review by the Biden administration in connection with its stated intention to restart the Iran nuclear deal. But if the secondary sanctions remain in place over an extended interim period, blocking EU companies from going back in while China steals the march on the rest of the developed world in Iran, this (or some other analogous situation) could be a potential flash point in the sanctions battle.

To forecast how such a situation may play out, all we have to do in the sanctions counter-measure scenarios posited above is to remove the name of ZZCL or another generic lower-profile Chinese entity and replace it with the names of China's national champions in each relevant industry sector, and then project what measures and counter-measures each side might take.

[187] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

[188] https://www.nytimes.com/2021/03/27/world/middleeast/china-iran-deal.html

It would be a game of who blinks first, with China in effect daring the US to slap an SDN designation on potentially dozens of China's major state-owned enterprises, all of which would resolutely ignore any US sanctions at Beijing's direction, just as all of the top EU companies would have done in 1996 if their governments had so requested.

If the US thinks it can call China's bluff, and imposes sanctions anyway, China can deploy different counter-measures, starting either with penalties for minimum mandatory compliance or for over-compliance as the circumstances may dictate, to ratchet up the pain for the US side without triggering all out economic war, until a partial sanctions détente is achieved.

G. End Game – De-Dollarization of International Trade

This would be high stakes geopolitical poker, with high risks for all involved, and no guarantee that the right outcomes can be achieved by either side. Given the stakes, and given China's preference for the long game, China may be more likely to wade in carefully, probing for possible cracks in the US armor, pushing for incremental advantage on a case-by-case basis, and at the same time seeking (where possible) to consolidate support from other US trading partners which share the universal objections to US overuse of sanctions, in order to exert sufficient pressure to effect changes in the status quo.

Ultimately, the only truly effective anti-sanctions play is to erode the source of US sanctions power by reducing the dominance of the US dollar in international trade, thereby undermining the US stranglehold on the global financial system. But absent another black swan event which results in a massive devaluation of the dollar without bringing down the entire global economy, de-dollarization may prove to be the most challenging play of all.

III. Can De-coupling from the US Dollar De-fang US Secondary Sanctions?

US Extra-territorial Jurisdiction Hinges on the Dominance of the US Dollar, So US Global Leverage Will Persist Until the US Dollar Is De-throned

The power to print a nation's currency is one of the greatest powers of any government, but the power to print to the dominant global currency is perhaps the greatest power any government can possess. [189]This immense power is currently in the hands of the US, and it has weaponized the dominance of the US dollar to enforce key elements of its geopolitical policy preferences on the rest of the world.

The aggressive use by the US of unilateral secondary sanctions has spurred the adoption of a range of counter-measures by US friends and foes alike in an attempt to blunt the extra-territorial impact of these secondary sanctions. To be effective, however, such counter-measures must be able to shield non-US companies from the severe penalties that the US may impose for non-compliance.

As we have seen [190], blocking statutes alone have generally proven to be paper tigers, more political posturing than an effective defense. China may be in a better position to use counter-measures in a more holistic manner to push back against US perceived overuse of sanctions, but this will require a high degree of tactical finesse in order not to have a chilling effect on foreign investment or give rise to other unintended consequences.

[189] Ray Dalio interview, https://www.youtube.com/watch?v=ZY-BzPDj868

[190]https://www.inhousecommunity.com/article/china-joins-eu-and-others-in-adopting-tough-counter-measures-to-push-back-against-perceived-us-sanctions-overreach/

More fundamentally, unless the dominance of the US dollar in international transactions is eroded, the US will be able maintain its current stranglehold on the global financial system, rendering all counter-measures ineffective. All currencies eventually die or devalue, but the US dollar remains dominant with no signs of faltering any time soon.

However, the US position is not impervious to attack, and governments and experts around the world are actively exploring a range of options to restore more balance to the current asymmetrical global financial system which currently works disproportionately to the unilateral advantage of the US.

A. Neutralizing the Threat of the "Nuclear Option"

One of the areas of potential vulnerability in the current US position of dominance, which various US trading partners are assessing, relates to shoring up the independence of the existing global payment infrastructure to remove or reduce the severity of the threat of US deployment of the equivalent of weapons of mass economic destruction.

The massive power of the US arsenal of economic sanctions can be illustrated by the case of Macau-based Banco Delta Asia (BDA). In 2005 US Treasury officials designated BDA as a "primary money laundering concern" under the US Patriot Act based on suspicions that BDA had engaged in money laundering and counterfeiting on behalf of North Korea. [191] By being so designated, the bank was cut off from the US and global financial systems.

[191] https://www.treasury.gov/press-center/press-releases/Pages/js2720.aspx

The fallout was immediate and dramatic. The move sparked a run on the bank, and other regional banks halted dealings with BDA, worried that they too could become targets of US sanctions and be barred from the international banking system. Finally, Macau authorities took control of the bank to conduct its own investigation. [192]

Over the last 20 years, the US Treasury has designated more than a dozen banks, as well as the banking systems of Myanmar, Nauru and Ukraine, as being "primary money-laundering concerns" and has ordered US banks to sever ties to such foreign banks or banking systems on five occasions. [193] One such instance involved the Bank of Dandong and two other smaller Chinese banks, also for allegedly facilitating transactions with North Korea. In each case, this action was viewed as the financial equivalent of a corporate "death penalty."

To date all of the banks so sanctioned have been relatively small, but that does not tell the entire story. US courts have found three large Chinese banks, the Bank off Communications, China Minsheng Bank and Shanghai Pudong Development Bank, in contempt for failure to comply fully with subpoenas in connection with a US Treasury investigation into transactions conducted by Minzheng International Trading Limited, which could put the banks at risk of being barred from access to the US financial system.[194]

192 https://www.ft.com/content/c1b4ead8-d261-11db-a7c0-000b5df10621;https://www.theguardian.com/world/2006/oct/13/tisdallbriefing.northkorea

193 https://www.wsj.com/articles/SB117374251156034710 ; see also https://www.treasury.gov/press-center/press-releases/Pages/js1874.aspx

194 https://www.reuters.com/article/us-usa-trade-china-banks-idUSKCN1UQ03U

Moreover, as recounted in Part 2 in this series, the US cut Iranian banks off from access to SWIFT, and has aggressively pursued criminal actions against numerous global banks for sanctions violations, all with the implicit threat that if the banks failed to agree to a plea deal or deferred prosecution agreement (DPA), they too could be cut off from the US and global financial systems.

More ominously, in 2014 and 2015 the US and its European allies threatened to disconnect Russia from SWIFT, [195]and in 2017, US Treasury Secretary Steven Mnuchin made a similar threat to cut China off from the global financial system if it did not follow through with respect to UN sanctions against North Korea. [196] More recently, the European Parliament passed a resolution to the effect that Russia should be cut off from SWIFT if it invaded Ukraine. [197]

If disconnecting small banks from the US and international financial system can be deemed to be a financial "death penalty," then denying access to SWIFT to a major country like Russia or China can only be considered to the economic equivalent of "going nuclear." Russian officials have repeatedly stated that they would consider being barred from SWIFT as a "declaration of war" [198] that would have severe consequences.

B. Strengthening the Independence of SWIFT

The EU's threat to weaponize access to the SWIFT network is somewhat ironic. In the wake of the Trump administration's reimposing secondary sanctions on EU companies in respect of deals with Iran, the

[195] https://www.forbes.com/sites/kenrapoza/2015/01/27/russia-to-retaliate-if-banks-given-swift-kick/?sh=40c79b51652e

[196] http://themillenniumreport.com/2017/09/us-threatens-to-cut-off-china-from-swift-if-it-violates-north-korea-sanctions/

[197] https://www.europarl.europa.eu/doceo/document/RC-9-2021-0236_EN.html

[198] https://www.rt.com/russia/525271-swift-cut-spiral-sanctions/

European Council on Foreign Relations (ECFR) identified that the disproportionate influence of the US over SWIFT was a key area of risk exposure for EU companies and proposed that the EU Member States should take coordinated action to protect the independence of SWIFT. [199]

Given SWIFT's background and governance, it is doubly ironic that EU officials would feel the need to take steps to reduce US control over the global payment network. SWIFT (full name, the Society for Worldwide Interbank Financial Telecommunication) is a cooperative company organized under Belgian law and is overseen by the G-10 central banks (Belgium, Canada, France, Germany, Italy, Japan, The Netherlands, United Kingdom, United States, Switzerland, and Sweden), as well as the European Central Bank, with its lead overseer being the National Bank of Belgium. [200]

SWIFT dominates global payment messaging to such an extent that there is no viable alternative in place. Similarly, notwithstanding the decline in the US share of global trade, the US dollar continues to dominate cross-border transactions, which are facilitated over the SWIFT network. But at the same time. SWIFT is so fully integrated into the US banking network, through which all US dollar payments ultimately are processed, that if the US cuts off SWIFT from US dollar transaction processing, then SWIFT in large measure shuts down.

To date, the US has used its dominant market and political position to compel SWIFT to do its bidding, but the ECFR proposes to have the EU Member States call on SWIFT to turn the tables on the US and use the leverage of the mutual interdependence of SWIFT and the US banking system against the US. One approach floated by the ECFR is for the EU to adopt a stronger version of the current EU Blocking Statute specifically directed at preventing SWIFT or other financial institutions or mechanisms from complying

[199] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

[200] https://www.swift.com/about-us/legal/compliance-0/swift-and-sanctions

with US secondary sanctions to ensure that individual banks and entire banking systems cannot be disconnected from SWIFT. By taking such a "defiant" position, the EU could test the resolve of the US to press ahead with draconian secondary sanctions involving denial of access to SWIFT. [201]

The ECFR also suggested two other more aggressive approaches. The first would be to nationalize SWIFT, or at least threaten to do so. Alternatively, the EU could go to the IMF to seek to protect SWIFT against unilateral interference.

But all of these proposals are raised by the ECFR in the context of reducing EU vulnerability to US abuse of its leverage over SWIFT in ways deemed detrimental to the EU. Now that the EU is once again threatening to use discontinuance of access to SWIFT to penalize its geopolitical adversaries, it is not clear that any of these ECFR proposals will garner support as a practical matter.

C. Establishing Alternatives to SWIFT and the US banking System

Promoting the independence of SWIFT is only a first step in the effort to minimize the extra-territorial impact of US secondary sanctions. SWIFT is a financial information messaging service that facilitates international payments, but it does not handle the currency settlement and clearance aspects of the transactions.

Because payment transactions outside of the US are predominantly denominated in US dollars, the currency clearance will still typically be completed through correspondent banks in the US, thereby

[201] https://ecfr.eu/publication/meeting_the_challenge_of_secondary_sanctions/

triggering US assertion of jurisdiction. Consequently, in order to reduce the risk that US dollar international payments may be subject to the potential impact of US sanctions, the connection to the US banking system must be severed.

One alternative is to use the Clearing House Automated Transfer System (CHATS) in Hong Kong. CHATS was set up in 2000 to settle transactions in Hong Kong dollars, US dollars, Euros and Yuan, and is used by more than 200 participating financial institutions. Through correspondent bank relationships, transaction settlement in the four supported currencies can be performed for the entire Asia region and beyond.

The US dollar settlement system is the oldest and most important of the four currency settlement systems operated by CHATS. Parties in Asia can use CHATS to complete payment transactions in real time without potential delays due to different time zones, and some legal scholars have argued that clearing US dollar payments through CHATS could insulate the non-US parties from US long-arm jurisdiction since the payments are settled in Hong Kong and thus do not touch the US banking system. [202]

However, some Chinese banking experts are of the view that using CHATS may still not prove to be a suitable alternative US dollar clearance channel for sanctions risk reduction purposes in all cases. Because CHATS is operated by global banks with high levels of exposure to the US banking system, they may be more conservative about processing US dollar payments through CHATS which are potentially problematic to any degree from a US perspective. Moreover, in some cases involving US dollar payments

[202] Related arguments raised in the Meng Wanzhou extradition case.
See:https://asialawportal.com/2021/03/03/the-defense-of-huawei-cfo-meng-wanzhou-how-the-principles-of-the-rule-of-law-extend-fundamental-protections-to-non-u-s-companies-and-executives-subject-to-extraterritorial-jurisdiction/

with no other US nexus, US authorities reportedly have claimed jurisdiction on the grounds that the US dollars initially originated from the US.

Even with these important caveats, the CHATS US dollar clearance system has proven to be quite popular. In 2019, the system on average settled more than 570,000 transactions per month with an average monthly value of nearly US$855 billion. These figures represent growth of 16.3% in terms of average monthly transaction volumes and 20.5% in terms of average monthly values compared to 2017. However, the US dollar transaction volume on the CHATS platform still represents only a miniscule share of the total US dollar settlement volume in the US.

Consequently, in order to more fully hedge against the potentially devastating economic fallout from potential disconnection from SWIFT, and from the over-dependence on the US dollar and US dollar clearance in the US, Russia and China have been developing their own alternative payment systems, and are looking at ways to integrate these platforms globally.

The Russian payment platform is SPFS (the acronym is taken from the Russian name, which can be translated as System for Transfer of Financial Messages), which has been in development since 2014, after the US first threatened to disconnect Russia from the SWIFT system. Russian officials have suggested that SPFS is now robust enough to insulate it from disruptions should it in fact be banned from SWIFT, boasting in 2018 that "The number of users of our internal financial messages' transfer system is now greater than that of those using SWIFT." [203]

[203] https://www.rt.com/business/442946-russias-analogue-of-swift/

Notwithstanding Russian officials' public optimism, the SPFS system faces significant challenges: Transaction costs on SPFS originally were much higher than for SWIFT (although SPFS fees were reduced in 2018), but more importantly the system can be used primarily only in Russia. In the last couple of years Russia has reached agreements to link SPFS to other countries payment systems in China, India, Iran, as well as the countries inside the Eurasian Economic Union, which plan to use SPFS directly. At the end of 2020, 23 foreign banks from Armenia, Belarus, Germany, Kazakhstan, Kyrgyzstan and Switzerland had connected to the SPFS.

By comparison, more than 11,000 SWIFT member institutions in more than 200 countries and territories sent over 35 million transactions per day through the SWIFT network in 2020.[204] Consequently, the SPFS system is seen by many observers as a last resort, rather than as a replacement for the SWIFT network. [205]

Although China started to build its own payment system at roughly the same time as Russia did, China is much further along. China introduced the Cross-Border Interbank Payment System (CIPS) platform in 2015. CIPS is the international complement to China's domestic payment network, China National Advanced Payment System (CNAPS). Both are backed by the People's Bank of China.

Unlike SWIFT, CIPS focuses on providing payment clearance and settlement services, and CIPS works together with SWIFT to provide financial information messaging services to facilitate cross-border payments. However, in order to reduce China's exposure to US sanctions risk, CIPS has simultaneously been developing an independent payment messaging system as an alternative to SWIFT as well, which would allow China to bypass SWIFT if necessary. [206]

[204] https://www.investopedia.com/articles/personal-finance/050515/how-swift-system-works.asp

[205] https://www.forbes.ru/finansy-i-investicii/358573-natyanutaya-struna-vozmozhno-li-otklyuchenie-rossii-ot-swift

[206] https://www.nbr.org/publication/chinas-ten-year-struggle-against-u-s-financial-power/

Eswar Prasad, Cornell international trade policy expert, observed that China is "astute enough not to challenge SWIFT until the CIPS has matured, but no doubt one day the challenge will come." [207] SWIFT has taken note of CIPS' intentions, and the China head for SWIFT has tried to persuade China not to invest in an alternative payment messaging network, arguing as early as 2016 that there is no need for China to build their own financial information messaging "highway" since the SWIFT "highway" already exists. [208]

Of course, the fact that the SWIFT highway exists does China no good if the US can order SWIFT to block the highway on-ramps. Since SWIFT has not yet demonstrated that it is willing to rebuff US (or now even EU) directives to cut off access for geopolitical adversaries, China clearly is of the view that establishment of an independent alternative payment infrastructure platform is a necessary investment, no matter the cost.

CIPS has made tremendous strides in developing its global footprint as a new start-up platform. Over the last six years, CIPS has grown from a starting position of zero to more than 1100 participants in nearly 100 countries, principally located in Asia (867 in total, 522 of which are in China), but also based in Europe (147), Africa (39), North America (26), Oceania (20), and South America (17). [209] Overall, the CIPS global network is much stronger than Russia's SPFS platform, but compared to the SWIFT network, its coverage is still extremely limited, with only one-tenth the number of participants as SWIFT.

With respect to its core business of clearance and settlement services, CIPS has also experienced explosive growth, posting nearly 700% increases in both the number of transactions and aggregate value

[207] Eswar S. Prasad, Gaining Currency: The Rise of the Renminbi (Oxford: Oxford University Press, 2017), 116

[208] https://www.thebanker.com/Global-Transaction-Banking/Swift-dips-into-China-with-CIPS?ct=true

[209] https://www.cips.com.cn/cipsen/7068/7047/48084/index.html

from 2016 to 2019. However, again, transaction values are still quite modest, at just under US$5 trillion for all of 2019. By comparison, the Clearing House Interbank Payments System (CHIPS) in New York does an equivalent value in about three working days. Even the US dollar CHATS system in Hong Kong more than doubles up the transaction value of CIPS.

D. Can the Euro and the Yuan Erode the Dominance of the US Dollar?

As can be seen from these figures, at present CIPS remains a minor player in cross-border payments, but this also reflects the fact that CIPS is designed to promote and facilitate the internationalization of the Yuan, so the development of CIPS and the internationalization of the Yuan are mutually interdependent. Because the Yuan has not yet made a meaningful dent in the dominance of the US dollar in international trade, this has stunted the growth of the geographic footprint and transaction volumes and values of the CIPS platform.

Even though China is the world's leading exporter with a staggering 13.2% share of total global exports, [210] the Yuan comprises less than 2% of all international payments made via the SWIFT network, ranking sixth behind the US dollar, Euro, Pound Sterling, Japanese Yen and Canadian dollar. [211] The US ranks second in global exports with an 8.7% share, but as previously noted, 50 to 80 percent of international trade is invoiced in US dollars.

In fact, only 20% of China's cross-border trade payments are settled in Yuan, [212] which means that China has not been able to effectively promote the Yuan even in connection with China-related cross-border

[210] https://www.wto.org/english/res_e/statis_e/wts2020_e/wts2020chapter06_e.pdf

[211] https://www.swift.com/sites/default/files/documents/swift_bi_currency_evolution_infopaper_57128.pdf

[212] https://timesofaddu.com/2021/02/15/are-global-economies-de-dollarizing/

payment transactions, where it should have an advantage, while the US dollar is used not only for US-related transactions but also is used extensively internationally in transactions with no US-based counterparty.

Another point of reference: In 1960, the US share of global economic output peaked at 40% but by 2019, that percentage had been cut nearly in half, to 24%. Over that same period, China's share of global GDP quadrupled from 4% to 16%. [213]The fact that the US dollar has retained its disproportionate dominance internationally notwithstanding the marked decline of the US position in the global economy demonstrates that the power of a dominant global currency is not quickly or easily eroded. The converse is also true – an increasing share of global GDP on the part of China does not automatically result in a corresponding increase in acceptance or influence of the Yuan in global trade transactions.

For China, this cuts both ways. Given the continuing strong position of the US dollar globally, China (and everyone else around the world) remains subject to US long-arm jurisdiction. At the same time, given the weak position of the Yuan internationally, calls by influential voices in China for China to adopt more long-arm statutes, in order to push back against perceived US over-reach in terms of extra-territorial enforcement of US unilateral secondary sanctions, will carry no threat as a practical because China cannot use the Yuan in the same way the US uses the US dollar to extend its reach.

The US dollar will likely retain its position of dominance until such time as it is weakened through external events or possibly self-inflicted damage. Some commentators saw the economic upheaval caused by the COVID-19 pandemic, and the massive stimulus spending by the Trump and Biden administrations to try to dig the US out of the economic hole caused by the pandemic, as a potential threat to the dollar's

[213] https://www.visualcapitalist.com/u-s-share-of-global-economy-over-time/

pre-eminence. [214] However, prior predictions of the decline or collapse of the US dollar, including after the 2008 financial crisis, have not come to pass as yet.

According to renowned economist and currency historian Barry Eichengreen of UC Berkeley, the resiliency of the US dollar can be attributed to the advantages the dollar enjoys as the world's reserve currency. But it is also due to the "Tina" principle famously espoused by Margaret Thatcher: there is no alternative. [215]

E. The two leading contenders to the global currency throne are the Euro and the Yuan, but each has its problems:

The Euro is the second most widely adopted reserve currency, comprising approximately 20 percent of global foreign exchange reserves. However, there is no common EU treasury, so control of Euro assets is fragmented across the various EU Member States, and there is no unified Euro bond market.

The Yuan is not fully convertible for the capital account, and so is not open or liquid enough for financial markets. There are also concerns that full convertibility may be incompatible with the levels of control currently asserted by Chinese officials over the currency. The Yuan accounts for only 2% of global reserves, again far below China's share of global economic output, reflecting hesitancy in some quarters to hold more Yuan arising out of the relative opaqueness of China's financial policies and controls.

The primacy of the US dollar in international trade and finance makes it the safest and most attractive currency for countries to hold as a reserve currency, and until there is a tipping point resulting in a major

[214] https://www.cfr.org/backgrounder/dollar-worlds-currency

[215] https://www.theguardian.com/business/2020/aug/13/forget-doom-laden-headlines-the-dollar-has-not-gone-into-terminal-decline

erosion in confidence in the US dollar, and either the Euro or the Yuan have proven to be an equal or superior alternative, the US dollar will be difficult to supplant.

Great powers have great currencies, [216] and China is positioning the Yuan to assume a much more important role. Most commentators agree that the low-hanging fruit for the Yuan is regionally within Asia and the Belt and Road countries, where it has the greatest economic and cultural influence.

Morgan Stanley analysts project that given the growing assets held in China by foreign investors, by 2030 the Yuan will comprise up to 10% of global reserves, putting it in third place behind the US dollar and the Euro. [217] If China can persuade more of its trading partners to denominate China import/export transactions in Yuan, it may be able to grow international use of the Yuan to similar double-digit levels over the same time period.

In such a scenario, we may be on track towards the multipolar, multiple reserve currency world projected by Eichengreen more than ten years ago, where he envisioned the US dollar, Euro and Yuan all being "consequential international and reserve currencies." [218] Such an environment would undoubtedly accelerate the development of the CIPS payment infrastructure to more closely rival SWIFT, and the increased use of the Euro and the Yuan would draw more trade payment settlement transactions away from the US banking system.

[216] https://www.nbr.org/publication/chinas-ten-year-struggle-against-u-s-financial-power/

[217] https://www.cnbc.com/2020/09/04/chinas-yuan-rmb-to-become-third-largest-reserve-currency-by-2030-morgan-stanley.html

[218] https://aric.adb.org/grs/papers/Eichengreen.pdf

In such a multiple-currency, multipolar world, absent a further black swan event which resulted in the complete erosion of confidence in the US fiscal condition, the US dollar would likely still hold a leading position among the three currencies. Theoretically this could permit it to continue to threaten "financial excommunication" from the US and global financial system, but US dollar dominance would be severely undermined by the increased ease of circumvention of the US banking system by the use of credible alternative transaction currencies.

In fact, under such conditions, the continued overuse of unilateral secondary sanctions and threats of long-arm enforcement would merely serve to further drive down use of the US dollar, potentially accelerating the decline in its importance. In practical terms, such a multipolar world would likely de-fang US sanctions without resulting in the rise of a new currency hegemon to replace the US dollar.

F. Digital Disruption as an International Currency Game Changer?

One additional alternative scenario may develop over the coming decade in parallel with the projected rise of the Yuan and the rebalancing of global currencies. This relates to the rise of digital currencies – and in this case the agent of digital disruption may not be bitcoin or its erstwhile private competitors, but rather Central Bank Digital Currencies (CBDCs). In the CBDC space, China is in the lead.

China launched trials of its digital Yuan (e-CNY) in multiple cities in China in 2020, and has expanded those trials to additional cities in the last few months, putting China at the cutting edge of CBDC development. Scores of other central banks are looking at development of their own CBDCs. [219] Japan and South Korea reportedly are not far behind China, and the EU projects that it will roll out its own

[219] https://www.economist.com/finance-and-economics/2021/02/20/bitcoin-crosses-50000

CBDC in four to five years. [220] The US, on the other hand, originally appeared not to have a sense of urgency in respect of CBDC development, but is now actively studying the issue in partnership with MIT.[221]

Governments' interest in CBDCs is understandable – it allows them to retain control of their currencies in a new, more powerful digital form, while at the same time pushing back against decentralized finance (DeFi) digital currencies like bitcoin which are outside of government control. CBDCs are true national currencies issued and managed by the country's central bank, just like tradition currency but in digital form. But that digital form allows governments to track the money and transactions to combat money laundering, tax evasion and other illicit transactions.

China's e-CNY is initially being rolled out for consumer use in parallel with existing digital payment platforms such as Alipay and WeChat Pay, which already have much higher adoption rates in China than similar systems do in the West. The expectation, however, is that the e-CNY will eventually be deployed in cross-border trade, particularly in the ASEAN and Belt and Road regions.

Because CBDC-based transactions run completely independently from the existing banking system, CBDCs constitute an alternative means to challenge the hegemony of the US dollar – no SWIFT messaging system is required; there is no need to transact through US commercial banks; and with the potential for multiple CBDCs (and with the US currently lagging behind in CBDC research and development), US dollar denominated transactions could become less dominant in global trade.

[220] https://theconversation.com/chinas-digital-currency-could-be-the-future-of-money-but-does-it-threaten-global-stability-160560

[221] https://beincrypto.com/fed-chairman-powell-on-cbdc-its-better-to-get-it-right-than-be-first/

Many leading commentators have suggested that the e-CNY is being developed primarily for the purpose of circumvention of US sanctions.[222] But that is a feature common to all CBDCs, not just the e-CNY. It is a new form of technology disruption driven by a host of motivations on the part of central banks, with an important side benefit of neutering US secondary sanctions. This is a result that will be welcomed not just by countries targeted by US sanctions but also all third countries currently caught up in the wide net of US secondary sanctions, including many of the US' closest allies.

However, the timeline and scale of adoption of e-CNY and other CBDCs by individuals and corporations are still uncertain, and the deployment of the e-CNY in international trade will be subject to many of the same dynamics as currently constrains the use of the Yuan internationally. Much will depend on payment terms and hedging and swap options to manage related exchange rate risks.

But there is another critical element to consider – the potential for integration of the e-CNY with a more comprehensive digital platform for international trade. Richard Turrin, author of Cashless, China's Digital Currency Revolution, sees the e-CNY as an entry token into an entirely new digital ecosystem – a China-centric cross-border intelligent logistics system combining 5G, blockchain and e-CNY, which will allow purchasers from across the ASEAN and Belt and Road regions to place purchase orders, secure trade finance, clear customs, and track shipments door to door, all digitally. [223]

G. Managing the Present Conflicts

[222] http://www.niallferguson.com/journalism/finance-economics/dont-let-china-mint-the-money-of-the-future ; https://americanaffairsjournal.org/2021/02/carrie-lams-problem-and-ours-chinas-state-backed-digital-currency/

[223] https://www.youtube.com/watch?v=cHQFCCkR2bg

In such a multipolar, multi-CBDC world, the US no longer has its hands on all the levers in the global financial system. Countries are no longer at risk of being cut off from SWIFT because SWIFT will no longer be relevant and eventually may fade away entirely unless it can re-invent itself to adapt to the brave new CBDC world in a way that adds value. In this environment, financial sanctions lose their bite. The markets with the best integrated payment and delivery platforms will be the winners.

But this inexorable march of innovation on the payments side will not heal the potential technology divide between the China-based and US/Western-based standards that is threatened by the current technology bans implemented by the US and now potentially posed by China by way of retaliation. Moreover, the transition away from the current US dollar-dominated global financial system will take time.

In the interim, the threat of conflicts-of-law stalemates presents a real and present danger for multi-national companies, as blocking rules and other counter-measures force MNCs to decide what laws they will obey and which they will intentionally choose to violate. And over this same interim period of time, while global banks continue to pursue policies of over-compliance with the requirements of US sanctions laws, MNCs will need to examine their relationships with their bankers and assess related risks.

The truth of the matter is that government counter-measures to US secondary sanctions are intended to re-assert sovereignty under the banner of protecting their companies. But just as the costs of enforcing US foreign policy through the imposition of direct and secondary sanctions are borne by corporations and individuals through loss of business and in terms of increased compliance management costs, the deployment of counter-measures only adds further to the risks and costs of MNCs, without always conveying the promised protections.

IV. Navigating the Minefields of Potential Conflicts-of-Law Stalemates Arising from Anti-Sanctions Counter-Measures

Blocking Rules and Other Counter-Measures Place MNCs and Global Banks in a Classic Catch-22 Situation, Adding to Ever-Increasing Legal Risks and Compliance Costs

In March 1997, a Wal-Mart store manager in Winnipeg, Canada inadvertently touched off an international firestorm when he ordered the removal of 48 pair of C$13 men's pajamas from the store shelves. The cause of the furor? The pajamas were made in Cuba.

The year prior, the US had passed the Helms-Burton Act which strengthened the US embargo against Cuba which had been put in place initially in 1958, immediately preceding the fall of the Fulgencio Batista regime at the end of the Cuban Revolution. In addition, and most controversially, the Helms-Burton Act extended the territorial application of the US embargo to apply to *foreign companies* trading with Cuba.

Contrary to the hard-line position adopted by the US vis-a-vis Cuba, Canada had maintained a policy of continued diplomatic engagement, and Canadian companies accordingly had continued to trade with Cuba. Canadian officials responded angrily to the Helms-Burton Act on the grounds that it was an intrusion on Canada's sovereign right to determine its own foreign policy, and in the fall of 1996, Canada updated the Foreign Extraterritorial Measures Act (FEMA) to make it unlawful for Canadian companies to comply with the US embargo of Cuba.

The Wal-Mart store manager may have thought that no one would notice the removal of the Cuban-made

clothing items, but when thousands of Cuban pajamas were subsequently pulled from Wal-Mart shelves in 135 stores across Canada, the story was picked up by major Canadian media outlets, stoking anti-US sentiment among the Canadian public. The controversy escalated when the store manager was quoted in the Winnipeg Free Press as saying that Wal-Mart was a US-owned company, and US law prohibited the sale of the Cuban pajamas.[224]

Canadian officials denounced the removal of the Cuban pajamas and announced the opening of an investigation under FEMA. "We expect companies in this country to obey the laws of Canada and to act according to Canadian ethics," Finance Minister Paul Martin said. "That position is unequivocal."[225]

Bowing to the intense public and political pressure, Wal-Mart Canada relented. In a brief news release, the company said that following "a comprehensive review and consultation" that included discussions with Canadian officials, it was putting the Cuban pajamas back on the shelves. The company said that its decision was intended to reflect "our commitment to meet the expectation of the Canadian marketplace."[226]

The action of Wal-Mart Canada to resume selling the Cuban-made sleepwear may have placated Canadian authorities (no further action was taken under FEMA), but it put its US parent company in a potentially untenable position. Within hours, Wal-Mart headquarters put out a statement saying that its Canadian subsidiary had deliberately defied instructions from the US parent company to obey US law and discontinue all sales of Cuban goods. That in turn prompted the US Treasury Department to

[224] https://www.csmonitor.com/1997/0310/031097.intl.intl.5.html

[225] ibid.

[226] https://www.nytimes.com/1997/03/14/business/wal-mart-canada-is-putting-cuban-pajamas-back-on-shelf.html

announce that it was "reviewing" Wal-Mart's action and declared its intention to enforce the embargo.[227]

As the New York Times noted in its reporting on the incident, the divergent positions taken by parent and subsidiary may have been a calculated decision as "it enable[d] the Canadian subsidiary to maintain that it is complying with Canadian law, and it enable[d] the United States company to maintain that it has taken a position consistent with the American law."[228]

But the capitulation of Wal-Mart Canada to pressure from Canada still did not sit well with US officials. Marc Theissen, now a columnist for The Washington Post, but then the spokesman for the Senate Foreign Relations Committee and senior advisor to committee chairman Senator Jesse Helms, described the uproar in Canada as having reached "absurd proportions," wondering, "Has Canada become like the USSR where government dictates to business what products they stock on their shelves?"[229]

The answer to Mr. Theissen's rhetorical question is, of course, no. It was not Canada that was trying to dictate to Canadian businesses what products they could stock on their shelves. It was the US.

A. China's Blocking Rules: A Paper Tiger or a Crouching Tiger?

The Cuban pajamas flap was just one skirmish in the broader global battles over the US adoption on the

[227] ibid.

[228] Ibid.

[229] https://www.csmonitor.com/1997/0310/031097.intl.intl.5.html

Helms-Burton Act and and the Iran and Libya Sanctions Act (ILSA), sometimes referred to as the D'Amato Act, both of which came into effect in 1996. Both were designed to apply to both US and foreign companies.

As described in prior articles in this series, in response to the aggressive backlash from countries around the world to the extraterritorial application of US secondary sanctions under the Helms-Burton Act and the D'Amato Act, led by many of the US's closest allies, including Canada and the EU, the US backed down in large measure at that stage.

But when Trump reimposed these secondary sanctions in 2018, the global environment had changed, and it became painfully apparent that the EU Blocking Statute and Canada's FEMA were mere paper tigers and were no match for the immense power of US financial sanctions arising out of the unchallenged dominance of the US dollar in international trade and the centrality of the US banking system in the global financial system.

As previously referenced, in the aftermath of the universal surrender of EU companies to the threat of US secondary sanctions, the European Council for Foreign Relations (ECFR) conducted a full-scale reassessment of the EU's vulnerabilities to US sanctions, both directly and indirectly. The ECFR's report, published in June 2019, was entitled Meeting the Challenge of Secondary Sanctions.[230] In that report, the ECFR conceded that due to the passive and fragmented response of the EU Member States to the 2018 "snap-back" sanctions, the US did not see the EU as much of a threat to challenge US unilateral sanctions. The similarly ineffective response of Canada to the most recent US secondary sanctions clearly places Canada in the same position of weakness.

[230] Meeting the challenge of secondary sanctions – European Council on Foreign Relations (ecfr.eu)

However, the ECFR noted that US officials see China as a much more formidable adversary in the global sanctions battle, as China may be willing to take more aggressive and cohesive action to push back against what many around the world view as an abuse of the dominant position of the US in the global financial system.

While that may in fact be the case, the array of anti-sanctions counter-measures adopted by China over the last several months are all in an incipient state, and it should not be expected that the various arrows in China's counter-measure's quiver will be used to strike back formally at US sanctions immediately. Chinese officials reportedly are still studying how and when best to deploy this new arsenal and may not yet even be in a position to provide guidance to affected parties in China. This is typical for a major new piece of legislation in China – there is usually a period of market observation, further consultation and comparative analysis, sometimes for one to two years or even longer, before enforcement is undertake in earnest.

So while the EU Blocking Statute and Canada's FEMA seemingly are inert as the result of a failure to deploy these counter-measures as a practical matter (after a putative launch to much vehement but ultimately ineffectual diplomatic bluster), in contrast, China's comprehensive sanctions counter-measures arsenal is currently inert only because it is still in its natural gestation period. Other counter-measures have already been demonstrated conclusively to have no deterrent effect (at least in their current form), while China's anti-sanction counter-measures are as yet unproven. They may be another paper tiger, but then again, they may be a crouching tiger waiting for the opportune time to pounce.

B. Blocking Rules, Even If Not Currently Enforced, Add to MNC Compliance Risks

The fact that these counter-measures have not yet been enforced is of little comfort to Chinese and foreign multi-national companies. The rules blocking extraterritorial application of secondary sanctions in various countries around the world are on the books, and government enforcement postures can change. Moreover, in the absence of safe harbors for compliance exceptions confirmed by relevant government authorities, MNC corporate policies typically require compliance with the applicable black-letter law requirements as the baseline position.

This is the dilemma created by blocking rules: Unless exemptions are provided, MNCs are placed in the impossible position of having to comply with mutually contradictory legal requirements. As demonstrated by the case of the Wal-Mart Canada Cuban-made pajamas, as a matter of black-letter law, complying with the US sanctions would result in a violation of Canadian law.

The fact that Canada ultimately has not enforced the provisions of FEMA to date only adds to the complexity of the analysis because the board of directors and senior management of Canadian companies (including Canadian subsidiaries of foreign companies) may face *personal criminal liability* under FEMA if Canada were to adopt a more aggressive enforcement posture. Moreover, the Canadian company may also face criminal liability, including fines of up to C$1.5 million, but more importantly a criminal conviction could result in debarment of the company from government contracts together with a host of other adverse collateral outcomes, so as a matter of fiduciary responsibility, these issues also cannot be ignored by senior management. As international trade law expert Alison Fitzgerald in the Ottawa office of Norton Rose Fulbright noted in her commentary on FEMA, “By requiring non-compliance with US anti-Cuba legislation, the FEMA regime effectively shifts the financial and legal risk of Canada’s diplomatic relationship with Cuba onto Canadian businesses.” [231]

231

https://www.nortonrosefulbright.com/en/knowledge/publications/60af4e56/between-a-rock-and-a-hard-place-canadian-companies-face-increased-risks-following

The same conflict exists under the EU Blocking Statute, perhaps more particularly now after the recent Advocate General guiding opinion on the interpretation and application of the statute, which adopts a more rigid analysis. As noted in article 2 in this series, it is not clear that officials and courts in the EU Member States will follow the AG's strict reading of the statute, nor is it clear that criminal liability might be imposed under the EU Blocking Statute as is the case under Canada's FEMA, although that is not foreclosed by the terms of the statute. Again, it is this very uncertainty, and the potential for more aggressive enforcement, that means that MNCs must take the EU Blocking Statute into account when applicable and work around it as appropriate.

The same is true for China's new anti-sanctions regime. It is not yet fully ready for deployment, and it is not clear how it eventually will be enforced, but it also cannot be ignored, either now or going forward.

It is this risk of being placed in a position of a conflicts-of-law stalemate that has caused international trade sanctions experts to observe that blocking rules, at least as currently devised and implemented, create a myriad of additional problems and solve none. Governments present the blocking rules as a counter-measure to help protect their companies, but in fact such rules are almost always merely a political statement. In practice, such blocking rules actually make things worse for impacted companies than the US sanctions they are intended to counteract.

All of this is compounded by the fact that blocking rules are enforced only by threatening to penalize the companies that the blocking rules ostensibly are designed to protect. This is the fundamental contradiction inherent to blocking rules.

It is possible that China may be able to deploy their new arsenal of counter-measures with greater deftness

and effectiveness than the EU and Canada have done to date, but it is a high-risk game, as each action produces not only a predictable equal and opposite reaction, but all too often also produces unanticipated collateral fallout together with the potential for unconstrained escalation.

C. A General Framework for a Potential Counter-Measures Risk Matrix

It is against this backdrop of unpredictability in respect of the implementation of China's new anti-sanctions counter-measures, as well as the real-world implications of the same, that we must assess the related liability exposure of companies operating in China.

In this regard, it is important to note that the impact of the counter-measures may differ depending on the nature of the entity. A sample list of entity types in China that may be subject to the new China counter-measures may include domestic state-owned enterprises (SOEs), Chinese private companies (POEs), foreign multi-national companies (MNCs) outside of China, Chinese subsidiaries of foreign MNCs, domestic banks, and China operations of global financial institutions.

The other axis of our risk matrix can consist of the primary categories of US sanctions that may apply to Chinese companies. For purposes of this discussion, we will focus on three: secondary sanctions, the SDN List and the Entity List. There are other important categories of US (and also non-US) sanctions programs, and this analysis is of necessity over-simplified, but this approach should be sufficient to highlight certain key points.

In Part 2 in this series, we outlined various scenarios to illustrate several important aspects of China's new anti-sanction counter-measures. To briefly recap:

- Under the Blocking Rules, Chinese authorities can block Chinese companies from complying with US secondary sanctions, but this does not block the US from using the SDN List to "blacklist" Chinese companies and senior managers for alleged violations of the US secondary sanctions.

- When the US "blacklists" Chinese companies and individuals, then global banks and many MNCs may cut all ties with the sanctioned persons. In some cases, this is required by law (mandatory minimum compliance) but in other cases it goes well beyond what is required by law (over-compliance). China's Blocking Rules do nothing to address the impact of such de-coupling on a global scale.

- To shield Chinese companies at least in part from such fallout, China could in certain situations use the UEL Provisions to threaten to restrict access to the China market by foreign parties (perhaps more particularly banks) which have adopted a posture of over-compliance. However, such retaliatory measures by China also carry broader risks of escalation and unintended collateral consequences.

Building off that initial baseline analysis in respect of secondary sanctions and SDN designation, we now turn to technology bans under the Entity List. Here again, the Blocking Rules, strictly speaking, do not apply in this scenario. But in addition, China may not have any tools in their anti-sanctions toolkit to push back against US and non-US suppliers which comply with the US technology ban because these counterparties are essentially left with no option but to comply – US suppliers are under direct legal obligation to comply and if non-US suppliers do not comply, then their access to the base US technology will also be cut off, with potentially devastating impact.

However, Chinese media have reported that FedEx may be among the first to be included on the UEL for its diverting more than 100 packages intended to be delivered to Huawei. The global shipping giant claimed that the delays were due to the additional burden placed on it by US authorities to inspect the contents of shipments to ensure that they were not subject to the US technology ban.[232] The company apologized for the diversion of Huawei packages, citing "'operational errors", and it has sued the US government, challenging what it said was an "impossible task" to "police the contents" of all export shipments.

D. Assessing Related Risks for MNCs in China

Next, we look at potential risks for MNCs in these scenarios. In this context it will be important to distinguish between US companies outside of China, China subsidiaries of US companies, non-US companies outside of China, and China subsidiaries of non-US companies. For China subsidiaries of US corporates, it is important to confirm the extent to which particular US sanctions programs apply to the operations of overseas subsidiaries (as is the case in respect of the Cuban embargo and the Iran sanctions).

On the flip side, China's new Blocking Rules apply to companies registered in China but not to foreign companies or even SOE/POE overseas subsidiaries outside of China, and conversely, the UEL Provisions appear to be designed to apply only to foreign companies outside of China and not to their China subsidiaries.

Although the Blocking Rules apply to China subsidiaries of foreign MNCs as a legal matter, as a practical

232 https://www.dailymail.co.uk/news/article-7288827/FedEx-HSBC-Flex-likely-foreign-firms-Chinas-unreliable-entity-list-State-media.html

matter it would appear unlikely that a foreign subsidiary in China would encounter any potential liability thereunder. The Blocking Rules by their terms relate only to situations where a company in China is prohibited or restricted by US secondary sanctions[233] from entering into transactions with counterparties in a sanctioned country. But the rules do not come into play where a company in China does not engage and does not intend to engage in such transactions due to other reasons.

Moreover, the more significant challenges under other blocking rules have arisen where pre-existing transactions have to be unwound in order to not run afoul of newly imposed US secondary sanctions. In those situations, it may be assumed that the exit was due primarily, or at least partially due, to the secondary sanctions, but as previously noted this has proven to be virtually impossible to police as a practical matter, and it is unclear that the recent AG opinion in Europe will change this dynamic.

It is much more difficult, perhaps impossible as a practical matter in most cases, to determine that a company has declined to enter into *new* transactions with sanctioned counterparties due solely to the secondary sanctions as there are innumerable reasons a company may choose to pursue or not pursue particular business opportunities even apart from sanctions compliance considerations.

Most MNC subsidiaries in China do not deal with sanctioned countries and have no plans to do so. Unless Chinese authorities adopt a much more rigid framework requiring more explicit business justifications for decisions not to enter into new transactions that are subject to restrictions under the US sanctions programs (which seems highly unlikely), no reporting obligation should arise under the Blocking Rules. In any event, it seems apparent that China adopted the Blocking Rules in an effort to protect Chinese companies, not to punish foreign subsidiaries in China for not entering into restricted

[233] As discussed in prior articles in this series, the Blocking Rules apply to the extra-territorial enforcement of laws from any foreign country, but it is understood that in practical terms this is directed to US secondary sanctions.

transactions with counterparties in countries subject to US sanctions.

The risk matrix is different, however, with respect termination of contractual arrangements by foreign companies with Chinese counterparties subject to US sanctions under the SDN List or Entity List. As referenced above and in prior articles in this series, the potential for liability under the UEL Provisions in connection with such a contract termination may turn on the distinction between mandatory minimum compliance versus over-compliance, and even then, it is expected that any such retaliatory measures will be limited in number and scope in order to avoid further escalation.

But as noted above, the UEL Provisions refer only to foreign companies and thus may not cover actions undertaken by MNC subsidiaries in China to terminate contracts with sanctioned counterparties in China. This may be a distinction without a difference under the UEL Provisions, however, where the actions of the China subsidiary are taken at the direction of the foreign parent, but again, in that case we fall back to the analysis above as to the potential for liability under the UEL Provisions generally.

We will address the risk profile for banks in respect of these categories of US sanctions in more detail in the next installment in this series, but it is perhaps worth noting at this juncture that while over-compliance may be more common among banks than among corporates, the overall compliance posture adopted by different banks may be based on a complex set of competing considerations, and in all cases will reflect the particular risks for banks arising out of the interconnectedness of the global financial system and the dominance of the US dollar in that system.

E. Risk Mitigation Scenarios and Strategies

The Blocking Rules, UEL Provisions and other sanctions measures and counter-measures recently adopted by China may still be in their normal gestation period prior to full implementation and enforcement, but that is not to suggest that there are no immediate practical implications.

To the contrary, the passage of this entire suite of laws and regulations is a signal of an intention and a willingness on the part of Chinese authorities in the near- to medium-term to push back and even retaliate against perceived overreach by the US and other countries in terms of sanctions directly or indirectly impacting Chinese companies and individuals. Similarly, we can expect that many Chinese parties will see this signal and take the position that the Blocking Rules stand for the general proposition that all foreign sanctions laws are unenforceable in China, even though such a position may not in all cases be fully supported by the express terms of the laws and regulations.

Unquestionably, the skeletal framework that has been adopted to date needs to be fleshed out, and China's enforcement profile in this regard needs to be clarified. But it is also unquestionably the case that compliance policies and related contractual provisions cannot be simply copied and pasted from foreign precedents and applied directly in China without modification; all such policies and provisions must be updated to reflect the new legal reality represented by the new anti-sanctions legal regime in China.

Moreover, while the status of implementation of the EU Blocking Statute and Canada's FEMA may differ from the eventual implementation and enforcement posture under China's new counter-measures, there are lessons to be drawn from best practices which have evolved to address the risks of potential conflicts-of-law stand-offs in those jurisdictions which may be useful in China as well.

These issues can arise in a variety of contexts, and the mitigation steps to be taken may differ based on the nature of the affected party. A high-level overview of some of the more important contexts and considerations are set out below. In each case, parties will need to undertake further analysis and review in order to tailor the solutions to the circumstances.

F. Compliance Policies and Related Contract Provisions

Foreign corporates and banks will need to review the sanctions compliance policies for their branches and subsidiaries in China with a view to ensuring that there are no inconsistencies with applicable new Chinese legal requirements. As demonstrated by the Wal-Mart Canada case referenced above, this will typically mean that the policies for the foreign parent and the China subsidiary will need to take different forms, with the China form expressly providing that the China entity will, to the extent possible, comply with both the foreign and domestic sanctions and anti-sanctions regimes insofar as not inconsistent. Compliance-related provisions of cross-border contracts entered into by foreign parties as well as downstream contracts in respect of domestic transactions entered into by China subsidiaries of foreign corporates should also be reviewed and revised in a similar manner.

Where the policies and practices of foreign subsidiaries in China are dictated by the foreign parent, this gives rise to the question of whether corporate policies can be considered "other measures" for purposes of the Blocking Rules, which are designed to block the extraterritorial application of both "foreign legislation" as well as "other measures." Commentators have expressed different views on this point to date. It is worth noting that under Canada's FEMA, corporate policies which require Canadian companies to give effect to US sanctions laws would be captured under FEMA's prohibition, so this is not outside the realm of possibility under the China Blocking Rules as well, depending on the interpretation ultimately adopted by

Chinese officials.

In the context of bank agreements and insurance policies, other considerations may provide some additional protection, depending on the interpretations adopted. For example, European legal experts have suggested that certain sanctions-related clauses may still enforceable as permissible conditions to funding of loans or payment of claims, citing a 2018 decision of an English court declining to invalidate such a clause in an insurance contract on the basis that giving effect to such clause would violate the EU Blocking Statute. However, that case dealt with insurance policy provisions which predated the updating of the EU Blocking Statute, and it is possible that a different conclusion may be reached in respect of such compliance clauses in banking agreements or insurance policy documents entered into after the updated blocking rules took effect.[234]

Another area in which related issues may arise is in the context of the mandatory updating of Sino-foreign joint venture contracts under the Foreign Investment Law (FIL) which took effect at the beginning of 2020. Under the FIL, the old foreign-invested enterprise (FIE) laws and regulations were repealed and all Sino-foreign joint ventures (JVs) and wholly foreign-owned enterprises (WFOEs) are now to comply with the corporate governance requirements under the Company Law. In connection with this transition, all 500,000-plus FIEs that were registered prior to the effective date of the FIL will need to amend their base corporate documents to come into compliance with the requirements of the Company Law prior to the end of 2024. As part of this exercise in respect of JVs, it is expected that sanctions compliance clauses in the joint venture agreements will need to be revisited and revised in a manner consistent with the points noted above.

[234] https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

G. Transaction Counter-party Screening and Due Diligence

In this series of articles, we have focused on a narrower set of sanctions categories in order to illustrate broader principles, but in practice the US alone administers numerous sanctions programs, and the United Nations, the EU and other countries have also adopted a wide range of sanctions, all of which need to be tracked. And in many cases, such as in a typical buy-sell commercial transaction, it will be necessary to check not only whether the buyer and the seller are included on the list of sanctioned parties, but also all of the other participants up and down the transaction chain, including ships, carriers and ports.

Finally, it will be necessary to screen the goods as well as the payment currency and channels. Procurement of sanctioned products, without conducting adequate supply chain due diligence, can give rise to penalties. For example, in 2019 ELF Cosmetics was fined US$1 million for procuring more than 150 shipments of false eyelashes from a Chinese supplier containing materials sourced from the Democratic People's Republic of Korea (DPRK). As US sanctions expert Perry Bechky observed in a 2019 presentation to the Beijing International Arbitration Center, OFAC imposed the fine even though ELF had "[n]o actual knowledge of the DPRK-origin materials." According to Bechky, who previously served as an OFAC official, ELF subsequently not only started conducting supply chain audits (including checking suppliers' bank records) but also "require[d] suppliers to sign certificates of OFAC compliance.".[235]

Supply chain audits thus can present major challenges for corporates, and access to online databases to verify the integrity of the company's supply chain and business partners is an indispensable tool.[236] But as intimidating as the task is for corporates, the screening challenges for banks can be even more daunting

[235] https://works.bepress.com/perry_bechky/25/

[236] See, e.g., https://professional.dowjones.com/risk/

given their de facto front-line enforcement responsibilities, which if they fail to discharge fully may result in severe penalties. As a result, as one global banker told *The Economist*, compliance costs for the global banks can run into the billions of US dollars per year.[237] According to multiple experts, major Chinese banks have also been ramping up their compliance efforts dramatically in order to ensure that their access to the US banking system to transact US dollar business will not be cut off.

In the context of the semi-conductor chip ban imposed on Huawei, Chinese tech companies have undertaken aggressive screening of domestic and global suppliers, tracing back through multiple layers of component and sub-component suppliers, and even to the suppliers of the technology and equipment used by such component suppliers, to determine whether their supply chains are vulnerable to a similar US technology ban. This has resulted in a massive increase in investment by Chinese tech companies in compliance management in order, first, to ensure that they know what products and components they can and cannot sell to parties on the Entity List, such as Huawei, and second, to put themselves in a position to be able to de-couple from suppliers using controlled US-sourced technology if and when they may be similarly barred.[238]

H. Implications for M&A Transactions

Sanctions compliance screening also arises in the context of mergers and acquisitions due diligence. US investors in particular will need to take care to ensure that all potential issues of non-compliance with US sanctions laws are addressed prior to closing. This will require a comprehensive review of all

237 https://www.economist.com/finance-and-economics/2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy

238 https://asia.nikkei.com/Spotlight/The-Big-Story/US-China-tech-war-Beijing-s-secret-chipmaking-champions

transactions, counter-parties and technology licenses to identify potential risk issues.[239]

However, if certain problematic transactions entered into by the target prior to closing are unwound on a post-closing basis in order to bring the newly acquired company into compliance with US sanctions laws, this may run afoul of relevant blocking rules. Two cases in Europe illustrate the potential risks.

The first involved the acquisition of Austrian bank BAWAG by US investor, Cerberus, in 2007. In order to bring the bank into compliance with US sanctions laws, prior to closing of the acquisition, BAWAG closed the bank accounts of more than 100 Cuban nationals. Austrian authorities initiated an investigation to assess whether the action violated the Austrian legislation implementing the EU Blocking Statute. The threat of possible fines prompted Cerberus to seek an exemption from US authorities, which was granted, permitting BAWAG to reinstate the banks accounts of the Cuban nationals. As a result, Austrian officials closed their investigation and took no action.[240]

A similar scenario arose in connection with the acquisition of Dutch software company Exact by KKR. After the acquisition, Exact terminated its distribution contract with Curacao-based PAM, which distributes software in Cuba. PAM then brought legal action against Exact for breach of contract, and argued that the EU Blocking Statute prohibited Exact from terminating the contract. In a June 2019 decision, the Hague District Court found in favor of PAM, prohibiting Exact from terminating the contract. The court did not expressly base its ruling on the EU Blocking Statute, and since the court found that Exact was required to honor the contract on other grounds, no violation of the EU Blocking Statute arose.

239 https://globalinvestigationsreview.com/guide/the-guide-sanctions/first-edition/article/sanctions-issues-arising-in-corporate-transactions

240 https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/braa007/5909823

However, this decision put Exact and KKR in the uncomfortable position of being in technical violation of the Helms-Burton Act. If US authorities were to pursue Exact for this violation, Exact may argue that it should not be liable based on a defence of foreign sovereign compulsion in the form of the judgment of the Hague court. While the outcome of such a defense to a US enforcement action is not clear, some legal scholars take the view that, judging by recent OFAC and US court decisions, the chances of success of such a defence may not be very high.[241]

In addition, in an effort to strengthen the EU Blocking Rules, the EU Commission has recently issued a Communication proposing, among other steps, to subject US investment in Europe to more intense investment scrutiny if as a result of such a proposed acquisition the EU-based target company may be required to comply with US extra-territorial sanctions.[242] It is conceivable that similar criteria could be incorporated into review of inbound investments into China, but it is not clear whether such measures would have a significant impact on the enforcement of US secondary sanctions generally.

I. Best Practices in Connection with the Unwinding of Problematic Transactions

As previously noted, the vast majority of enforcement actions and "claw-back" cases pursuant to "blocking rules" have arisen in the context of termination of contracts involving restricted transactions. This is also the scenario which may give rise to potential liability under the UEL Provisions for foreign parties which intend to exit an existing deal with a sanctioned counterparty. This may come up in situations where the Chinese party is added to the SDN List or Entity List, or (as above) in the context of an M&A transaction.

[241] Ibid.

[242] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0032&qid=1611728656387

In order to reduce the potential for liability in such scenarios where blocking rules and other potential counter-measures may apply, it is critical to document in writing the reasons for the termination of the transaction, referring to any number of a broad range of permissible commercial considerations, without any reference to an intention to comply with US sanctions rules.

For similar reasons, it is often better to enter into a negotiated exit rather than to exercise termination rights pursuant to termination triggers in the contract relating to non-compliance with US sanctions laws (which, as discussed above, may now need to be revisited and revised to reflect the potential impact of the new China counter-measures). The permissible commercial rationale for the unwinding of the transaction can be set out in the preliminary statements to the termination agreement as well as in related correspondence.

Such a consensual termination agreement should also include relevant waivers of claims, indemnification obligations and further assurances undertakings. It is likely that unwinding a transaction on this basis will entail some compensating payments, but in most cases, this may be considered one of the costs of compliance and a form of insurance in the context of potential counter-measures.

J. Use Caution in respect of Special Purpose Vehicles

Chinese parties historically have viewed special-purpose vehicles (SPVs) controlled indirectly through nominee shareholder arrangements as a possible work-around structure to avoid constraints under US sanctions in connection with certain transactions with counterparties in sanctioned countries, but this is a

high-risk strategy as demonstrated by the ZTE and Huawei cases.[243] The use of such SPV structures will raise red flags for banks and both Chinese and foreign MNC counterparties.

However, there is one important possible exception – government-sponsored and -backed SPVs, such as INSTEX in the EU. INSTEX (full name, Instrument in Support of Trade and Exchange) was set up by the EU to facilitate permitted transactions with Iran. It is an alternative payment system that involves a form of barter in order to avoid cross-border payments and thus arguably fall outside of the reach of US sanctions.

It works generally as follows: Supplier EU-1 in Europe sells goods and services to customer IRAN-1 in Iran, so IRAN-1 owes money to EU-1. Simultaneously, Iran-based supplier IRAN-2 sells products to customer EU-2 in Europe, so EU-2 is obligated to make payment to IRAN-2. Rather than have two off-setting cross-border payments, under the INSTEX hybrid "barter" arrangement, EU-2 pays the money owed by it to IRAN-2 to EU-1, while IRAN-1 pays the money owed by it to EU-1 to IRAN-2.[244]

This presents a possible interesting model for the massive 25-year China-Iran deal signed in March 2021, which involves up to US$400 billion of infrastructure investment by Chinese parties in Iran in exchange for Iranian oil at steeply discounted prices.[245] Using an SPV structure based on the INSTEX model, the Iranian infrastructure project owners could pay the Iranian crude oil suppliers and the Chinese oil purchasers could pay the Chinese infrastructure project contractors, with no cross-border payments in US

243 https://asialawportal.com/2021/03/10/learning-from-the-huawei-cfo-meng-wanzhou-case-what-chinese-and-other-non-u-s-companies-and-executives-should-do-to-limit-exposure-to-criminal-liability-in-the-u-s/

244 https://www.managementstudyguide.com/instex-payment-system.htm

245 https://www.nytimes.com/2021/03/27/world/middleeast/china-iran-deal.html

dollars or even in Yuan.

As a practical matter, INSTEX has had limited utility to date, and has been used only for humanitarian transactions not covered by the US "snap-back" secondary sanctions, such as the sale of agricultural commodities, medicine, and medical goods. This structure has not been expanded into other categories of restricted transactions, and most private EU companies reportedly are reluctant to take the risk of a direct violation of US secondary sanctions via INSTEX, so it is still an unproven vehicle.[246]

But this may be just the kind of test case that China may be willing to undertake, with the implicit or explicit threat that it will deploy counter-measures, including pursuant to the Blocking Rules and possibly the UEL Provisions, should the US try to interfere. This is a scenario that US and other Western counterparties should assess with caution as this could trigger a direct conflicts-of-laws stalemate with the full panoply of risks outlined above.

K. Bracing for the Sanctions Battles to Come

By adopting this new array of sanctions counter-measures, China has sent a clear message that it intends to fight back against what it views as overuse of sanctions by the US as a tool to compel conformity to US foreign policy preferences. The battles may not be engaged immediately, but both foreign and domestic companies and banks must brace for the coming conflicts-of-law skirmishes.

Foreign and domestic parties will enter the fray with competing agendas, backgrounds and capabilities.

[246] Lohmann_Extraterritorial U.S. Sanctions_Only Domestic Courts Could Effectively Curb.pdf; Meeting the challenge of secondary sanctions – European Council on Foreign Relations (ecfr.eu)

Major MNCs and global banks already have robust compliance resources and systems, but given the impotence of the blocking rules adopted elsewhere, they still have only modest experience with the interplay between sanctions measures and counter-measures. China presents a new challenge in this arena, and as demonstrated by the Wal-Mart Canada case study cited above, the risks are both legal, diplomatic and *reputational*, both in China and in home markets.

On the other hand, the compliance experience and capabilities of Chinese SOEs, POEs and banks are uneven. The top tier, which have had the most risk exposure to date, have stepped up their compliance game over the last five years in particular. As one expert noted, it is telling that Huawei has been caught up in the US sanctions net relating to Iranian transactions occurring earlier in the first half of the last decade, and not for conduct in the last half of the decade, reflecting the general observation that it and other top Chinese companies, as well as the top Chinese banks with a global footprint, have made significant progress in respect of sanctions compliance over a relatively short period of time, now approaching and in many cases matching their foreign counterparts in this regard.

But at the next level down, among the broader group of Chinese corporates and even some other Chinese banks, the level of appreciation of compliance risks lags far behind, which is reflected in a corresponding lag in investment in compliance management resources. In this new era of increasing deployment of sanctions measures and counter-measures, no Chinese company with international exposure will be able to lie low and hope not to be targeted.

In this process, it will also become increasing apparent that not only do domestic and foreign corporate counterparts have conflicting interests and loyalties in many cases, but domestic companies and global banks (including Chinese global banks) may in many instances also have competing agendas. Recent disclosures in the Canadian extradition case of Huawei CFO, Meng Wanzhou, illuminate many of the

dynamics of the banker-customer relationship in the context of an environment of heightened sanctions risk for both sides.

In order to achieve a pre-emptive thaw in the developing economic Cold War between the world's top two economies, it is critical that corporates, and perhaps particularly Chinese companies, better understand what drives the compliance management policies of the global banks, and how that can create an adversarial stance in what should in fact be a partnership. We will explore these relationship dynamics in our next installment.

V. A Case of Divided Loyalties: In an Environment of Heightened Risks Arising From Sanctions and Counter-measures, Banks Are in the Cross-Hairs

The HSBC Role in the Genesis of the Case Against Huawei CFO Meng Wanzhou Demonstrates the Legal and Business Risks for Both Banks and Their Corporate Customers in the Context of Potential Conflicts-of-Law Stand-offs

In August 2013, a team from Huawei, led by CFO Meng Wanzhou, daughter of Huawei founder Ren Zhengfei, met with representatives from HSBC in a private room in the back of a Hong Kong restaurant. The purpose of the meeting was to discuss issues arising out of reports published by Reuters in late December 2012 and January 2013, claiming that Huawei had uncomfortably close ties with Skycom, which reportedly engaged in business activities in Iran which were restricted under US sanctions. These reports had set off alarm bells in HSBC.

By this point, HSBC had been providing banking services for Huawei's expanding global operations for roughly 15 years, and Huawei reportedly was one of the twenty largest customers for HSBC's Global Liquidity and Cash Management Department[247]. As Meng noted in her presentation, HSBC knew Huawei well, and based on public documents, it appears that the bankers and the finance team from Huawei had over the years enjoyed a cordial, even friendly relationship. However, the media reports of Huawei's activities in Iran via Skycom had threatened to put the relationship at risk.

At the Hong Kong meeting, Meng presented a slide deck outlining the company's extensive internal

[247] http://en.people.cn/n3/2020/0724/c90000-9714596.html

compliance policies and practices, and provided more details on the relationship between Huawei and Skycom[248]. The Huawei team additionally noted that HSBC had rich experience in trade compliance, and indicated that they looked forward to learning from HSBC to help the company further improve its compliance practices.

What the Huawei delegation may not have known at the time was that HSBC had recently had its own serious compliance issues. In early December 2012, just three weeks prior to the first of the Reuters reports, the bank had signed a Deferred Prosecution Agreement (DPA) with the US Department of Justice (DOJ), and had acknowledged an extensive and egregious pattern of illegal payment transactions over a period of many years in violation of US sanctions rules. Under the DPA, HSBC paid nearly US$2 billion in fines and forfeitures, fired numerous senior managers and deferred or clawed back bonus compensation for others, and was required to put in place a more robust compliance management system to be supervised by an independent compliance monitor reporting directly to the US government.[249]

As such, it would appear that the Huawei team's confidence in HSBC's supposedly superior compliance experience may not have been fully justified. According to sources familiar with the situation, for its part, Huawei independently took additional significant steps in the following months and years to strengthen its compliance programs, and it notably has not been targeted to date for sanctions violations arising out of conduct occurring after the Hong Kong meeting. In fact, the current charges against Meng and Huawei may never been brought had it not been for further serious malfeasance on the part of HSBC.

[248] For more details, see https://asialawportal.com/2021/02/19/tracing-the-origins-of-the-case-againsthuawei-cfo-meng-wanzhou-how-global-banks-extend-the-reach-of-u-s-extraterritorial-jurisdictiondirectly-and-indirectly-impacting-the-global-expansion-of-chin

[249]http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations

A. HSBC Compliance Problems Create Adversarial Relationship vis-à-vis Huawei

Following the Hong Kong meeting, the bank conducted further internal reviews. This was a serious matter from the perspective of HSBC given the background of its own criminal violations of US sanctions and the terms of the DPA.

HSBC conducted multiple risk reviews over the ensuing months to discuss the "reputational and regulatory concerns" in respect of Huawei, and after full consideration of the related facts and circumstances, in March 2014 the bank's global risk review committee determined to maintain the banking relationship with Huawei. Shortly thereafter, HSBC issued a commitment letter to Huawei outlining the terms of a proposed US$900 million credit facility, and approximately one year later in 2015, HSBC participated in a US$1.5 billion syndicated loan facility extended to Huawei.

The banking relationship continued without further apparent complications through the fall of 2016, a full three years after the fateful Hong Kong meeting. At that time, US prosecutors reportedly were considering bringing new criminal charges against HSBC relating to conduct on its foreign exchange desk.[250] If this new case went forward, it could constitute a breach of the DPA, in which case the bank would be subject to even more severe penalties, including, in the worst-case scenario, being denied access to the US banking system, which would be a death blow to the bank's global operations.

In order to preserve the DPA, and under direct pressure from US prosecutors to do so, HSBC conducted a further probe of Huawei's transactions in Iran and its relationship with Skycom. [251]The bank's internal

[250]https://www.bloomberg.com/news/articles/2016-09-07/u-s-said-to-weigh-hsbc-charge-that-couldupend-2012-settlement

[251]https://www.reuters.com/article/us-usa-china-huawei-tech-insight/long-before-trumps-trade-warwith-china-huaweis-activities-were-secretly-tracked-idUSKCN1QN2A

probe turned up the PowerPoint presentation prepared by Meng for the August 2013 meeting. The bank's findings were turned over to the DOJ by the HSBC independent compliance monitor appointed by US authorities in a series of presentations in 2017. Based on the results of the HSBC probe, US prosecutors allege that Meng's PowerPoint presentation contained "numerous misrepresentations" constituting bank fraud, which forms a core part of the DOJ's case against Meng.

As a legal and practical matter, HSBC had no choice but to cooperate in the DOJ's investigation of Huawei. Reuters reported that Robert Sherman, a spokesman for HSBC, stated, "Information provided by HSBC to the Justice Department was provided pursuant to formal demand, including grand jury subpoena or other obligation to provide information pursuant to a Deferred Prosecution Agreement or similar legal obligation."[252] On the one hand, failure to comply with the DOJ formal demand would have constituted a breach of the terms of the DPA, while on the other hand, by cooperating in the probe HSBC ultimately was able to secure the dismissal of all charges under the DPA at the end of the five-year term in December 2017. The choice was clear – HSBC had to protect its own interests by complying with its legal obligations, even if that meant handing over information regarding one of its largest customers.

B. Understanding Banks' Inherent Conflicts of Interest

From the court filings in the pending Meng Wanzhou extradition case in Canada, it appears that at the time Huawei may not have fully appreciated the inherent conflicts of interests on the part of HSBC arising from the stranglehold that the US has over global banks and the global banking system generally and the terms of the DPA specifically. Moreover, Huawei presumably did not anticipate that a criminal investigation into HSBC's own further misconduct could trigger a series of events that resulted in criminal indictments of Huawei and its CFO, while at the same time the bank would be cleared of all charges.

[252] https://www.reuters.com/article/us-huawei-hsbc-exclusive-idUSKCN1QF1IA

Generally, customers have a legitimate expectation that banks will keep their information confidential. In fact, courts and regulators have consistently recognized that such a confidentiality obligation forms an implied term in the agreement between a bank and its customers.[253] Some corporates may view their communications with their bankers as being subject to protection based on something akin to the attorney-client privilege. As is the case with consultations with lawyers, discussions with one's bankers necessarily will involve confidential and proprietary information, and it is essential that bank customers feel free to openly communicate such information to their bankers without fear of unauthorized disclosure. Banks, on the other hand, similarly depend on the completeness and accuracy of customer information so that they can make informed lending decisions. As such, the bank's undertaking to protect the confidentiality of such sensitive customer information encourages the type of open communication that fosters mutual trust.

However, this obligation of confidentiality on the part of the banks is not absolute. Under English law, for example, a bank in the UK can disclose customer information in the following circumstances: it is compelled to do so by law; it has a public duty to do so; the bank's own interests require disclosure; or the customer agrees to the information being disclosed.[254] This may be considered to be similar in some respects to the crime/fraud exception to the attorney client privilege,[255] and in the context of the rise of financial sanctions and anti-money laundering regulations, bank confidentiality obligations have in many respects continued to be eroded in favor of protecting the broader interests of the public.[256]

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[253] See, e.g., https://www.inbrief.co.uk/personal-finance/bank-obligations-to-customers/ and http://www.coucounis.com/index.php/en/news-insights/publications-articles/77-bankconfidentiality-a-dying-duty-but-not-dead-yet

[254] Ibid.

[255] https://www.americanbar.org/groups/litigation/committees/trial practice/articles/2014/spring2014-0414-crime-fraud-exception-attorney-client-privilege/

[256] http://www.coucounis.com/index.php/en/news-insights/publications-articles/77-bank confidentiality-a-dying-duty-but-not-dead-yet

As a result, when it comes to sanctions compliance, there is no banker-customer privilege to protect communications from the customer to the bank. In fact, in this context, it should be understood that the banks have an affirmative obligation to disclose potential noncompliant transactions to the authorities. The resulting contradictions and competing interests and obligations on the part of banks introduce a tension that potentially impacts all communications between corporations and their global banking partners, and given the DPA entered into by HSBC, and the appointment of an independent compliance monitor to supervise the bank's compliance management systems, these tensions were even more pronounced in this case.

This is a critical dynamic that corporations and senior managers must keep in mind in connection with all communications with their banks, and as a rule, corporates must adopt a much more rigorous approach in respect of the presentation of information to their bankers. A policy of strict transparency and accuracy must always be scrupulously adhered to. Imprecision in communications in an effort to smooth over potentially sensitive issues carries high risks.

C. HSBC – Caught Between a Rock and a Hard Place

But at the same time, banks will still need to assure customers that, to the fullest extent permitted under law, they will strictly maintain the confidentiality of customer information. If banks fail to provide customers with sufficient comfort in this regard, trust in the bank will be eroded, which may result in irreparable damage to the bank's reputation and business.

That is why, in this case, HSBC was so careful to clarify in its public statements cited above that it was compelled to respond to a "formal demand" from the DOJ, in an obvious effort to place it squarely within the exception to the general rule on confidentiality of customer information to allow for disclosures

required by law.

However, over the course of the Meng extradition proceedings, HSBC has repeatedly been dragged back into the spotlight, creating extraordinary levels of continuing aggrevation for the bank as it sought to navigate between competing demands and expectations on the US and Chinese sides. For example, in the summer of 2020, Meng's lawyers presented arguments challenging her extradition on the grounds that key portions of the slide deck from the 2013 meeting in the Hong Kong restaurant had been omitted from the Record of the Case (ROC) presented by US prosecutors, constituting an abuse of process. Even though the DOJ, not HSBC, prepared the ROC, leading Chinese media outlets focused much of their vitriol at HSBC.

The China Daily referred to the bank as an "accomplice" in what the paper referred to as a politicized prosecution, noting that some observers claimed that HSBC "played an improper role" in Meng's case, which "undermined its credibility as a trustworthy partner."[257] The People's Daily Online excoriated the bank for having "framed" Huawei by "setting traps to ensnare" the company, claiming that HSBC had "exaggerated data and hid[den] facts." [258]

In an effort to quell the growing groundswell of opprobrium against the bank in China, which together with Hong Kong accounts for half of the bank's global profits,[259] HSBC put out a statement directly to its customer base in China via its public WeChat account. The statement asserted that the bank "did not prompt the investigation of Huawei. US government scrutiny of Huawei began long before HSBC got caught up in the case in late 2016." Moreover, the statement continued, "HSBC does not have any hostility

[257] https://www.chinadaily.com.cn/a/202007/24/WS5f1ae50ca31083481725bf86.html

[258] http://en.people.cn/n3/2020/0724/c90000-9714596.html

[259] [insert citation]

toward Huawei and did not 'frame' Huawei."[260]

While the HSBC statement appears to be generally consistent with the facts of the case as publicly reported, it was far from sufficient to placate its critics in China. Citing comments from leading Chinese analysts, the Global Times called the HSBC statement "unconvincing" and "not persuasive." The report also noted the rise of widespread negative sentiment in China towards the bank, citing observers who claimed that HSBC's "reputation among Chinese people has deteriorated," and that major Chinese companies may be reluctant to do business with the bank going forward.[261]

D. New Evidence Provides a Window into Banks' Internal Compliance Review Processes

Meng's lawyers have challenged the extradition proceedings in Canada on several grounds, but one recurring theme in the defense presentation is that the record on its face is insufficient to make the case for bank fraud.

In order to bolster this line of the defense, Meng's lawyers brought a separate legal action in Hong Kong to force HSBC to produce internal documentation relating to the nature and extent of the bank's review process following the August 2013 meeting to investigate the press allegations against Huawei. The parties reached a settlement of that separate case, and the bank produced the requested documentation pursuant to a court order which stipulated that the documents would not be disclosed publicly.

[260] https://edition.cnn.com/2020/07/27/business/hsbc-huawei-conflict/index.html

[261] https://www.globaltimes.cn/content/1195604.shtml

Meng's lawyers then sought to adduce this new evidence in the extradition proceedings in Canada. This was a two-step process:

- First, Meng's legal counsel asked that the Canadian court keep the documents under seal by issuing a ban on publication. Such a request was required under the terms of the Hong Kong court order. The Canadian court rejected this request on the grounds that that was inconsistent with the "open court" principle, which requires that court proceedings be open and accessible to the public and to the media.[262]

- The court also ruled against Meng's separate application to have this new HSBC evidence taken into account in the extradition proceedings. The court ruled that the new evidence related to the ultimate question of guilt or innocence, which was to be addressed at the trial stage not the extradition stage.[263]

Overall, this is not an unexpected result, but while on the face of it, Meng's lawyers lost on both counts, the reality may be more nuanced. Meng was "contractually bound" under the agreed Hong Kong court order to request that the HSBC documents be kept under seal,[264] but the Canadian court's denial of that application has resulted in the public disclosure of this evidence, which overall is a positive result from the perspective of Huawei and Meng as the new evidence tends to cast doubt on the sufficiency of the bank fraud charges and suggests that either HSBC or the DOJ has not yet told the full story behind this prosecution.[265] So even though the court will not consider this evidence as part of the extradition

[262] Canada court rejects Huawei CFO push for publication ban on new evidence in U.S. extradition case | Reuters

[263] Huawei exec Meng Wanzhou loses bid for key evidence in U.S. extradition battle | CBC News

[264] 8 Meng Wanzhou is 'contractually bound' to try to keep HSBC evidence secret in extradition case, lawyers say | South China Morning Post (scmp.com)

[265] At this stage, US prosecutors only have to make a minimal presentation to meet the relatively low threshold for extradition, so additional evidence supporting the charges may be presented by the DOJ at a later stage if the case proceeds. Similarly, although as part of these extradition proceedings Meng's lawyers have presented some evidence that goes to the heart of her defense, it should be expected that even this presentation by the defense is incomplete at this stage. In this

proceedings, the information has now become part of the public record and thus may influence public perception of the merits of the case.

For purposes of our analysis, this evidence sheds light on the internal review process undertaken by HSBC in the aftermath of the Reuters reports about the relationship between Huawei and Skycom, which helps illuminate a process which otherwise may be opaque from the perspective of the bank customer. This evidence also highlights the continuing nature of banks' Know Your Customer (KYC) compliance obligations with respect to existing customers, as well as the potential internal tensions within a bank when it comes to balancing preservation of a long-standing relationships with a major bank customer versus protection of the bank's interests through KYC and sanctions compliance.

E. KYC – A High-Risk Proposition for Banks and Customers

By way of further background before looking in more detail at the new evidence, we briefly outline below in general terms the nature and scope of the bank's KYC obligations.

KYC obligations were mandated under the Patriot Act after it became apparent that existing protocols under the Bank Secrecy Act (BSA) had been insufficient to detect the flow of money used to fund the 9/11 attacks.[266] Under the Patriot Act, all financial institutions, including securities firms, insurance companies, money transfer platforms, as well as banks, were required to implement anti-money laundering (AML) programs, including through verification of the identity of their customers.[267] In 2016, the Financial Crimes Enforcement Network (FinCEN) under the US Treasury Department issued new Customer Due

article, we present some of the arguments advances by Meng's legal counsel since defense counsel has to date created a more complete record, which may be controverted by the prosecution in the trial phase.

[266] https://www.jumio.com/kyc-in-banking/

[267] https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/tompki.pdf

Diligence (CDD) rules which amended the AML/KYC rules under the BSA to clarify and strengthen the applicable CDD procedures by requiring that covered financial institutions take additional steps to identify and verify the identity of the natural person beneficial owners of legal entity customers.

During the onboarding of new customers, the KYC process thus typically is comprised of (1) a customer identification program (CIP), which for individuals consists of collection and verification of ID documents and proof of residence, and for legal entity customers includes company registration documents, confirmation of beneficial owners and review of the nature and purpose of business relationships entered into by the entity in order to develop a risk profile; (2) customer due diligence (CDD), which involves the screening of customers against sanctions and politically exposed persons lists as well as for adverse media reports; and (3) where red flags appear, enhanced due diligence (EDD) to assess related higher levels of risk.[268]

For many individual customers, the KYC process can be completed in no longer than a few to several working days,[269] but anecdotal evidence indicates that for more complex cases, the process may take a few to several months. In some jurisdictions, the KYC process and related requirements may present nearly insurmountable obstacles for start-up companies with no business track record to open a bank account.

In addition, as was the case here in respect of the HSBC investigation in response to the Reuters articles, financial institutions have an obligation to undertake continuing monitoring of customer transactions to identify and report suspicious transactions and, on a risk basis, to maintain and update customer

[268] https://medium.com/@Deepakamirtharaj/the-complete-guide-to-understand-know-your customer-kyc-5dd1c16614c4

[269]

information.[270]

Financial penalties for KYC/AML-related compliance breaches represented 99% of the total fines of US$10.6 billion imposed on financial institutions in 2020. This total figure for financial penalties for 2020 was 27% higher than the total for 2019. In all, more than US$46.6 billion in enforcement actions have been levied against financial institutions for AML and sanctions violations from and after 2008.[271]

Just in respect of violations of OFAC sanctions programs, more than 35 banks have been fined since 2010, in amounts ranging from a low of US$12,500, assessed against TransPacific National Bank for violations of Iran sanctions, to a high of US$8.9 billion, imposed against BNP Paribas for non-compliance with sanctions programs relating to Cuba, Iran and Sudan.[272] The list of sanctioned banks includes numerous well-known global financial institutions, such as RBC (ABN Amro), Barclays, Wells Fargo, JP Morgan/JP Morgan Chase, Commerzbank AG, Societe Generale, Standard Chartered, ING, Bank of Tokyo-Mitsubishi, Deutsche Bank, Bank of America, Credit Agricole, PayPal, Western Union, and of course, HSBC.[273]

As such, the KYC process is clearly a high-risk proposition for banks and other financial institutions, and as sanctions programs have proliferated and enforcement actions have ramped up, banks are the focus of increasing regulatory scrutiny in their front-line monitoring and quasi-enforcement role. If they get the process wrong, the penalties can be severe.

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[270] https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule

[271] https://www.fenergo.com/fines-report-2020/

[272] https://www.refinitiv.com/content/dam/marketing/en_us/documents/infographics/fines-for banks-that-breached-us-sanctions-infographic.pdf

[273] Ibid.

Moreover, as we can see from the HSBC case, when it comes to compliance, the very steps which the bank may need to take to protect its interests (and indirectly, the public's interests) may in some cases result in authorities targeting the bank's customers. Consequently, it is also critical for bank customers to understand how the KYC process works. The new evidence made public in the Meng Wanzhou extradition case provides important insights in this regard.

F. What Did HSBC Know and When Did They Know It?

The crux of the bank fraud charges against Meng are based on the allegation that in the PowerPoint presentation she made materially false statements to HSBC regarding Huawei's relationship with Skycom, and in reliance on such statements the bank put itself at risk of further sanctions violations. Meng's legal counsel assert that the new evidence fatally undercuts this claim by demonstrating that senior officers at the bank already had ample evidence of the nature of the relationship at the time of their internal probe into the facts underlying the Reuters articles.[274]

In the PowerPoint presentation, Huawei stated that its engagement with Skycom was a "normal business cooperation," and that "as a business partner of Huawei, Skycom works with Huawei in sales and services in Iran." Huawei further acknowledged that, as reported by Reuters, it had once been a shareholder in Skycom and that Meng had previously been a member of Skycom's board of directors, but that Huawei had since sold its shares and Meng had stepped down from the board. The presentation slide deck further highlighted in underscored text that "Huawei's engagement with Skycom is normal and controllable business cooperation, and this will not change in the future."[275]

[274] The facts set out in this section are drawn from related court filings.

[275] For a more detailed description of the contents of the PowerPoint presentation, see https://asialawportal.com/2021/02/19/tracing-the-origins-of-the-case-against-huawei-cfo-mengwanzhou-how-global-banks-extend-the-reach-of-u-s-extraterritorial-jurisdiction-directly-andindirectly-impacting-the-global-expansion-of-chin

US prosecutors charge that notwithstanding the fact that Huawei had sold its direct shareholding in Skycom, Huawei continued to control Skycom indirectly through its control of Canicula, an intermediary holding company which had acquired the shares of Skycom from Huawei in a non-arms-length transaction, and that as such the PowerPoint misrepresented the actual facts. The indictment further alleged that in reliance on these misrepresentations, HSBC continued its banking relationship with Huawei and as a result could have faced civil or criminal penalties for processing payments that violated US sanctions laws.[276]

These allegations cannot be assessed in a vacuum. Because of the long-term relationship between HSBC and Huawei, the bank already had extensive information on Huawei and all affiliated companied related to the group. HSBC would have already conducted full KYC/AML due diligence on every member of the group with which it had dealings. As such, when the bank decided to maintain its banking relationship with Huawei, it did not do so solely or perhaps even principally in reliance on the PowerPoint presentation. As required under applicable laws, HSBC conducted further due diligence to update the relevant KYC information.

As set out in the court documents submitted by Meng's lawyers, HSBC's internal records demonstrate that both Reuters articles were immediately flagged and circulated internally within the bank. Given that Huawei was one of the bank's largest global customers, and given that the bank was on heightened alert to compliance risks following its signing of the DPA only weeks earlier, this matter was treated with a high degree of importance and urgency, and a wide range of bank officers were copied on the internal correspondence.

[276] https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei cfo-wanzhou-meng-charged-financial

A formal internal investigation was kicked off within days. The bank was quickly able to confirm that Skycom's principal business was in Iran, that Skycom had been incorporated in 1998 and that it was 100% owned by Canicula and its sole director was a Huawei employee, that Skycom and Huawei shared the same address, and that both Skycom and Canicula maintained accounts with the bank, which were included under the Huawei master group in the bank's internal information reporting system. Internal HSBC emails also referred to Skycom as a "Huawei affiliate." Moreover, the bank promptly contacted Huawei to arrange for the Skycom and Canicula accounts be closed, which was another implicit acknowledgment by the bank of Huawei's de facto control over those entities.

Another reason for the urgency was that HSBC was the lead bank on a pending syndicated loan to Huawei in an amount equivalent to US$1.5 billion. Accordingly, the bank conducted its first risk committee review of this matter on May 14, 2013, when a meeting of the Global Banking & Markets, Asia Pacific Global Banking and Management Committee (the "Reputation Risk Committee") was held. Based on the updated KYC reports, the internal team stated that they were "satisfied that sufficient consideration had been given to sanctions," and the Reputation Risk Committee approved proceeding with the syndicated loan, which was announced in August 2013.

All of the foregoing internal review process predated the meeting in the Hong Kong restaurant at which the Huawei delegation presented the original Chinese-language version of the PowerPoint. An English version of the PowerPoint was provided to HSBC by Huawei a few weeks later, and was circulated to relevant HSBC managers, including members of the Global Risk Committee and Client Selection Committees. In one internal email, an HSBC manager expressed his satisfaction with the description of Huawei's trade compliance efforts as set out in the PowerPoint.

Thereafter, three further risk reviews were held by HSBC in respect of these matters:

• A November 28, 2013 meeting of the Asia Pacific Client Selection Committee (the "Client Selection Committee");

• A further meeting of the Reputational Risk Committee held on March 18, 2014; and

• A March 31, 2014 meeting of the Global Risk Resolution Committee (the "Global Risk Committee").

The report submitted for the November 28 Client Selection Committee meeting was substantially similar to the report prepared for the May 14 Reputation Risk Committee review, but added that the relationship management team viewed the reputational risk of dealing with Huawei as "acceptable."

In emails in advance of that meeting, the team members responsible for preparation of the report debated whether to include the PowerPoint in the submission to the committee, but decided not to do so because of the large number of persons on the committee. Instead, it was decided it would be sufficient to note that Huawei's policy is to comply with all applicable laws and sanctions and then to describe the internal controls put in place by Huawei. In addition, in advance of the meeting an email was circulated in connection with the draft report indicating that a copy of the PowerPoint was available upon request.

Based on the presentations submitted, the Client Selection Committee decided to maintain the relationship with Huawei. The process for the subsequent two risk reviews followed the same format with similar results – the bank at all levels determined that the reputational risk associated with the continued relationship with Huawei was acceptable.

Given the information available to bank managers based on the bank's own internal KYC review, it appears that HSBC had sufficient information to understand the relationship between Huawei and Skycom,

even independent of the Huawei PowerPoint presentation. Moreover, as Meng's legal counsel have emphasized, the PowerPoint states that the relationship with Skycom was "controllable" by Huawei, which appears to be consistent with the results of the bank's updated KYC review. From the HSBC internal documents, all facts pointed to Skycom's being a de facto Huawei affiliate for all practical purposes, and the record suggests that HSBC took action based on that understanding.

Moreover, even if a more narrow view is taken of what facts were actually known to senior officers of the bank at the time,[277] the available information taken together was more than sufficient to put HSBC on notice of the relevant issues, and it could have conducted further enquiries as it may have deemed necessary or appropriate. Compare the KYC update due diligence undertaken by HSBC in the months following the initial Reuters reports with the investigation undertaken by the bank more than three years later at the request of the DOJ when the bank's DPA was under threat of being revoked. In that latter case, HSBC internal investigators reportedly conducted more than 100 interviews, reviewed nearly 300,000 emails and analyzed years of financial transactions. This demonstrates that had the bank felt it necessary, it could have deployed more resources to conduct further investigation during the initial 2013-2014 timeframe.

As noted above, in the course of the subsequent investigation in response to the DOJ demand, the PowerPoint was uncovered, but this was already known to bank managers at the time of the original decisions to maintain the banking relationship. The bank's later internal probe reportedly also found evidence that Huawei had continued to control Skycom indirectly through intermediary holding companies which received funding support from Huawei. This detail on the funding support for Canicula

[277] The question of seniority of the bank officers who were in the loop on the issues relating to the Huawei-Skycom relationship is disputed by the parties in the Meng extradition case. The ROC suggests that only junior managers were aware, but Meng's legal counsel have referenced documents showing that very high level managers were directly involved and so had personal knowledge, as one might anticipate in a high-profile case involving a major global customer of the bank.

was not expressly disclosed in the PowerPoint, but the connections between Huawei and Skycom/Canicula were already known to the bank at the time of the original risk reviews, and searches of public records and the bank's own transaction records likely could have revealed the additional details omitted from the PowerPoint.

The indictments allege that HSBC would not have continued to maintain the banking relationship with Huawei had the full facts been known, and as a result the bank was put at risk of potential sanctions violations. This presents questions of fact and law to be addressed at the trial stage should Meng be extradited.

But if the trial court determines that the presentation made by Huawei was not legally deficient for purposes of the bank fraud charges, then that possibly could also present a question as to whether HSBC could or should have faced liability for its failure to conduct adequate KYC due diligence (assuming the bank committed any actual violations of sanctions restrictions as the result of the bank's decisions to continue the banking relationship based on the information known to it at the time based on its own records).

To that point, it appears from the new documentary evidence that the relationship management team responsible for the Huawei relationship within the bank may have intentionally sought to streamline the review process by not attaching the PowerPoint to the risk review reports and by not enquiring further into the details of the relationship between Huawei and Skycom/Canicula. As noted above, all indications suggest that bank management understood and accepted that the two entities were in fact controlled by Huawei, and by requiring Huawei to close those accounts, it appears that HSBC expected this would isolate the potential risks so that the broader relationship with Huawei could continue without interruption.

This reflects the natural tension with a bank – it must comply with applicable sanctions rules, but it also hopes to maintain profitable banking relationships with major customers, so it will try to balance both objectives in each case where it can legitimately do so. But this is a delicate balancing act, which illustrates a fundamental principle that bears underscoring: If the bank errs too far on the side of maintaining the customer relationship, and does not fulfil its obligations under applicable laws and regulations, it can pay a very heavy price in the form of sanctions enforcement penalties. Consequently, if the bank's reputation and continued viability may be placed at risk in a given scenario, it will always err on the side of compliance and possibly even over-compliance.

In this case, the DOJ waived all potential charges against HSBC, including for possible KYC breaches, and elected instead to prosecute only Huawei entities and Meng Wanzhou for bank fraud based on information that appears to have already been known to or available to the bank at the time of the original risk reviews.[278] This thus appears to be a case of selective exercise of prosecutorial discretion on the part of the DOJ based on their assessment of the facts and the law, but this possibly also reflects the broader contours of the US-China relationship, where HSBC may be seen as a more sympathetic party than Huawei.

G. International banks in the China Anti-sanctions Counter-measures Cross-hairs

In any event, as noted above, it is the DOJ, not HSBC, which ultimately is responsible for the framing of the charges against Huawei and Meng. In addition, even though in the China market HSBC touts its China heritage with its origins in Hong Kong and Shanghai, the UK-headquartered bank is still seen in China as a foreign bank, and as such it presents a convenient target for criticism by Chinese pundits for its perceived role in the case, and the suspicion of HSBC's motives and actions in the case run deep in China.

[278] Other criminal offenses are charged in the indictment but these are beyond the scope of this article.

This torrent of condemnation of HSBC could not have come at worse time for the bank, as it came just as China was promulgating the Provisions on the Unreliable Entity List in September 2020 (UEL Provisions), which form an integral part of China's new arsenal of anti-sanctions counter-measures. The UEL Provisions target foreign entities that, among other things, take "discriminatory measures" against a Chinese counterpart in a manner which violates "normal market transaction principles," causing serious damage to the legitimate rights and interests of the Chinese party.[279]

Not surprisingly, some prominent voices in China have opined that HSBC's conduct fits neatly into the parameters of the conduct intended to be proscribed by the UEL Provisions. State-backed Global Times, citing experts, reported in September of 2020 that HSBC could be one of the first foreign entities to be placed on the UEL for its role in the case against Meng.[280] If the bank were so listed it could be subject to a range of severe penalties which could in large measure "blacklist" the bank in China.[281]

No foreign entities have yet been added to the UEL, but that has not stopped some major Chinese companies from taking unilateral action. In November of 2020, China Baowu Steel Group, the world's largest steel company, blacklisted HSBC, claiming that the bank is a high-risk lender.[282] Soon thereafter, however, the Bank of Communications described its 16-year relationship with the lender as "so perfect." HSBC holds 19% of BoComm.[283] HSBC's strong position in trade finance in China is also seen as an important buffer against possible backlash, since unplugging the bank from a company's cash management system likely would prove to be much more difficult than "blacklisting" the bank from capital markets work, particularly since Chinese banks currently are not well-equipped to handle many

[279] UEL Provisions, Art. 2

[280] https://www.globaltimes.cn/content/1201612.shtml

[281] UEL Provisions, Art. 10

[282] https://www.theepochtimes.com/worlds-largest-steel-company-blacklists-hsbc-in-retaliation-for huawei-case_3883940.htm

[283] https://www.nasdaq.com/articles/hsbcs-weak-investment-bank-softens-china-backlash-2021-06-28

types of trade finance transactions.[284]

If China were to add HSBC to the UEL based on its complying with formal document demands from the DOJ, that likely would be viewed by the international community as unnecessarily provocative, and could have a chilling effect on other foreign banks in China and on foreign investors who depend on such banks for their China business operations. As discussed in prior articles in this series, the conduct of HSBC in connection with the DOJ probe into Huawei's activities in Iran, may be considered to be "mandatory minimum compliance," which may be more likely to be viewed as consistent with "normal market transaction principles," which is the applicable standard under the UEL Provisions.

A greater area of potential vulnerability for foreign banks, however, could be their penchant for "over-compliance." According to foreign sanctions experts, it is difficult to quantify how big a problem over-compliance is, but the general consensus is that it is a significant problem among banks globally. The challenge for banks is that the line dividing permitted and proscribed conduct is blurred, often intentionally by US authorities, and because the penalties for violations are so high, the natural impulse of risk-adverse financial institutions is to steer as clear of the indistinct line as possible. This results in some lost business for the banks, but this still represents a rational business decision from their perspective given the extent of the potential penalties. The real burden falls on customers who are being prevented from conducting lawful business. One expert noted privately that banks are becoming increasingly cautious and thus expanding the extent of their over-compliance as a buffer against potential sanctions risks.

Such over-compliance could be seen by Chinese authorities as falling outside the scope of "normal market transaction principles," which could trigger potential liability exposure under the UEL Provisions. The

[284] Ibid.

penalties for such violations can be tailored to the circumstances, so it is not unreasonable to project that at some point, Chinese authorities could select a suitable target for a test case to push back against "over-compliance" in a limited manner.

If managed deftly, this could push foreign banks to pressure US authorities to carve out some clearer safe harbors for non-US dollar business and even for non-restricted US dollar business. This move alone could result in a significant narrowing of the severity of the impact of US sanctions, and could embolden other countries, which share China's strong objections to US unilateral secondary sanctions, to pressure their banks to adopt a similar course of action.

H. Reverse Due Diligence – Know Your Bank (KYB)

Many Chinese banks have similarly adopted a posture of over-compliance and in some cases have taken the concept to extremes, declining all categories of banking services for Chinese entities which are subject to even limited sanctions.

However, Johnson Ma, China head for Dow Jones Risk & Compliance, which has working relationships with the vast majority of Chinese financial institutions, notes that "Chinese banks are increasingly finding more sophisticated ways to provide non-restricted services." With more than 200 Chinese companies or persons on the SDN List, under OFAC's 50 percent rule,[285] that means that there likely are several thousands of entities or individuals in China which are affected, so as indicated by Ma, there needs to be some way to accommodate their non-restricted service requirements, and more Chinese banks now appear

[285] For more information on the OFAC 50 percent rule, see https://www.inhousecommunity.com/article/us-secondary-sanctions-provoke-strong-backlashamong-friends-foes-around-world/

to be finding a way to navigate through the minefield of US sanctions without incurring excess compliance risk exposure.

On the other hand, other China banking experts have noted that different Chinese banks will have different risk profiles, and in some cases a bank may decline certain business that may not be strictly prohibited under US sanctions simply because the cost of compliance management exceeds the potential revenues for the business. It can be more a simple costbenefit analysis rather than an over-abundance of caution.

This suggests that bank customers may wish to conduct their own due diligence on their banks to assess what their risk profile is and to understand how their compliance management policies and practices work. In essence, it would be the reverse of the banks' KYC review of its customers – it would be a "know your bank" or KYB assessment undertaken by bank customers.

For example, notwithstanding the fact that Huawei had a long-standing business cooperation with HSBC, once it became aware that the bank had signed the DPA for its own serious sanctions violations, Huawei may have considered what steps it may take to limit the risk that US authorities could put pressure on the bank to produce evidence that it could use against the company, which has been subject to significant continuing political pressures in the US on several fronts over many years. Similarly, customers of other banks, including domestic Chinese banks, should assess their bank's risk profile and make plans in case they or counterparties are sanctioned, adversely impacting normal transactions.

The objective is not to find a banking partner which will actively conceal illicit transactions. In the wake of the Huawei and ZTE sanctions cases, as well as other high profile compliance matters, Chinese

companies – and the Chinese government – have now recognized the critical importance of proper compliance management, and a financial institution partner which does not take compliance seriously will not be a productive or reliable partner for other purposes.

The primary objective for the corporate banking customer is to ensure that access to otherwise legitimate, non-restricted banking services is not unreasonably curtailed through inappropriate over-compliance. The parallel objective for Chinese authorities may be to put international banks in a position where they will be more circumspect in the scope of their compliance so as not to expand the scope of application of US sanctions beyond their express terms by making the banks choose between over-compliance and unrestricted access to the China market.

The US has effectively enlisted the global banks as front-line enforcers of US sanctions policy to date, but China may be able to skillfully deploy its counter-measures under the UEL Provisions in limited test cases to push back against over-compliance to make the banks rebalance their risk analysis to a degree which may change the overall calculus.

Regardless of how the initial skirmishes between sanctions and counter-measures play out, global banks will clearly be in the cross-hairs. Consequently, the global banks may end up as the indispensable players to help the different governments forge a future sanctions/counter-sanctions détente.

[end]

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