

The Risks for International Business under the Hong Kong National Security Law

Dennis W. H. Kwok, Barrister at Law

Former Legislative Councilor of Hong Kong SAR representing the Hong Kong legal profession (2012–2020)

Senior Fellow, Ash Center for Democratic Governance and Innovation,
Harvard University Kennedy School

Elizabeth Donkervoort

Program Director for East Asia, American Bar Association
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Tony Saich, *Editor*

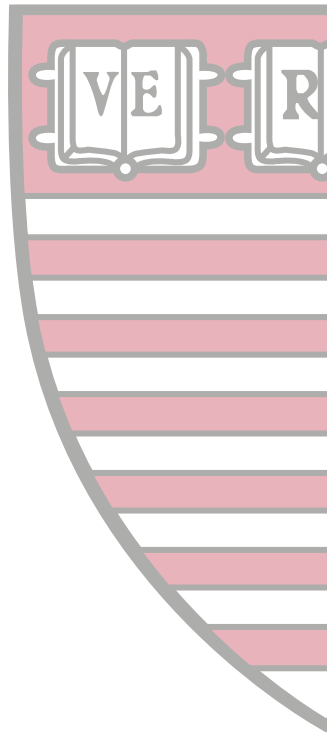
July 2021



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*The author is qualified as a barrister in Hong Kong SAR.

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A PUBLICATION OF THE

Ash Center for Democratic Governance and Innovation

Harvard Kennedy School
79 John F. Kennedy Street
Cambridge, MA 02138
617-495-0557
ash.harvard.edu

About the Authors

Dennis Kwok was elected as the member of the Legislative Council (LegCo) representing the Hong Kong legal profession in 2012. The legislature in Hong Kong is divided into geographical seats and functional seats. Each member of the legal profession has one vote and is entitled to elect their representative in LegCo. Kwok succeeded veteran lawmaker Dr. Margaret Ng who held the LegCo legal seat for 16 years. Previous occupant of the legal seat includes Mr. Martin Lee, S.C., father of the democratic movement in Hong Kong. In 2016, Kwok was re-elected for a second four-year term with a 69% majority of votes from the legal profession.

In LegCo, the main policy areas that Kwok focused on included access to justice, human rights protection and the independence of the judiciary in Hong Kong. Kwok oversaw the development of legal policy issues including the independence of prosecution decisions, the development of the legal profession and legal education.

Kwok accepted numerous speaking engagements outside Hong Kong to discuss geopolitical issues related to the region. These engagements include the Asia Society, New York City Bar and the Council on Foreign Relations (New York), the United Nations Business and Human Rights Forum (Geneva), an European Parliament Subcommittee (Brussels), German Marshall Fund, Georgetown University and the Heritage Foundation (Washington DC), Venstre (Norway), the Stockholm Free World Forum (Sweden) and the Lowy Institute (Australia). In his private legal practice, Kwok specializes in cross-border commercial disputes and international arbitration. He obtained his LLB from King's College London. He qualified as a solicitor in England & Wales (2003) and as a barrister in Hong Kong (2006).

Elizabeth Donkervoort is currently the Program Director for the American Bar Association's Rule of Law Initiative in East Asia, where she oversees programming to strengthen access to justice and rule of law. Donkervoort has a decade of experience working in the democracy and governance sphere, working with grassroots organizations in some of the world's most restrictive environments to strengthen their organizational capacity, strategic planning, and security. For five years she was based in Hong Kong where she oversaw the International Republican Institute's civil society capacity building programs in the People's Republic of China and Laos People's Democratic Republic (2015-2016) helping develop the Institute's largest collection of training curriculum and resources for activists, organizations, and citizen movements. Prior to IRI, Donkervoort helped administered Freedom House's Emergency Assistance Program, providing support to threatened human rights defenders and civil society organizations around the globe.

Donkervoort is admitted to the bar in both Alberta, Canada and New York, USA. She worked with Brownlee LLP as a member of their Municipal Law Practice, providing legal advice and assistance to local governments in Alberta and representing clients before all levels of court up to the Court of Appeal, as well as administrative tribunals. Donkervoort received her JD and Master of Asia Pacific Policy Studies from the University of British Columbia and an Honours Bachelor degree from the University of Toronto.

Abstract

Hong Kong, a former British colony, has been a special administrative region of the People's Republic of China (PRC) since 1997. The National People's Congress promulgation of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Hong Kong National Security Law, HK NSL) on June 30, 2020, has a substantial impact on Hong Kong's constitutional structure known as "One Country, Two Systems." Enshrined under the Basic Law (Hong Kong's constitution under the Sino British Joint Declaration), One Country, Two Systems guaranteed that Hong Kong would exercise a high degree of autonomy—with its own political, economic, and legal systems—based on the rule of law. The HK NSL has been in operation for one year. This article analyzes the impact of the HK NSL on Hong Kong's legal system and, in particular, its civil law jurisprudence. The article also explores the new legal risks and challenges international businesses face when dealing with PRC businesses or matters impinging on national security in mergers and acquisitions, commercial transactions, and civil disputes. These issues will be examined against the current geopolitical landscape and rising tensions between the PRC and other nations.

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Introduction

Businesses looking for guidance on how the Hong Kong National Security Law (HK NSL) will affect their operations may be inclined to review how Hong Kong courts have interpreted the People's Republic of China's (PRC) own 2015 National Security Law (PRC NSL) in commercial contexts. In doing so, companies should proceed with caution.

Hong Kong courts have had few occasions to consider issues related to national security and state secrets in the commercial/regulatory context and even fewer opportunities to review the PRC's definition of those terms. In the limited case law available, Hong Kong courts have in the past rejected a party's attempts to avoid disclosure of information based upon claims that the disclosure would harm the PRC's national security.

In one such case decided in 2015,¹ the High Court of Hong Kong rejected an argument made by Ernst & Young to resist compliance with a disclosure order made by the Hong Kong Securities and Futures Commission on the basis that the requested documents were, *inter alia*, state secrets and therefore PRC law prohibited disclosure. The disclosure order required Ernst & Young to disclose audit papers and correspondence in connection with a PRC-based company. The High Court rejected Ernst & Young's argument and found there was no evidence to support the contention that the requested documents constituted "state secrets" under the relevant PRC law.²

Courts in the United States have taken a much harder line against the application of PRC law with respect to state secrets. In *BDO China Dahua CPA Co., Ltd., et al. (BDO China)*, the PRC affiliates of four major banks raised a similar defense as Ernst & Young. They were censured for failing to produce documents pursuant to Section 106 of the Sarbanes-Oxley Act of 2002.³ While acknowledging the overly broad scope of "state secrets" under PRC law, the US administrative law judge in *BDO China* rejected the defendants' arguments, stating compliance with PRC's State Secrecy Law was no defense to noncompliance of US law. The judge had "no sympathy" for the defendants, who were "between a rock and a hard place" of their own choosing.⁴

Ordinarily, case law such as *Ernst & Young* may provide instructive authority for businesses looking for legal certainty. But the HK NSL has fundamentally changed the legal landscape in Hong Kong, upending previously settled judicial precedents.

The method of its adoption and the framework of oversight established by the HK NSL and other recent electoral reforms in Hong Kong⁵ brings the once semiautonomous region almost fully into the PRC's unified party-governance structure. To date, an analysis on how the HK NSL could impact the civil jurisdiction of the Hong Kong courts, and commercial transactions involving PRC entities, is lacking. This article will explore whether Hong Kong courts have jurisdiction to decide what constitutes a state secret or national security concern in civil disputes, as well as the potential impact of national security issues on international businesses operating in the region or having dealings with PRC entities.

There is a tendency within the commercial sector to view laws such as the HK NSL as primarily aimed at curbing political dissent. This is a dangerous assumption in light of the current environment in the PRC, where the Chinese Communist Party (CCP) is at the heart of the political, legal,⁶ and private sectors.⁷ In the PRC anything, including civil disputes, can become "political" or of a "national security" nature. In the PRC, national security concerns can touch on any aspect of the economy, from finance to energy to technology to infrastructure (further analyzed below).⁸ As cases such as *BDO China* and *Ernst & Young* demonstrate, the PRC's expansive definition of national security and state secrets poses considerable challenges to statutory disclosure obligations in multiple jurisdictions. The international community can expect further change from the status quo as the CCP expands its absolute authority in the private business sector, in the PRC, in Hong Kong, and beyond. The abrupt halt to

the Ant Financial IPO in Hong Kong is one such example.⁹ Already, the uncertainty caused by the HK NSL is leading some international companies to choose Singapore over Hong Kong as the Asian dispute resolution center for arbitration.¹⁰

So far, substantial attention has been paid to the impact the HK NSL has on judicial independence, the One Country, Two Systems framework, and the harsh conditions defendants charged under the HK NSL face. This article argues that the central question is not whether Hong Kong courts are still independent in the traditional sense under established rule of law principles. Rather, with the overarching authority to supervise and decide on matters of national security fully vested in the Central People's Government (CPG) under the new HK NSL legal framework, the jurisdiction for Hong Kong courts to independently decide on issues of national security is highly limited. Under the new framework, national security issues will be treated much in the same way that national defense and foreign affairs do; that is, matters of national security are outside the authority and jurisdiction of Hong Kong SAR (save for most criminal offenses committed in Hong Kong) and are exclusively within the power and authority of the CPG.¹¹

The National Security Law for Hong Kong

To put matters into context, we must first understand the extremely unusual nature of the HK NSL. Hong Kong is a Special Administrative Region of the PRC via the 1984 China-United Kingdom Joint Declaration on the Question of Hong Kong (Joint Declaration), an international treaty pursuant to which the United Kingdom transferred sovereignty over Hong Kong back to the PRC on July 1, 1997, and the PRC promised Hong Kong would retain a high degree of autonomy.

The basis of what is known as the One Country, Two Systems doctrine governing Hong Kong is set out in its Basic Law—Hong Kong's de facto constitution passed by the National People's Congress Standing Committee (the NPCSC) pursuant to the Joint Declaration. Under this system, Hong Kong's legislative body, the Legislative Council, has the authority to establish laws, including for national security. Article 23 of the Basic Law obligates the Hong Kong government to enact laws under its own authority, prohibiting, inter alia, "any act of treason, secession, sedition, subversion against the CPG or theft of state secrets."¹²

Notwithstanding Article 23 of the Basic Law, the NPCSC directly promulgated the HK NSL on June 30, 2020. The HK NSL empowers the CPG to establish an Office for Safeguarding National Security within Hong Kong, which oversees the implementation of national security activities within Hong Kong and can recommend cases to be remanded to courts in the PRC,¹³ eroding Hong Kong's high degree of autonomy in breach of the fundamental principle underlying the One Country, Two Systems framework promised under the Joint Declaration. The means by which the HK NSL was adopted and the oversight by the CPG thus create a constitutional rupture not anticipated by the Basic Law. As such, norms and practices previously accepted in Hong Kong's legal system must be revisited.

Who Has Jurisdiction to Consider National Security Issues in Civil Disputes?

Prior to the adoption of the HK NSL, it would be assumed that Hong Kong courts had the jurisdiction to decide all cases pursuant to its judicial powers under the Basic Law (Articles 80 and 84). The promulgation of the HK NSL has fundamentally changed Hong Kong's original constitutional setup. Articles 40, 41, and 45 of the HK NSL clearly confer jurisdiction on Hong Kong courts to try criminal offenses arising under the HK NSL, with the notable exception of cases of great severity, imminent threat, or

involving “external elements.”¹⁴ The relevant language is clear: Hong Kong courts have the authority to deal with matters of national security that are *criminal* in nature. But the HK NSL is silent on whether the Hong Kong courts have jurisdiction to hear *civil* proceedings that involve matters of national security and/or state secrets. Given the law’s vagueness, if a PRC conglomerate or state-owned enterprise (SOE) makes a similar claim as Ernst & Young, would courts in Hong Kong have jurisdiction to hear it and make a judicial determination?

To answer the question, guidance from the State Council, the top administrative authority of the PRC, is instructive. The State Council provides guiding principles on how PRC laws, including the Basic Law and HK NSL, are to be interpreted and implemented.

In the same year as Hong Kong’s 2014 Occupy Central movement, the State Council issued a white paper titled “The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region,” wherein it asserted that the PRC retains “comprehensive jurisdiction” over Hong Kong and the Hong Kong SAR has no “residual powers” of its own.¹⁵ Accordingly, any Hong Kong official organs of power, including the judiciary, does not have any authority unless explicitly provided for by the CPG. Much like national defense and foreign affairs under the Basic Law framework, matters of national security are strictly under the CPG’s authority and jurisdiction.¹⁶ This perspective has been echoed by PRC state media.¹⁷ Put another way, based on the white paper, all of Hong Kong SAR’s powers emanate from and are under the CPG’s supervisory control. Thus, if the CPG does not specifically grant a power to the Hong Kong SAR, then that power is retained by the CPG. Because the HK NSL explicitly provides jurisdiction to Hong Kong courts to hear (most) criminal cases under the law but is silent as to civil cases involving national security, it follows that Hong Kong courts have no jurisdiction to preside over civil proceedings involving national security issues, and/or the Hong Kong courts shall have to defer such matters to the CPG for determination through the mechanism under the HK NSL (analyzed below).

This interpretation is supported by recent case law. The Court of Final Appeal (CFA), Hong Kong’s highest court, recently held in *HKSAR v. Lai Chee Yin* (Jimmy Lai case) that the Hong Kong courts do not have the jurisdiction to consider legal challenges to the HK NSL based on grounds that it contravened the Basic Law or the International Covenant on Civil and Political Rights as applied to Hong Kong.¹⁸ The CFA also laid down extremely high hurdles for someone who is charged under the HK NSL to obtain bail. The CFA decision in the Jimmy Lai case effectively establishes that HK NSL supersedes Hong Kong’s de facto constitution and its protection of human rights. Even though the Basic Law and the HK NSL are both enacted by the National People’s Congress, the latter effectively trumps the former. It is therefore unclear how one could assert the supposed guarantees of human rights under Article 4 of the HK NSL. There are also provisions within the HK NSL itself that further limit the powers of Hong Kong courts. Article 62 provides that where local laws are inconsistent with the HK NSL, the HK NSL governs. Local laws include the Hong Kong Bill of Rights Ordinance. Also, Article 14 prohibits judicial review of decisions of the National Security Committee created under the HK NSL (in direct contravention to the right to judicial review under Article 35(2) of the Basic Law). As analyzed below, Article 47 gives wide powers to the chief executive (hence the CPG) to decide what amounts to national security and/or state secrets, and this determination is binding on the Hong Kong courts. These HK NSL provisions, when combined with the effect of the CFA decision in Jimmy Lai, mean there is no legal avenue to challenge the HK NSL or its implementation by the National Security Committee.

Under Article 3 of the HK NSL, the CPG has overarching responsibility for Hong Kong’s national security affairs. Hong Kong’s chief executive is accountable to the CPG on all matters of national security and is required to submit annual reports.¹⁹ Given the broad and expansive nature of national security (as analyzed below), this represents a fundamental change to the legal landscape in Hong

Kong. Two foreign nonpermanent judges from the United Kingdom and Australia have either resigned or declined to be reappointed to sit on the CFA.²⁰ The use of prominent foreign judges was an important constitutional tradition for the Hong Kong legal system. While it is likely that foreign judges from other jurisdictions would not be allowed to hear HK NSL,²¹ the gradual loss of this tradition signals a worrisome trend over the implementation of the HK NSL.

The HK NSL creates a framework where political appointees have the ultimate authority on national security issues with no checks and balance. Article 44 of the law gives the chief executive, who is accountable to the CPG, the power to create a list of designated judges for all Hong Kong courts, from magistrates to judges on the CFA. Only those on the list can preside over HK NSL cases. This list of judges is most certainly vetted by the National Security Committee, which the chief executive chairs. The term of office of the designated judges is limited to one year. This is a highly unusual arrangement to say the least. Designated judges may also be removed at any time on the grounds of his/her statements or behavior.²² This arrangement arguably constitutes the most serious systemic intrusion into judicial independence. In addition, the PRC state media is increasingly vocal and assertive over Hong Kong judicial decisions. This creates enormous political and social pressure on the Hong Kong judiciary.

In a recent meeting between the Hong Kong chief justice and the president of the Supreme People's Court in Beijing, President Zhou Qiang expressed that he expects the Hong Kong judiciary to thoroughly and accurately implement the PRC Constitution, Basic Law, and HK NSL and to comprehensively implement the “patriots administering Hong Kong” principle (patriotism is defined by the CPG).²³

What Is “National Security”?

The HK NSL does not define “national security,” nor do the implementing regulations made under Article 43 of the HK NSL. The definition currently being applied by Hong Kong police and prosecutors is sufficiently broad as to encompass participation in journalistic activities and democratic primary elections. Following from the above analysis, understanding what constitutes “national security” within the PRC legal framework will be instructive for individuals and companies continuing to operate in Hong Kong and the PRC in light of the HK NSL. In other words, the HK NSL must be understood and interpreted within the context of the broader PRC legal framework.

PRC law provides an expansive definition of national security and does not confine the concept to traditional topics such as acts of terrorism, separatism, or extremism. The PRC definition also encompasses “non-traditional security fields such as economic security, cultural security, societal security, science and technology security, cybersecurity, environmental security, resource security, nuclear security, and the security of overseas interests.”²⁴ The PRC NSL requires all actors to safeguard key economic interests including industries vital to the national economy, key industrial sectors, key infrastructure projects, and key construction projects:²⁵

- finance
- resources and energy
- food safety
- culture²⁶
- technology
- cybersecurity²⁷
- ecological and environmental protection
- nuclear technology
- exploration and use of outer space, international seabed areas, and polar regions

This expansive definition of national security and application across industries has been echoed by top government officials in Hong Kong, including the chief secretary (who is a member of the National Security Committee).²⁸ Importantly, both the PRC NSL and HK NSL apply to state-owned as well as private entities. With that in mind, what are the risks to international companies in the context of commercial transactions, civil litigation, or international arbitration proceedings?

HK NSL Impact on International Business

International businesses with operations and interests in the PRC and Hong Kong face new risks and challenges because of the HK NSL. First, the extraterritorial reach of the law under Articles 37 and 38 means that individuals and companies can be criminally liable for documents, work, or activities conducted outside of Hong Kong that nevertheless “endanger” PRC national security. This could include receiving information about meetings if they fall within a key industry,²⁹ purchasing documents that later become classified as state secrets,³⁰ or hosting a website or server outside Hong Kong that contains content that violates the HK NSL.³¹ Similarly, given the breadth of industries subject to national security concerns by the PRC, disputed intellectual property claims over a piece of technology could amount to national security or state secrets.

The recent raid on local news outlet Apple Daily, which included freezing HK\$ 18 million in assets spread over three affiliated companies, [suspending trade in shares of Next Digital](#) (Apple Daily’s parent company), and arresting five senior management staff, highlights the breadth of authorities’ powers under the law as well as the potential punishments provided for by the NSL HK. As of this writing, none of the specific news articles alleged by Hong Kong authorities to have violated the HK NSL have been identified. The future of Apple Daily is in serious doubt. According to the National Security Department of the Hong Kong Police, these news articles [date back to 2019](#), before the HK NSL was promulgated, and that even the [sharing of those articles could be a violation of the law](#).³² This case highlights that even journalistic activities could be regarded as endangering national security in the eyes of the Hong Kong authorities. International media outlets operating outside of the PRC and Hong Kong are also caught under the HK NSL.

In the PRC, trade secrets often overlap with state secrets, especially in the context of SOEs or in the context of the PRC’s regional economic development strategy or the country’s competitive edge in the international market.³³ The consequences for “unlawfully”³⁴ providing state secrets to a foreign institution, organization, or individual outside Hong Kong or the PRC can be harsh, carrying a maximum sentence of life in prison.³⁵ In a civil dispute or arbitration, a party might refuse to disclose evidence on the basis that to do so could violate the HK NSL or resist deployment of such evidence on the same basis. In addition, a SOE or PRC conglomerate could threaten an opposing party that it is disclosing evidence and information to a foreign court or tribunal that constitutes “state secrets or intelligence” in contravention of the HK NSL.

In international commercial arbitration, there is a procedural mechanism for tribunals to exclude evidence on grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the arbitral tribunal determines to be compelling.³⁶ In investment treaty arbitrations between states, the arbitral tribunal would usually determine whether a claim to nonproduction of the documents is well taken. Some treaties permit a state to withhold documents on national security grounds, and some of those treaties make that a self-judging exercise, that is, the state withholding the evidence judges for itself whether it must withhold the documents.³⁷ In light of the HK NSL, it would be interesting to see how these issues related to national security play out when it comes to the enforcement of arbitral awards where an application needs to be made to Hong Kong courts.

Considering the reality in Hong Kong and the PRC today, it is highly likely that Hong Kong courts will have to defer to the Hong Kong government, which is accountable to the CPG, on national security issues arising in civil disputes. This structure is reinforced by Article 47 of the HK NSL that states “the courts of the Hong Kong Special Administrative Region shall obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves state secrets when such questions arise in the adjudication of a case. The certificate shall be binding on the courts.”³⁸ This provision is, in our opinion, deliberately worded wide enough to cover any proceedings in Hong Kong. It could provide an important procedural advantage to an SOE or PRC conglomerate that raises the issue of national security in a case. The PRC entity in question could foreseeably lean on the Hong Kong government to issue a certificate, which would in turn have to take instructions from the National Security Committee. With the ultimate power of interpretation of the HK NSL vested in the NPCSC, together with the overarching authority of the CPG, whether or not an issue is indeed a national security issue is not a legal determination but a political one. Going forward, there is a very real possibility that cases involving national security issues in civil and commercial disputes, similar issues as those in Ernst & Young, will be dealt with quite differently under the HK NSL.

Beyond the direct application of the HK NSL to companies with interests and activities involving Hong Kong, commercial disputes could arise out of the merger and acquisition of companies whose operations and business fall within the ambit of national security but may not be apparent at the time the deal was signed. As discussed above, the HK NSL is silent as to Hong Kong courts’ jurisdiction in civil disputes involving national security issues, and there is a very real possibility those disputes would be considered outside the authority and jurisdiction of the Hong Kong courts. Commercial parties should think much harder in deciding what choice of law and dispute resolution clauses they should adopt in future deals involving key economic sectors. Again, to fully understand the scope of national security under the HK NSL, it is important to read it in the context of related PRC laws.

Geopolitical tensions also play a role in defining whether a commercial matter is a national security issue. Mounting trade disputes between Australia and the PRC,³⁹ and global disputes and bans regarding 5G and Chinese technology companies such as Huawei and ZTE (and many others), have created a range of challenges for companies seeking to balance operations in the PRC and the United States. Both the PRC and the United States have increased state scrutiny of mergers and acquisitions on national security grounds, and the European Union has frozen the ratification process of its market access treaty with the PRC.

Recent legislation adopted by the CPG further suggests that commercial entities could be caught engaged in national security issues. First, the PRC Data Security Law, adopted on June 10, 2021, categorizes data and data flows as national security issues and provides officials with broad authorities to punish companies and their employees for illegal transferring data.⁴⁰ Second, the NPCSC recently revised its criminal law to target corporate espionage and penalize anyone for “stealing, spying into, buying or unlawfully supplying business secrets for overseas institutions, organizations, and individuals.”⁴¹ Finally, the PRC also issued new measures expanding its national security review of foreign investments that became effective in January 2021.⁴² As tension between China and other countries continues to rise, it is foreseeable that national security issues would surface in a far greater number of areas than before.⁴³ In a related development, the United States and other nations have expressed growing concerns regarding supply chain dependence on the PRC, leading some companies to consider offshoring manufacturing away from the PRC.⁴⁴ We have yet to see the full extent of this potential relocation of supply chains due to the ongoing pandemic. However, the Hong Kong American Chamber of Commerce has conducted a recent survey showing more than 40% of US expatriates are considering leaving Hong Kong.⁴⁵ In the process of relocation, individuals and international businesses should be careful of inadvertently

transferring state and/or trade secrets or intelligence to foreign entities in breach of Article 29 of the HK NSL.

The dynamics of this decoupling are complex and made more so by recent legislation enacted by the NPCSC in June 2021, in a likely response to the passage of the US Strategic Competition Act. As discussed above, under the PRC Data Security Law, companies face heavy penalties for transferring “sensitive” data outside PRC borders. When companies are requested by overseas judicial or law enforcement authorities to hand over data, such data may not be transferred without the permission of PRC authorities.⁴⁶ Companies, and their employees, could face legal challenges in the PRC for complying with regulations and policies imposed by foreign countries.⁴⁷ On the other hand, while some companies move their commercial operations away from the PRC, there is an increasing level of investments in PRC financial markets by Wall Street firms such as Goldman Sachs, Blackrock, and JP Morgan. The financial sector is of course a key economic sector that comes under the umbrella of national security in the PRC. However, in light of these legal and regulatory changes, international businesses will find it increasingly difficult to simultaneously comply with laws and regulations in both the PRC and elsewhere. The same dilemma faced by the parties in the BDO China case will be much more acute in today’s legal environment.⁴⁸ This tension would probably have the most significant impact on the finance and technology sectors due to the interdependency between the US and the PRC.

Foreign business executives have been detained or banned from leaving the PRC for economic disputes⁴⁹ and, in some cases, for crimes committed by their clients⁵⁰ or family members.⁵¹ Under the recent amendments to Hong Kong’s [Immigration Ordinance](#), authorities can impose exit bans on anyone. The Hong Kong Bar Association has warned against the unfettered powers given to the director of immigration under the amended ordinance,⁵² which will come into effect on August 1, 2021.

Conclusion

The balance between genuine national security concerns and civil liberties is an ongoing challenge in most countries, including liberal democracies. However, the promulgation of the HK NSL is a significant change from where the region was a year ago and has far-reaching consequences. Supporters of the HK NSL often ignore the nature of the HK NSL, which is fundamentally different in both form and substance when compared to similarly named legislations in liberal democratic countries. Its method of enforcement by the authorities is also very different. And we are still in the early days.

In a recent article published by the PRC legal scholar Tian Feilong (who contributed to the drafting of the HK NSL), Tian described the HK NSL as bringing about the structural expansion of the Hong Kong constitutional order and legal environment.⁵³ Mainland legal scholars like Tian have borrowed from the ideas of German jurist Carl Schmitt in arguing that “laws are designed to institutionalize the primacy of politics and sovereignty over the rule of law” or individual rights as understood under the common law.⁵⁴ They have also argued that law is an extension of politics and is used to achieve PRC national and geopolitical objectives. The HK NSL should be seen in the same light.

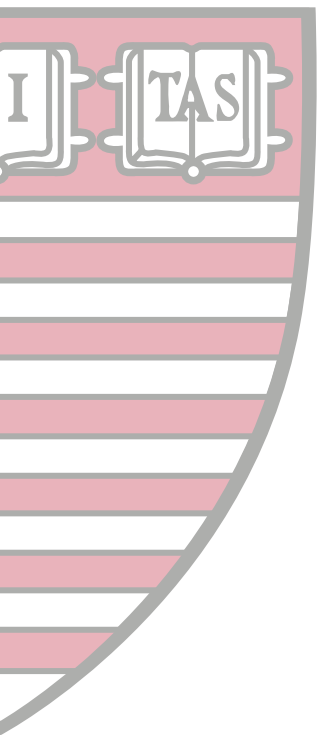
As the CCP’s centenary fast approaches and the PRC continues to aggressively “reclaim” its role as a global leader in social, political, and economic terms, the future trend is likely to move Hong Kong even further away from its past liberal traditions. It is imperative that the international community understands this paradigm shift and takes these new risks into account in their future operations and dealings in Hong Kong and the PRC.

Notes

1. SFC v. Ernst & Young [2015] 5 HKLRD 293, at p. 327–328 per Ng J: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=93214&QS=%2B&TP=JU.
2. SFC v. Ernst & Young [2015] 5 HKLRD 293, at p. 327–328 per Ng J: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=93214&QS=%2B&TP=JU.
3. Admin. proc. file no. 3-14872 and 3-15116 (January 22, 2014): <https://www.sec.gov/alj/aljdec/2014/id553ce.pdf>.
4. For a more comprehensive comparative analysis of the Ernst & Young and Dahua decisions, see Raymond Siu, Yeung Chan, and John Kong Shan Ho (2015), “Could Complying with China’s Secrecy Laws Be an Excuse for Auditors Not to Provide Their Working Papers of Auditing Chinese Companies? Recent Cases in the United States and Hong Kong,” *King’s Law Journal*, 26:1, 99–128.
5. Such as reforms to Hong Kong electoral process including reducing the number of legislators directly elected while increasing the number appointed by CCP entities or proxies, “national security” screening of candidates (<https://www.bbc.com/news/world-asia-57236775>), and “patriotic” oath regulations being adopted for various sectors from civil servants to judges and possibly teachers (<https://www.reuters.com/world/asia-pacific/hong-kong-legislators-pass-patriotic-oath-law-2021-05-12/>).
6. Articles 3 and 4 of the Regulation on Political-Legal Work of the CCP (中共中央印发《中国共产党政法工作条例》) establish the CCP as the absolute leader of the PRC’s legal system, including law enforcement and the judiciary; see http://www.gov.cn/zhengce/2019-01/18/content_5359135.htm. See also Nis Grünberg and Katja Drinhausen (September 24, 2019), “The Party Leads on Everything,” Mercator Institute for China Studies, https://merics.org/sites/default/files/2020-05/The%20Party%20leads%20on%20everything_0.pdf.
7. In September 2020, the General Office of the CCP Central Committee issued an opinion on “Strengthening the United Front Work in the Private Economy in the New Era” (中共中央办公厅印发《关于加强新时代民营经济统战工作的意见》); see http://www.gov.cn/zhengce/2020-09/15/content_5543685.htm. For a detailed analysis of this directive, see Scott Livingston (October 2020), “The Chinese Communist Party Targets the Private Sector,” Center for Strategic and International Studies, https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/201008_Livingston_CCP%20Targets%20Private%20Sector_WEB%20FINAL.pdf.
8. <https://www.csis.org/analysis/ideological-security-national-security>.
9. As this article was being drafted, the geopolitical and legal landscape of Hong Kong and the PRC continued to evolve. While the authors have endeavored to reference these ongoing changes throughout the article, there was insufficient time for a complete analysis and not all changes may be adequately accounted for.
10. http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.
11. Article 19(3) of the Basic Law and footnotes 16 and 17 below.
12. Full text: https://www.rightofassembly.info/assets/downloads/Hong_Kong_Basic_Law.pdf.
13. Article 55 of HK NSL.
14. Article 55 of HK NSL.
15. CPG State Council white paper (2014): http://www.china.org.cn/government/whitepaper/2014-06/10/content_32623618.htm.
16. The Court of Final Appeal endorsed this view in FACC no. 1 of 2021 [2021] HKCFA 3 at para. 32.
17. 依据香港国安法规定，香港国安委工作信息不予公开，其决定不接受司法复核。对此，法律专家分析指出，香港国安委负责处理与香港特区有关的国家安全事务，而国家安全事务性质上与国防、外交等一样，属中央事权。 http://www.xinhuanet.com/gangao/2020-07/02/c_1126189870.htm.
18. FACC no. 1 of 2021 [2021] HKCFA 3 at para. 37.
19. Article 11 of HK NSL.
20. <https://www.thetimes.co.uk/article/lady-hale-quits-hong-kong-court-as-china-tightens-grip-09pjsvrnb>; <https://www.abc.net.au/news/2020-09-18/judge-quits-over-hong-kong-national-security-law/12679318>.
21. <https://beta.thestandnews.com/politics/> 國安法壓港-路透社引消息-外籍法官將被禁處理國家安全案件
22. See Article 44 of HK NSL: “A person shall not be designated as a judge to adjudicate a case concerning an offence endangering national security if he or she has made any statement or behaved in any manner endangering national security. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office.”

23. <https://www.chinadaily.com.cn/a/202105/21/WS60a78e15a31024ad0bac0ab6.html>.
24. An analysis by Jude Blanchette of CSIS on a report issued by the Central Party School of CCP titled “Ideological Security in the Framework of the Overall National Security Outlook” by Professor Tang Aijun: <https://www.csis.org/analysis/ideological-security-national-security>.
25. Article 19 of PRC NSL: http://eng.mod.gov.cn/publications/2017-03/03/content_4774229.htm.
26. The Hong Kong SAR now has power to censor films on national security grounds. See <https://hongkongfp.com/2021/06/11/new-guidelines-allow-hong-kong-to-censor-films-on-national-security-grounds/>.
27. Chapter VI of the Data Security Law, adopted on June 10, 2021, establishes extensive liability on companies and employees for “core data” that is improperly transferred outside of the PRC. http://www.xinhuanet.com/2021-06/11/c_1127552204.htm.
28. <https://www.cso.gov.hk/eng/blog/blog20210411.htm>; “In fact, the challenges that we are facing in this new era have gone beyond political security, territorial security and military security as conventionally perceived. Extensive in breadth and depth, national security has a direct bearing on people’s interests and encompasses more than ten other key aspects, including economic security, cultural security, social security, technology security, cybersecurity, ecological security, resource security, nuclear security, overseas interests security and some emerging aspects like biosecurity, outer space security, deep sea security and polar security.” (emphasis added).
29. Such was the situation in the Rio Tinto case, in which four Australian iron ore exporters were jailed for inter alia receiving state secrets. While evidence regarding the state secrets was provided on camera, text of the verdict reveals the secrets obtained included discussions at meetings of the China Iron and Steel Association. See <https://www.reuters.com/article/china-secrets/china-defines-commercial-secrets-after-rio-tinto-trial-idUSTOE63Q02Y20100427> and <https://www.smh.com.au/business/just-what-is-a-chinese-commercial-secret-remains-a-secret-20100416-skmy.html>.
30. Michael Vines (July 5, 2010), “Geologist’s Sentence is Questioned,” *New York Times*, https://www.nytimes.com/2010/07/06/world/asia/06china.html?_r=1&ref=jonmhuntsmanjr.
31. Hong Kong Police requested an Israeli website hosting company to remove contents from a website: <https://www.newsweek.com/wix-apologizes-removing-website-support-hong-kong-democracy-1597387>.
32. <https://www.reuters.com/world/asia-pacific/hong-kongs-apple-daily-newspaper-says-police-arrest-five-directors-2021-06-16/>.
33. Zheng Tang and Xu Huang (2021), “State Secrets in the Hong Kong National Security Law,” in *Hong Kong Natural Security Law*, edited by Hualing Fu, forthcoming.
34. Based on the recent prosecution of pro-democratic lawmakers and activists for subversion under the HK NSL, the question of what amounts to “unlawfulness” is vague and seems entirely at the discretion of the HK prosecutors. We will see how the HK courts would deal with such arguments advanced by the prosecution at trial.
35. Article 29 of HK NSL.
36. IBA Rules on Taking of Evidence in International Arbitration, Article 9(2)(f).
37. Special thanks to a contribution from an international arbitration expert
38. 第四十七条 “香港特别行政区法院在审理案件中遇有涉及有关行为是否涉及国家安全或者有关证据材料是否涉及国家秘密的认定问题，应取得行政长官就该等问题发出的证明书，上述证明书对法院有约束力。”
39. Gabriel Crossley and Kirsty Needham (May 5, 2021), “China Suspends Economic Dialogue with Australia as Relations Curdle,” Reuters, <https://www.reuters.com/world/china-suspend-economic-dialogue-mechanism-with-australia-2021-05-06/>.
40. 中华人民共和国数据安全法 http://www.xinhuanet.com/2021-06/11/c_1127552204.htm; see also <https://www.scmp.com/tech/big-tech/article/3136996/chinas-new-data-security-law-promises-steep-punishments-unapproved>.
41. <https://www.scmp.com/economy/china-economy/article/3092939/china-sharpens-economic-espionage-penalties-tit-tat-provision>.
42. https://www.ndrc.gov.cn/xwdt/xwfb/202012/t20201219_1255024.html.
43. The recent Supreme Court of New Zealand decision in *Minister of Justice v. Kyung Yup Kim* [2021] NZSC 57 [June 4, 2021] is also cause for concern. In this case the defendant, a South Korean resident of New Zealand, was accused of killing a woman in Shanghai in 2009, and the PRC sought an extradition. In its judgement, the court determined that as long as the PRC provided sufficient assurances as to the accused’s treatment in the PRC, the extradition will go forward—subject to the minister’s final decision. It is significant that the accused is

- not a PRC citizen or resident yet he is still potentially subject to extradition from a third country. See <https://perma.cc/NZ3F-DB7D>. For more analysis, see Donald Clark (June 15, 2021), “New Zealand’s Troubling Precedent for China Extradition,” Lawfare <https://www.lawfareblog.com/new-zealands-troubling-precedent-china-extradition>.
44. Japan is leading the charge on offshoring manufacturing away from the PRC, earmarking several million dollars to encourage companies to transfer production back to Japan or Southeast Asia. See Simon Denyer (July 21, 2020), “Japan Helps 87 Companies to Break from China after Pandemic Exposed Overreliance,” *Washington Post*, https://www.washingtonpost.com/world/asia_pacific/japan-helps-87-companies-to-exit-china-after-pandemic-exposed-overreliance/2020/07/21/4889abd2-cb2f-11ea-99b0-8426e26d203b_story.html.
 45. <https://www.bloomberg.com/news/articles/2021-05-12/more-than-40-of-hong-kong-expats-may-leave-amcham-survey-says>.
 46. <https://www.bloomberg.com/news/articles/2021-06-10/china-passes-law-to-strengthen-control-over-tech-firms-data?sref=6ZE6q2XR>.
 47. 授权发布) 中华人民共和国反外国制裁法 http://www.xinhuanet.com/politics/2021-06/10/c_1127551959.htm; Law of the PRC on Countering Foreign Sanctions unofficial English translation: <https://www.chinalawtranslate.com/en/counteringforeignsanctions/>.
 48. The extradition case involving Huawei executive Meng Wenzhou and HSBC is a good illustration of this tension. At issue in this case are financial services provided by HSBC to Huawei that were used to support business in Iran, in contravention of US sanctions. This case began in 2019 and has resulted in a series of complications as well as two Canadian NGO workers being detained in a form of political retribution against Canada, where the extradition hearing is occurring. See Kim Richard Nossal (January 19, 2021), “Wrong Place, Wrong Citizenship: The Tribulations of the ‘Two Michaels,’” <https://www.lowvinstitute.org/the-interpretor/wrong-place-wrong-citizenship-tribulations-two-michaels>.
 49. Harris Bricken (November 28, 2020), “China Hostage Situations: What You Need to Know,” China Law Blog, <https://harrisbricken.com/chinalawblog/china-hostage-situations-what-you-need-to-know/>; Erika Kinetz (May 5, 2020), “‘No Remedy, No Rights’: China Blocks Foreigners from Leaving,” *The Diplomat*, <https://thediplomat.com/2020/05/no-remedy-no-rights-china-blocks-foreigners-from-leaving/>.
 50. Bloomberg (October 19, 2018), “Wealth Managers Curb China Travel after UBS Banker Is Detained,” <https://www.bloomberg.com/news/articles/2018-10-19/ubs-is-said-to-curb-some-china-travel-after-banker-detained>.
 51. <https://thediplomat.com/2020/05/no-remedy-no-rights-china-blocks-foreigners-from-leaving/>.
 52. <https://www.theguardian.com/world/2021/apr/28/hong-kong-passes-law-that-can-stop-people-leaving>; <https://www.reuters.com/world/asia-pacific/hong-kong-passes-immigration-bill-raising-alarm-over-exit-bans-2021-04-28/>; Hong Kong Bar Association submissions on the Immigration (Amendment) Bill: <https://www.hkba.org/sites/default/files/Immigration%20%28Amendment%29%20Bill%202020%20-%20Clause%203%20-%20Further%20Submission%2011.2.2021.pdf>.
 53. *Sing Tao Daily*, May 31, 2021.
 54. For more analysis, see “The Restructuring of Hong Kong and the Rise of Neostatism” by Professor Sebastian Veg; https://tocqueville21.com/le-club/the-restructuring-of-hong-kong-and-the-rise-of-neostatism/#_ftnrefl.



A PUBLICATION OF THE

Ash Center for Democratic Governance and Innovation
Harvard Kennedy School
79 John F. Kennedy Street
Cambridge, MA 02138

617-495-0557
ash.harvard.edu



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