

Navigating the Increase of Thematic Sanctions: A Focus on Human Rights from U.S. and Canadian Perspectives

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Evolution of Human Rights Sanctions: Canada

- 1992 → *Special Economic Measures Act (SEMA)* enacted allowing Canada to impose ‘unilateral’ sanctions in two circumstances;
 - 1) grave breach of international peace and security that had resulted, or was likely to result, in a serious international crisis; or
 - 2) when an international organization or association of States to which Canada belonged called on its members to impose sanctions.
- 2017 → *SEMA* amended allowing Canadian government for the first time to issue sanctions against foreign nationals engaged in “gross violations of internationally recognized human rights”
- 2017 → *Justice for Victims of Corrupt Foreign Official Act (Sergei Magnitsky Law)* enacted allowing Canada to sanction individuals involved in gross violations of human rights or acts of significant corruption anywhere in the world without first sanctioning a foreign state
- Canada’s two autonomous sanctions regimes emphasize the importance of the rule of law, democracy and respect for human rights. They signal that Canada does not accept behaviour that threatens international peace and security – acts of significant corruption, violation of human rights and breaches of international norms.
 - E.g. SEMA – Russia Regulations have been amended 38 times since 2014 to respond to Russia’s violation of sovereignty and territorial integrity of Ukraine, and grave human rights violations committed in Russia.

Evolution of Human Rights Sanctions: US

2012: Sergei Magnitsky Rule of Law Accountability Act

Requires the President to identify any person determined to be responsible for gross violations of human rights against individuals seeking to expose illegal activity by Russian officials or to obtain/exercise/defend/promote human rights in Russia

2016: Global Magnitsky Human Rights Accountability Act

Authorizes sanctions on any foreign person that the President identifies as responsible for extrajudicial killings, torture, or other “gross violations of internationally recognized human rights” against human rights activists/defenders; also for those involved in significant corruption

2020-21: Uyghur Human Rights Policy Act and Uyghur Forced Labor Prevention Act (UFLPA)

Authorizes sanctions on foreign persons that the President has determined are responsible for certain human rights violations of Uyghurs or other ethnic minorities in the XUAR; UFLPA expands coverage to “serious human rights abuses in connection with forced labor”

2011-12: Syria Sanctions

Executive Orders 13572 and 13606 blocking the property and suspending entry into the U.S. of certain persons with respect to human rights abuses

2014-15: Venezuela Sanctions

Executive Orders pursuant to Venezuela Defense of Human Rights and Civil Society Act require sanctions on persons involved in perpetuating, directing, or ordering, significant acts of violence or serious human rights abuses in Venezuela against persons associated with the antigovernment protests in Venezuela in 2014

2017: Expansion of Global Magnitsky

Executive Order 13818 authorizing sanctions on individuals involved in “serious human rights abuse”

2017: Countering America’s Adversaries Through Sanctions Act (CAATSA)

Covers range of national security issues; authorizes/requires sanctions for human rights abuses related to Iran, Russia, and North Korea (including forced labor overseas)

Qualifying Circumstances for Imposition of Sanctions and Discretionary Executive Power: Canada

Table 1 – Qualifying Circumstances for the Imposition of Sanctions

-	<i>United Nations Act</i>	<i>Special Economic Measures Act</i>	<i>Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)</i>
Qualifying circumstances	<ul style="list-style-type: none">▪ in fulfilment of Canada’s obligations to implement the decisions of the United Nations (UN) Security Council.	<ul style="list-style-type: none">▪ where an international organization or association to which Canada is a member has called for economic measures to be taken against a foreign state;▪ where a grave breach of international peace and security has occurred that has resulted in or is likely to result in a serious international crisis;▪ where gross and systematic human rights violations have been committed; or▪ where acts of significant corruption have been committed by public officials or their associates.	<ul style="list-style-type: none">▪ where a foreign national is responsible for – or complicit in – gross violations of human rights against government whistle-blowers, or individuals who are seeking to expose illegal activity or “obtain, exercise, defend or promote internationally recognized human rights and freedoms”; or▪ where a foreign public official or their associate is responsible for – or complicit in – an act of significant corruption.

Source: Table prepared by the author based on information obtained from *United Nations Act*, R.S.C. 1985, c. U-2, s. 2; *Special Economic Measures Act*, S.C. 1992, c. 17, s. 4(1.1); and *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, S.C. 2017, c. 21, s. 4(2).

“The Governor in Council **may**, if the Governor in Council **is of the opinion** that”

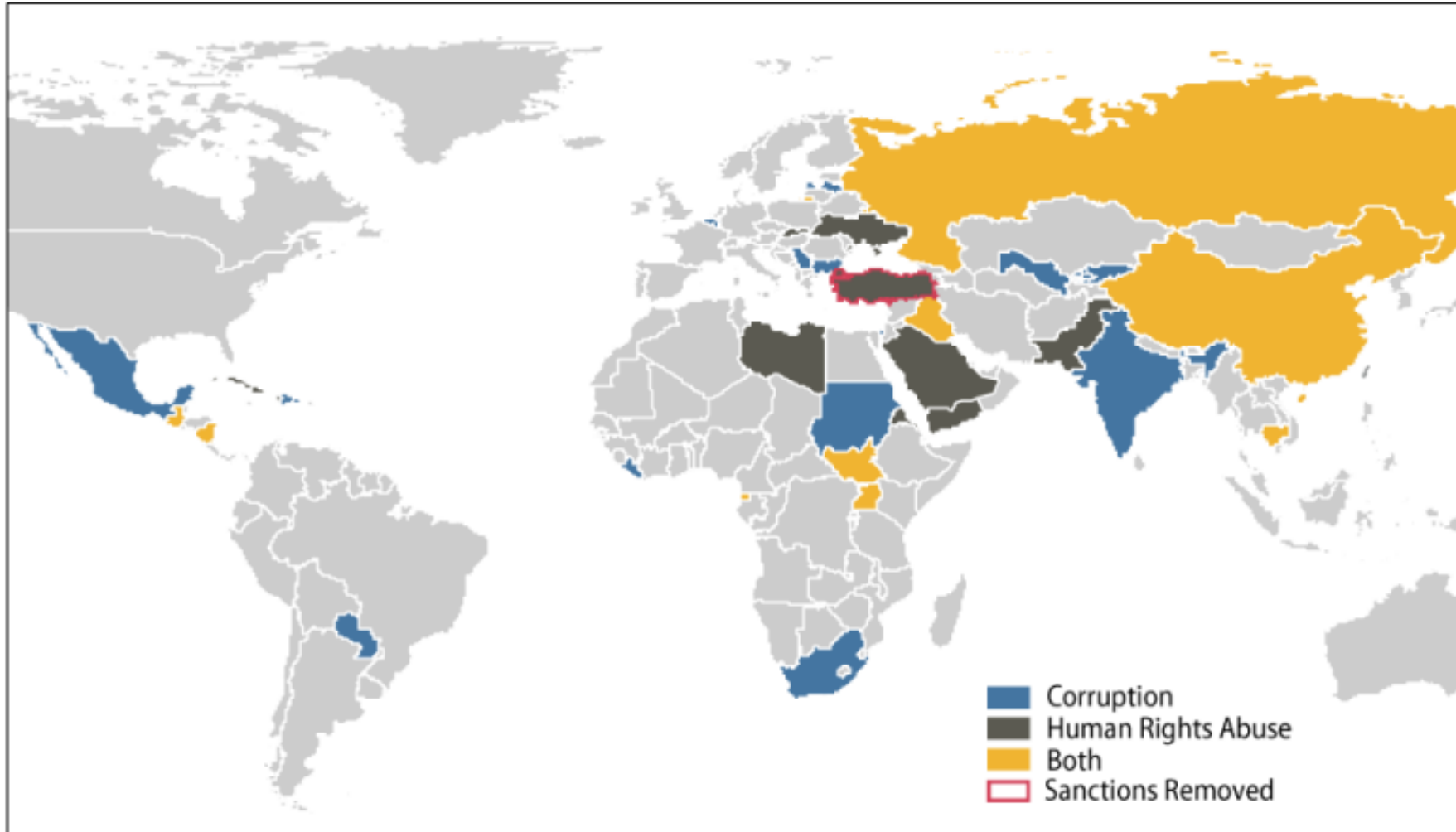
- Purposefully broad threshold
- No exact/exhaustive list of criteria whereby government would be compelled to act
- Designed to allow maximum opportunity for international cooperation and coordination on sanctions

JVCFOA (Magnitsky Law) and SEMA differ in their scope and applicability. Criteria under JVCFOA is tied to actions of individual foreign nationals, while SEMA relates to broader circumstances in a foreign state.

Source: Library of Parliament

US Global Magnitsky Enforcement

Figure 1. Nationalities of Individuals Designated for Economic Sanctions Under E.O. 13818

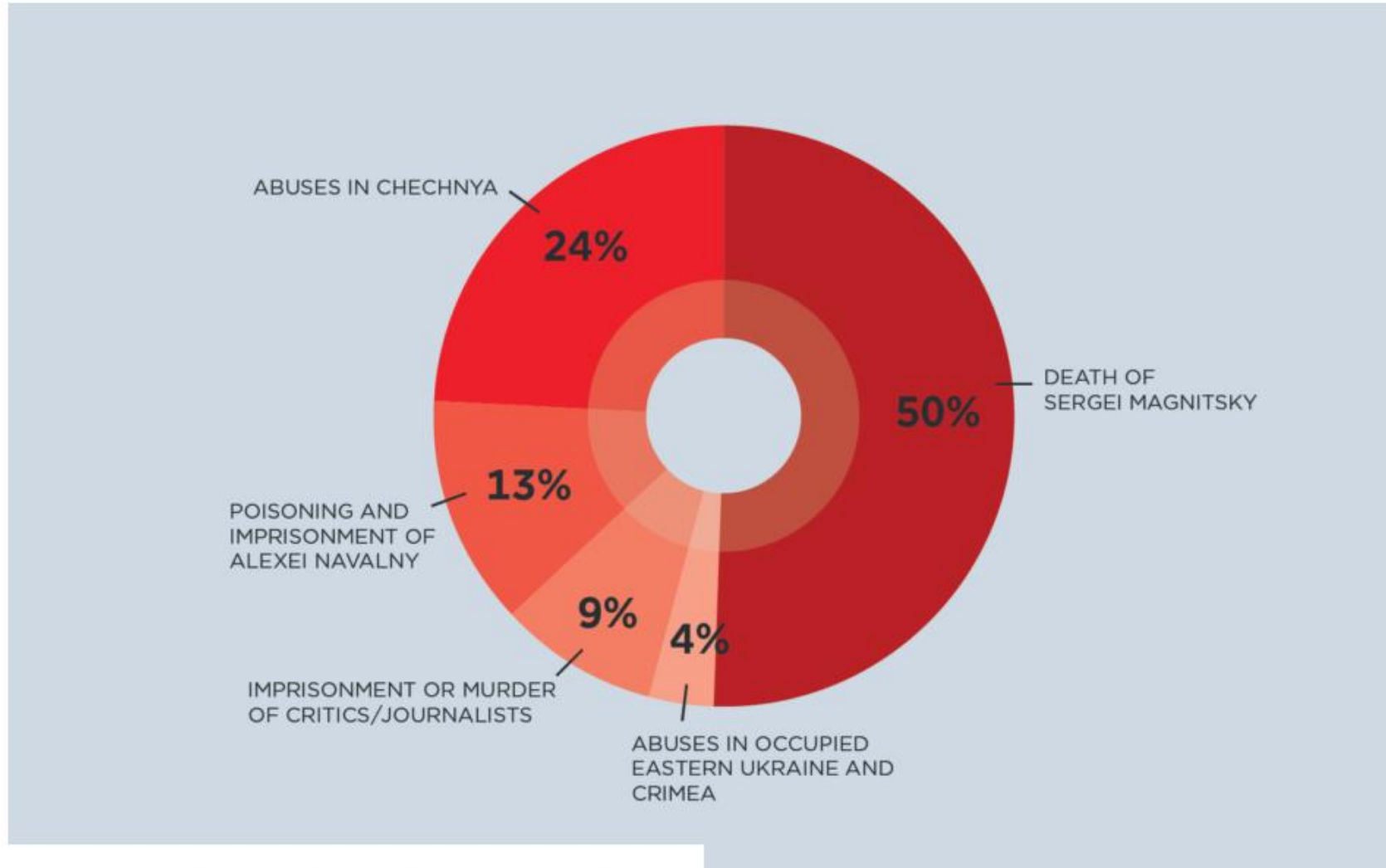


- As of Dec. 2021, over 330 individuals/entities subject to sanctions under Global Magnitsky authorities through EO 13818
- Includes 89 individuals sanctioned primarily for human rights abuses
- Most recent human rights-focused enforcement release (Dec. 2021) covered 15 individuals and 10 entities, involving abuses in Xinjiang, Bangladesh, North Korea, Burma

Source: CRS graphic based on data from the Office of Foreign Assets Control (OFAC).

US Human Rights Sanctions: Russia

Total Human rights-related Sanctions on Russia (2009–2021)



Source: Historical data from 2009–2021 from the U.S. Department of the Treasury's Office of Foreign Assets Control

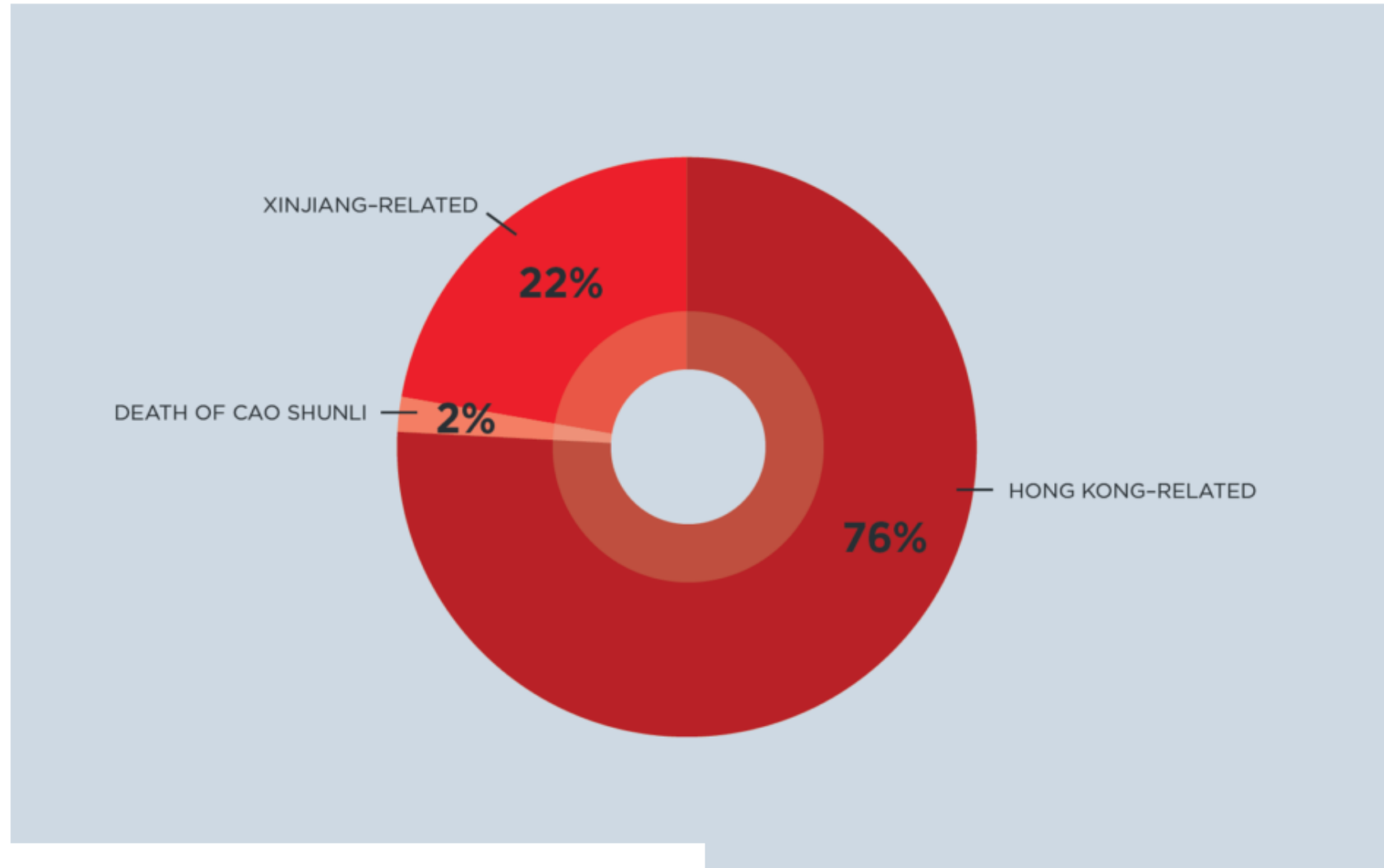
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US Human Rights Sanctions: China

Total Human rights-related Sanctions on China (2009-2021)



Source: Historical data from 2009-2021 from the U.S. Department of the Treasury's Office of Foreign Assets Control

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Focus on Forced Labor in Supply Chains

- Context:

- Forced labor: “all work or service which is exacted from any person under the menace of any penalty,” and for which the person has not offered themselves voluntarily (ILO)
- Estimated 27.6 million people in situations of forced labor – 3.5 people for every thousand (ILO report, Sept. 2022)
 - Recent increase “driven entirely by forced labor in the private economy”
 - “Touches virtually all parts of the private economy”
- Widespread forced labor reported in connection with Xinjiang (XUAR) poverty alleviation schemes by media/NGOs/governments/other stakeholders
- UN found indications that XUAR labor and employment schemes “appear to be discriminatory in nature or effect and to involve elements of coercion...” (Sept. 2022)
- Chinese government rejects claims of forced labor and other abuses in XUAR
- US lawmakers found that the Chinese government “engages in genocide and crimes against humanity” against Uyghurs and other ethnic minorities in XUAR, including imprisonment, forced sterilization, and persecution, including through forced labor (UFLPA)
- US and Canada built on existing enforcement tools including sanctions to exclude products made with forced labor and human rights abusers from economy

Prohibition on Forced Labour in Supply Chains: Canada

Canada - Customs controls and soon (?) reporting

Customs Tariff subsection 136(1) and tariff item 9897.00.00:

Bans various imports, including, since *CUSMA*:

“Goods mined, manufactured or produced wholly or in part by forced labour”

- Goods may be:
 - detained at border;
 - subject of tariff classification verification and re-determination within four years after importation
- Prohibition extends, under *Customs Act*, to:
 - possessing, acquiring or disposing of banned goods
- Obligation to report if believe on reasonable grounds that goods in possession are banned
- Detailed CBSA guidance still pending
- Penalties significant (but enforcement negligible to date)

Prohibition on Forced Labour in Supply Chains: Canada

Canada - Pending Bill S-211:

“Fighting Against Forced Labour and Child Labour in Supply Chains Act”

- A reporting regime:
 - Annual report to minister on
 - Steps to prevent and reduce the risk of forced or child labour at “any step of the production of goods”
 - Reporting to include activities, supply chains, policies, due diligence processes, risks and mitigation taken
 - Made publically available, including published prominently on website
- Failure to properly report or publish is an offence
 - Fine up to \$250,000
 - Standalone D&O liability
- Potentially in force by January, 2023

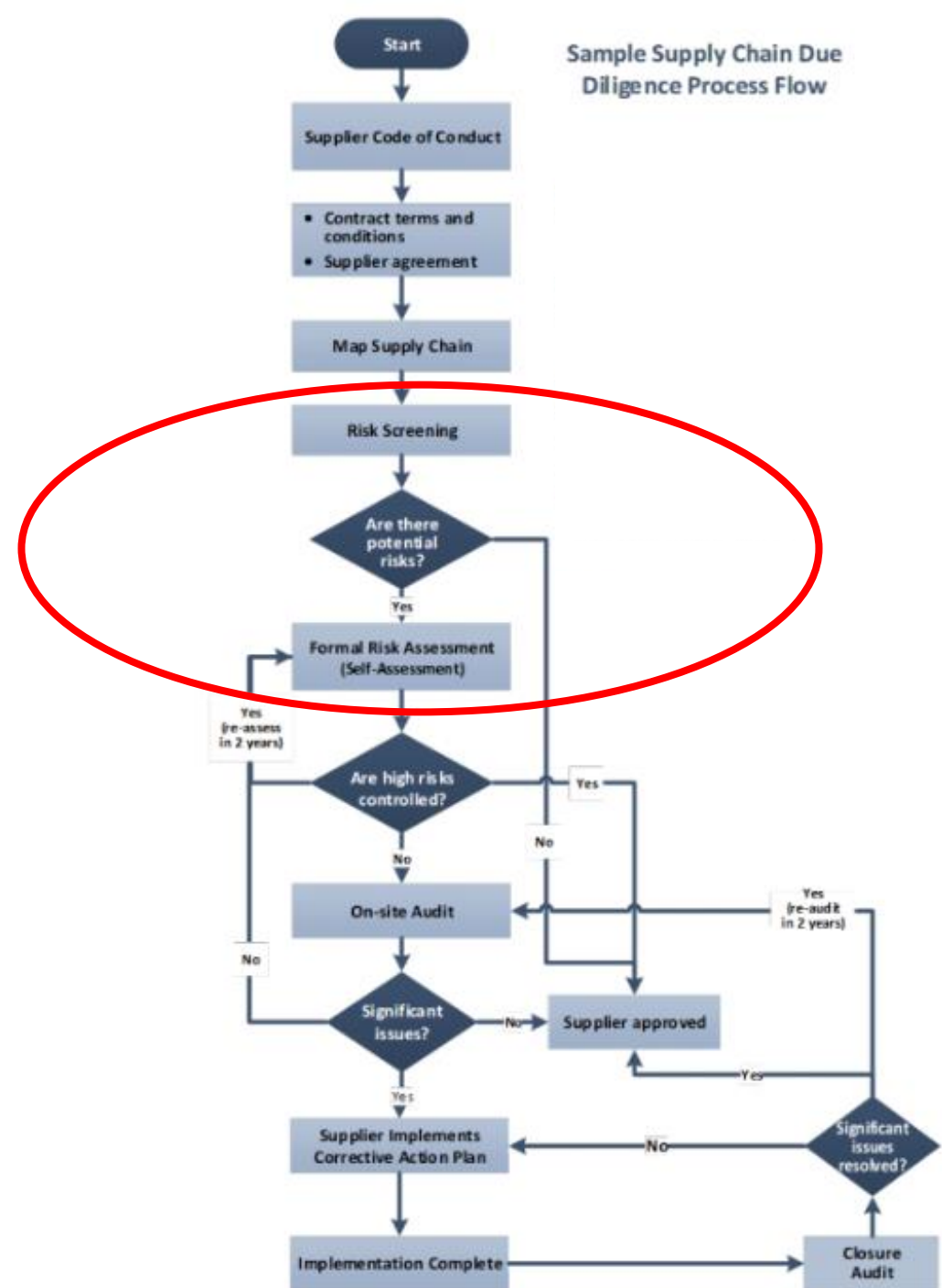
Prohibition on Forced Labour in Supply Chains: US

- Enforcement Background
 - The U.S. has long prohibited import of goods made with forced labor
 - US Customs and Border Protection (CBP) may detain at U.S. ports any goods they suspect are made in whole or part with forced labor
 - CBP bases its suspicion on both private and public allegations of forced labor in supply chains, including media reports
- UFLPA
 - **The UFLPA went into effect in June 2022** and builds on the existing ban by specifically targeting the XUAR
 - In effect, the UFLPA functions as a ban on products (1) **incorporating materials from the XUAR** or (2) **made by certain entities placed by the U.S. government on the “UFLPA Entity List”**
 1. The UFLPA requires CBP to apply a “rebuttable presumption” that any product coming into the U.S. which contains any input from the XUAR or made by Entity List entities is made with forced labor/not admissible to the U.S.
 2. The presumption can be overcome, but doing so will be virtually impossible given CBP’s documentation requirements to show that the goods or inputs from the XUAR or by Entity List entities were not made with forced labor
 - Also requires sanctions on foreign persons that the President has determined are responsible for certain human rights abuses including “in connection with forced labor” in XUAR

Relevance of Sanctions to Human Rights Due Diligence

- UN Guiding Principles on Business and Human Rights (UNGPs) require companies to respect the human rights of stakeholders
- Includes requirement of “due diligence”
- Elements: assess risks/impacts on stakeholders’ enjoyment of human rights; implement mitigation strategies; communicate with stakeholders
- Extends to potential impacts of a company’s own operations, and those of the company’s business relationships – *e.g.*, supply chains
- Sanctions screening may be incorporated into holistic risk assessment and mitigation processes
- Due diligence can mitigate sanctions exposure by proactively addressing activities/relationships that may become focus of future sanctions

Sample process flow source: Responsible Sourcing Tool





HAVE A QUESTION?

Q&A