

November 26, 2019

U.S. CONGRESS PASSES THE HONG KONG HUMAN RIGHTS AND DEMOCRACY ACT OF 2019; AWAITING PRESIDENTIAL SIGNATURE

To Our Clients and Friends:

On November 21, 2019, amid mounting tensions between China and Hong Kong, the U.S. Congress passed the Hong Kong Human Rights and Democracy Act of 2019 (the “Bill”)[1] and sent it to the President for his signature. The Bill, which aims to protect civil rights in Hong Kong and to deter human rights violations in the territory (including by punishing those who commit them), was passed by supermajorities in both houses of Congress—the House of Representatives approved the Bill by a 417-1 margin, while the Bill received unanimous support in the Senate.[2] As of this writing, the President has not signed the legislation. On November 22, 2019, President Trump suggested that he might veto the Bill in order to prioritize a trade deal with China, despite the fact that the President’s ability to exercise such authority will be limited because the Bill passed both houses of Congress with rare veto-proof majorities. Although the U.S. Congress has the power to create the law, the U.S. President has sole enforcement authority, and President Trump may still be able to express his displeasure with the Bill by narrowly interpreting the law’s provisions. We would expect that the President could announce his desire to narrowly interpret the law in a signing statement made simultaneous with his signing of the Bill.

The Bill has received widespread support from the Hong Kong protestors, whose activities over the past several months have often included calls on Washington to show its support for their movement. On the other hand, the Bill has been met with strong opposition in Hong Kong and China due to concerns that the legislation could disrupt economic stability in Hong Kong, as well as worsen the existing trade relationship between Hong Kong and the United States.[3] In Hong Kong, Chief Executive Carrie Lam has said that foreign interference in Hong Kong’s internal affairs is “totally unacceptable” and that any sanctions imposed by Washington would only serve to complicate matters further.[4] Beijing has also characterized the Bill as an interference in China’s domestic affairs and has threatened to take “strong countermeasures” against the United States if the Bill is implemented.[5]

Overview of the Hong Kong Human Rights and Democracy Act 2019

If enacted, the Bill would amend the United States-Hong Kong Policy Act of 1992 (the “1992 HK Act”), the primary legislation that governs the United States’ relationship with Hong Kong. The 1992 HK Act statute allows Hong Kong to be treated separately from mainland China on various economic matters such as trade. An earlier version of the Bill had been introduced in 2014 in response to the “Umbrella Revolution” that took place in Hong Kong that year;[6] and an updated version was again introduced in 2017. However, the Bill only gained legislative traction this year as violence in Hong Kong escalated.

The protests, which have spanned more than 22 weeks, originally began in June. They were spurred by a now-withdrawn bill that would have allowed extraditions from Hong Kong to mainland China, among other jurisdictions, a move that many Hong Kongers viewed as an attempt to circumvent the “one country, two systems” rule and erode human rights in the territory.[7] The protests have since grown into a bigger movement, including broader demands for democracy, such as universal suffrage and the ability for Hong Kongers to elect its own leaders, as set out under the Basic Law of the Hong Kong Special Administrative Region (the “Basic Law”).[8] Other demands that the protestors have made also include calls to establish an independent commission of inquiry to look into alleged police brutality against protestors.

The Bill, if signed into law, will increase the United States’ scrutiny over the situation in Hong Kong. According to the Bill, the objective of the legislation is to “reaffirm the principles and objectives set forth in the [1992 HK Act]”. [9] The Bill also calls for Hong Kong to remain “sufficiently autonomous from the People’s Republic of China to ‘justify treatment under a particular law of the United States, or any provision thereof, different from that accorded to the People’s Republic of China.’” [10] Similar to the 1992 HK Act, the Bill requires an annual assessment of Hong Kong’s autonomy to determine whether it should continue to be treated differently from mainland China. Additionally, the Bill introduces the potential imposition of U.S. sanctions in response to human rights violations in Hong Kong.

The following is a summary of the key provisions of the Bill:

Annual Certification of Hong Kong

Under the provisions of the Bill, on an annual basis the U.S. Secretary of State will be required to report to the Congress the U.S. Government’s view as to whether Hong Kong retains sufficient autonomy to merit its continued enjoyment of economic treatment by the United States distinct from (and in almost all cases more favorable than) the treatment provided to the mainland.[11] Furthermore, the report must include “an assessment of the degree of any erosions to Hong Kong’s autonomy” that have an impact on a number of matters such as commercial agreements, sanctions enforcement, export controls, and any other agreements and forms of exchange involving dual-use, critical, or other sensitive technologies as a result of any action taken by the Chinese government that is inconsistent with its commitments under the Basic Law or the Sino-British Joint Declaration of 1984.[12] Importantly, under the Bill a positive assessment that allows the continued differentiated treatment between Hong Kong and mainland China does not require that Beijing allow for further democratization in Hong Kong.

Annual Report on Violations of U.S. Export Control Laws and UN Sanctions in Hong Kong

The Bill also requires the U.S. Secretaries of the Treasury and State to submit a separate joint report to Congress that includes:

- a. an assessment of the nature and extent of violations of U.S. export control and sanctions laws occurring in Hong Kong;

- b. an identification of items reexported from Hong Kong in violation of U.S. export control and sanctions laws, including the countries and persons to which the items were reexported to, and how such items were used;
- c. an assessment of whether sensitive dual-use items subject to U.S. export control laws are being transhipped through Hong Kong and used to develop mass surveillance programs in China;
- d. an assessment of whether China has been using Hong Kong's status as a separate customs territory to import goods into China from Hong Kong in contravention of U.S. export control laws through certain schemes or programs that may exploit Hong Kong as a conduit for controlled sensitive technology;
- e. an assessment of whether Hong Kong has adequately enforced sanctions imposed by the United Nations ("UN");
- f. a description of the types of goods and services transhipped or reexported through Hong Kong in violation of UN sanctions to North Korea, Iran, or other high risk jurisdictions or entities; and
- g. an assessment of whether any shortcomings in Hong Kong's enforcement of sanctions and export controls necessitates the assignment of additional personnel to the U.S. Consulate of Hong Kong.[13]

Promulgation of U.S. Sanctions in Response to Human Rights Violations in Hong Kong

The Bill empowers the President to impose sanctions on individuals deemed responsible for "the extrajudicial rendition, arbitrary detention, or torture of any person in Hong Kong" or "other gross violations of internationally recognized human rights in Hong Kong." [14] The potential sanctions that could be imposed are varied, and could include asset blocking which would effectively blacklist any identified party from participating in transactions with U.S. persons. This would be akin to adding such a party to the U.S. Specially Designated Persons and Blocked Persons List (the "SDN List"), freezing any property owned by such a party in the United States, and prohibiting any transactions involving such a party that has a U.S. nexus.[15] This would also greatly limit the designated party's ability to engage in U.S. Dollar trade (which almost always requires clearing through a bank under U.S. jurisdiction).

Other types of sanctions that could be imposed include the revocation or denial of U.S. visas currently issued or to be issued to identified individuals.[16]

On the other hand, the Bill provides that visa applications from Hong Kong applicants will not be denied on the basis of "politically motivated arrest, detention, or other adverse government action." [17]

Implications of the Hong Kong Human Rights and Democracy Act 2019

Potential Impact on Hong Kong Companies

Under the 1992 HK Act, Hong Kong's distinct trading status from China has meant that it enjoys protection from punitive tariffs that the United States has imposed on China, including the tariffs that are currently in force as a result of continuing U.S.-China trade disagreements. If the Bill becomes law and Hong Kong's protected status is eroded or removed, the impact could be significant for both Hong Kong and U.S. companies. As discussed, the Bill requires the U.S. Secretary of State to assess and certify on an annual basis, whether Hong Kong should continue to enjoy its special trade benefits vis-à-vis the United States. An adverse assessment could potentially threaten this status. Hong Kong is currently the United States' 21st largest trading partner, with goods and services trade with Hong Kong amounting to nearly \$70 billion in 2018.[18] Any limitations on trade imposed on Hong Kong could also threaten its reputation as a global financial hub – which has relied, at least in part, on its preferential trading relationship with counterparties including the United States. More than 1,300 U.S. firms currently operate in Hong Kong, and nearly every major U.S. financial firm maintains a presence in the territory, with billions of dollars of assets under management.[19] Hong Kong also risks losing ready access to U.S. technologies that are more tightly controlled when exported to China as the Bill could result in the United States imposing the same export controls on Hong Kong as it places on China.

Potential Impact on U.S. Companies

The impact of the Bill on the United States could be broader than trade-related losses with respect to Hong Kong. The Bill could stall trade talks between the United States and China and derail plans between the two nations to complete a “phase one” trade deal that had been announced earlier in November.[20] Even more significantly, the Bill may invite China to impose its long-threatened countersanctions against U.S. companies. Following its recent favourable World Trade Organization decision against the United States, China may find justification to impose \$3.6 billion in tariffs against the United States.[21] The Bill could spur China to place additional sanctions on key U.S. imports such as aircraft, services, and wider manufacturing. Earlier in June 2019, aerospace manufacturer Boeing was reportedly in talks with Chinese air carriers for a potential \$30 billion deal for the sale of wide-body aircraft, which would be one of the largest orders ever placed.[22] The deal has been threatened by the ongoing trade war, and may be subject to further delay or even cancellation if the Bill becomes law and dealings with U.S. firms become more sensitive for major Chinese entities.[23]

Perhaps most aggressively, China could go as far as to proscribe some U.S. companies from doing business in China – effectively placing U.S. firms on a Chinese blacklist. Beijing has threatened such a response in the past but has yet to fully enact such a consequence. China announced the beginnings of such a list earlier in 2019 in response to the U.S. restrictions placed on Huawei Technologies Co.[24] At that time, China announced plans to establish an “unreliable entity” list that targets foreign companies or persons who China deems as severely damaging the legitimate interests of Chinese companies by, amongst others, blocking or cutting off supply chains for “non-commercial reasons.”[25]

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- [1] Summary of 116th Congress (2019-2020) (Nov. 21, 2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1838/summary/55>
- [2] See Jacob Pramuk, *Congress passes Hong Kong rights bill as Trump tries to strike China trade deal*, CNBC (Nov. 20, 2019), <https://www.cnbc.com/2019/11/20/house-passes-hong-kong-rights-bill-amid-trump-china-trade-talks.html>
- [3] See Tobias Hoonhout, *China Calls Senate’s Passing of Hong Kong Human Rights and Democracy Act ‘Very Disappointing’*, National Review (Nov. 20, 2019), <https://www.nationalreview.com/news/china-calls-senates-passing-of-hong-kong-human-rights-and-democracy-act-very-disappointing/>
- [4] See Iain Marlow and Daniel Flatley, *What the U.S. Congress Is and Isn’t Doing About Hong Kong*, Washington Post (Nov. 18, 2019), https://www.washingtonpost.com/business/what-the-us-congress-is-and-isnt-doing-about-hong-kong/2019/11/18/d51ab226-0a19-11ea-8054-289aef6e38a3_story.html
- [5] See *China warns U.S. of “strong countermeasures” to looming legislation on Hong Kong*, CBS News (Nov. 21, 2019), <https://www.cbsnews.com/news/china-hong-kong-human-rights-and-democracy-act-2019-strong-countermeasures-beijing-today-2019-11-21/>
- [6] Hong Kong Human Rights and Democracy Act, S. 2922
- [7] See *Senate Passes Bill Supporting Human Rights in Hong Kong as Protests Show No Sign of Abating*, Associated Press (Nov. 20, 2019), <https://time.com/5733673/senate-human-rights-democracy-act-hong-kong/>
- [8] See *Hong Kong’s Protests Explained*, Amnesty International (undated), <https://www.amnesty.org/en/latest/news/2019/09/hong-kong-protests-explained/>
- [9] Section 3 of the Hong Kong Human Rights and Democracy Act of 2019, S. 1838
- [10] *Id.*
- [11] *Id.* at Section 4
- [12] *Id.*
- [13] *Id.* at Section 5.
- [14] *Id.* at Section 7.
- [15] *Id.*
- [16] *Id.*

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- [17] *Id* at Section 4.
- [18] Office of the United States Trade Representative Hong Kong Report.
- [19] United States Department of State 2019 Hong Kong Policy Act Report.
- [20] *See US and China 'getting close' to trade deal, White House economic advisor Kudlow says*, CNBC (Nov. 15, 2019), <https://www.cnbc.com/2019/11/15/us-china-getting-close-to-trade-deal-white-house-advisor-kudlow.html>
- [21] *See Robert Delaney, China wins WTO case to sanction US\$3.6 billion in US products following anti-dumping dispute*, South China Morning Post (Nov. 2, 2019), <https://www.scmp.com/news/china/article/3036010/china-wins-wto-case-sanction-us36-billion-us-trade>
- [22] *See Boeing and Chinese airlines in talks for US\$30 billion mega-deal that trade war could derail*, South China Morning Post (Jun. 6, 2019), <https://www.scmp.com/news/china/article/3013289/boeing-and-chinese-airlines-talks-us30-billion-mega-deal-trade-war-could>
- [23] *See Explainer: U.S.-China trade war – the levers they can pull*, Reuters (Jun. 6, 2019), <https://www.reuters.com/article/us-usa-trade-china-levers-explainer/explainer-u-s-china-trade-war-the-levers-they-can-pull-idUSKCN1T62KY>
- [24] Gibson Dunn Client Alert (May 20, 2019), *Citing a National Emergency, the Trump Administration Moves to Secure U.S. Information and Communications Technology and Service Infrastructure*, <https://www.gibsondunn.com/?search=news&article-type=publications&s=huawei&year=&practice%5B%5D=1680>
- [25] *See What We Know About China's 'Unreliable Entities' Blacklist*, Bloomberg News (Jun. 4, 2019), <https://www.bloomberg.com/news/articles/2019-06-04/understanding-china-s-unreliable-entities-blacklist-quicktake>



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