How to Criticize U.S. Extraterritorial Jurisdiction (Part II)

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There are better and worse ways to criticize U.S. extraterritorial jurisdiction. In Part I of this post, I discussed some shortcomings of a February 2023 report by China's Ministry of Foreign Affairs, "The U.S. Willful Practice of Long-arm Jurisdiction and its Perils." I pointed out that the report's use of the phrase "long-arm jurisdiction" confuses extraterritorial jurisdiction with personal jurisdiction. I noted that China applies its own laws extraterritorially on the same bases that it criticizes the United States for using. I argued that the report ignores significant constraints that U.S. courts impose on the extraterritorial application of U.S. laws. And I suggested that China had chosen to emphasize weak examples of U.S. extraterritoriality, such as the bribery prosecution of Frédéric Pierucci, which was not even extraterritorial.

In this post, I suggest some better ways of criticizing U.S. extraterritorial jurisdiction. Specifically, I discuss three cases in which the extraterritorial application of U.S. law appears to violate customary international law rules on jurisdiction to prescribe: (1) the indictment of Huawei executive Wanzhou Meng; (2) the application of U.S. sanctions based solely on clearing dollar transactions through U.S. banks; and (3) the application of U.S. export controls to foreign companies abroad based on "Foreign Direct Product" Rules. The Ministry of Foreign Affairs report complains a lot about U.S. sanctions, but not about the kind of sanctions that most clearly violates international law. The report says much less about export controls and nothing about Meng's indictment, which is odd given the tensions that both have caused between China and the United States.

Wanzhou Meng

In 2018, federal prosecutors in New York indicted Huawei executive Wanzhou Meng for bank and wire fraud. They then sought her extradition from Canada, where she had been arrested at the request of U.S. authorities. The indictment was based on a meeting in Hong Kong between Meng and HSBC, a British bank, to convince it to continue doing business with Huawei despite concerns that the Chinese company might be violating U.S. sanctions on Iran. The prosecution's theory appears to have been that Meng's representations at this meeting ultimately caused HSBC's U.S. subsidiary to clear foreign transactions denominated in dollars through the United States in violation of Iran sanctions.

During the extradition proceeding, I filed an affidavit with the Canadian court explaining why the U.S. prosecution violated international law. Customary international law allows states to exercise prescriptive jurisdiction only when there is a "genuine connection" between the subject of the regulation and the regulating state. There are six traditional bases for jurisdiction to prescribe: territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction.

Clearly the United States did not have prescriptive jurisdiction based on territory or nationality because the conduct occurred in Hong Kong and Meng is not a U.S. national. Passive personality, which recognizes jurisdiction to prescribe based on the nationality of the victim, also could not justify the application of U.S. law in this situation because the alleged misrepresentations were made to a non-U.S. bank. And bank and wire fraud do not fall within the categories of offenses that are subject to the protective principle or universal jurisdiction.

The only possible way of justifying the application of U.S. law would be effects jurisdiction, reasoning that Meng's meeting with a British bank in Hong Kong caused its U.S. subsidiary to continue clearing dollar transactions through New York. But, in this case, it was not clear that the alleged misrepresentations actually caused such effects in the United States. And even if they did, it is difficult to say that such effects were substantial, which is a requirement for effects jurisdiction under customary international law.

Apart from customary international law, it is also doubtful that Meng's conduct in Hong Kong fell within the scope of the federal bank and wire fraud statutes. Applying the presumption against extraterritoriality (a limit on U.S. extraterritorial jurisdiction discussed in yesterday's post), the Second Circuit has interpreted those statutes to require conduct in the United States that constitutes a "core component" of the scheme to defraud. Although U.S. courts are currently divided on how much U.S. conduct is required under the federal bank and wire fraud statutes, Meng engaged in no U.S. conduct at all.

After nearly three years of house arrest in Canada, Meng agreed to a deferred prosecution agreement with the United States, in which she admitted that her statements to HSBC were false (though not that they violated U.S. law), and she returned to China. The agreement resolved a "damaging diplomatic row" between China and the United States. Because the indictment provides a clear example of U.S. extraterritorial jurisdiction in violation of international law, it is odd to find no mention of this case in the Ministry of Foreign Affairs report.

Correspondent Account Jurisdiction

A second example of U.S. extraterritorial jurisdiction that violates international law involves U.S. secondary sanctions. In contrast to Meng's indictment, the report discusses U.S. sanctions at length, but it does not focus on the kind of sanctions that most clearly violate international law. This is what Susan Emmenegger has called "correspondent account jurisdiction": sanctions imposed on foreign persons engaged in foreign transactions when the only connection to the United States is clearing dollar payments through banks in the United States.

The report calls the United States a "sanctions superpower" and specifically mentions U.S. sanctions against Cuba, Iran, Iraq, Libya, and Syria, as well as human rights sanctions under the Global Magnitsky Human Rights Accountability Act. "Sanctions strain relations between countries and undermine the international order," the report says. They can also cause "humanitarian disasters."

One can certainly criticize some U.S. sanctions as a matter of policy. As a matter of international law, however, most of these programs have strong support. U.S. sanctions typically take the form of access restrictions, limiting the ability of foreign parties to do business in the United States or with U.S. nationals. Under international law, these programs are based on the territoriality and nationality principles. In their comprehensive legal analysis of U.S. secondary sanctions, Tom Ruys and Cedric Ryngaert note that "most of these measures—denial of access to the US financial system, access to US markets, or access to the US for individual persons—merely amount to the denial of privileges" and "international law does not entitle foreign persons to financial, economic, or physical access to the US."

But correspondent account jurisdiction is different. The United States is currently prosecuting a state-owned bank in Turkey, Halkbank, for violating U.S. sanctions on Iran. According to the indictment, Halkbank ran a scheme to help Iran repatriate more than $20 billion in proceeds from oil and gas sales to Turkey's national oil company by using the proceeds to buy gold for Iran and creating fraudulent transactions in food and medicine that would fit within humanitarian exceptions to U.S. sanctions. The only connection to the United States was the clearing of dollar payments through banks in the United States.

As discussed above, customary international law requires a "genuine connection" with the United States. None of the traditional bases for jurisdiction to prescribe would seem to supply that connection. Halkbank is not a U.S. national, and it is being prosecuted for conduct outside the United States. Passive personality does not provide jurisdiction under international law because the only potential harm to U.S. persons from Halkbank's conduct is the risk of punishment for Halkbank's correspondent banks for violating U.S. sanctions, harm the United States is well placed to avoid. And clearing dollar transactions is not the sort of conduct that either the protective principle or universal jurisdiction covers.

That leaves the effects principle—that by arranging transactions with Iran in dollars outside the United States, Halkbank caused the clearing of those transactions in the United States. As in Meng's case discussed above, the problem with this argument is that the effects must be substantial to satisfy customary international law. It is difficult to see how merely clearing a transaction between foreign nationals that begins and ends outside the United States rises to the level of a substantial effect, since it does not in any way disrupt the U.S. financial system.

Correspondent account jurisdiction is not just a violation of international law; it is also a violation of U.S. domestic law. U.S. sanctions against Iran are issued under a statute called the International Emergency Economic Powers Act (IEEPA). IEEPA authorizes the President to prohibit financial transactions only "by any person, or with respect to any property, subject to the jurisdiction of the United States." As I explain in greater detail here, if the United States does not have jurisdiction under international law, the sanctions are invalid as a matter of domestic law under IEEPA.

The Ministry of Foreign Affairs report wants to claim that U.S. extraterritorial jurisdiction “violates international law.” But on sanctions, it spends most of its energy discussing programs that are consistent with international law. The report mentions correspondent account jurisdiction only briefly, accusing the United States of exercising jurisdiction based on “the flimsiest connection with the United States, such as … using U.S. dollar[s] for clearing or other financial services.” With this example, I agree. I simply wonder why the report did not focus on it to a greater extent.

Foreign Direct Product Rules

A third example of U.S. extraterritorial jurisdiction that the report could have emphasized involves U.S. export controls. On October 7, 2022, in a “seismic shift” of policy, the United States adopted new rules to limit China’s ability to develop advanced computing power, including artificial intelligence. (The rules were updated last month.) Most of these rules are consistent with international law, but the Foreign Direct Product Rules arguably are not.

First, the regulations limit the export from the United States of computer chips with advanced characteristics, other products that contain such chips, and equipment used to manufacture such chips. These restrictions are consistent with international law because they are based on U.S. territorial jurisdiction.

Second, the regulations add several Chinese companies, universities, and other entities to the U.S. Entity List and Unverified List, which prohibit those entities from receiving exports from the United States. Again, these restrictions are consistent with international law because they are based on U.S. territorial jurisdiction.

Third, the regulations prohibit U.S. engineers and scientists from helping China with semiconductor manufacturing even if those individuals are working on things that are not subject to export controls. These restrictions are consistent with international law because they are based on U.S. nationality jurisdiction.

Fourth, the regulations extend U.S. export controls extraterritorially to non-U.S. companies outside the United States. These rules are known as Foreign Direct Product Rules (FDP rules) because they prohibit foreign companies from exporting goods to China that are the direct products of technology that originated in the United States. Currently, the most advanced computer chips are made in Taiwan, South Korea, and Japan. The machines to make these chips are manufactured in the Netherlands. But U.S.-origin technology is used in virtually all chip manufacturing. So, the effect of these FDP rules is to extend U.S. export controls to chips made in Taiwan, Japan, and South Korea even if those chips themselves contain no components that were originally made in the United States.

There is a serious question whether FDP rules violate international law. None of the traditional bases for jurisdiction to prescribe exists. These U.S. rules are not based on territory, effects, nationality, passive personality, the protective principle, or universal jurisdiction. The origin of technology is not a traditional basis for jurisdiction to prescribe. Of course, the traditional bases are not exclusive. They are simply well accepted examples of a more general requirement that the regulating state must have a "genuine connection" to whatever it wishes to regulate. But it is not clear that the origin of technology qualifies as a genuine connection.

One thing that makes this analysis more complicated is the reaction of other states. Customary international law is based on state practice, so one must pay close attention to whether other states consider the origin of technology to be a legitimate basis for export controls. China, of course, has protested the U.S. export controls. But Taiwan, Japan, South Korea, and the Netherlands have not. This is different from what happened 40 years ago when the United States imposed export controls on foreign companies to prohibit the sale of certain goods to the USSR to try to stop the building of pipelines from Russia to Europe. In that case, the United States' allies in Europe strongly protested the export controls as a violation of international law, and in the end the United States withdrew those controls. This time, U.S. allies are supporting the export controls on sales of advanced computer chips to China.

The Ministry of Foreign Affairs report makes no mention of FDP rules. It does claim that "[u]nder the pretext of safeguarding national security," the United States "has adopted a package of measures including the Entity List and economic sanctions to restrict foreign enterprises from obtaining raw materials, items and technologies vital to their survival and development." The report's specific mention of the Entity List, which essentially blacklists certain Chinese companies, is consistent with the emphasis on this list in other Chinese protests of U.S. export controls. But, as explained above, the U.S. Entity List does not violate international law, whereas the FDP rules arguably do.

Conclusion

The United States frequently exercises extraterritorial jurisdiction. As I discussed in Part I of this post, so does China. Countries are within their rights to apply their laws extraterritorially so long as doing so is consistent with international law.

In these posts, I have used the Ministry of Foreign Affairs report as a foil because it has shortcomings. As I described yesterday, it uses confusing terminology, criticizes the U.S. for regulating on the same bases that China does, ignores constraints on U.S. extraterritoriality, and illustrates its points with weak examples (like the case of Frédéric Pierucci, which was not even extraterritorial). But I do not mean to suggest that the United States is beyond criticism. The United States does sometimes apply its laws extraterritorially in ways that violate international law, and, in this post, I have pointed to three examples.

It seems to me that China's criticism of U.S. extraterritorial jurisdiction would be more effective if it would focus on examples that violate international law rather than on examples that do not. China should be talking less about Frédéric Pierucci and more about Wanzhou Meng.

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