

The Proportionality and Necessity of Unilateral Sanctions

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Professor Sienho Yee has recently published a paper in Chinese Journal of International Law, entitled, "Unilateral Sanctions: Kind and Degree; Long-arm and Strong Arm Jurisdiction; Real Intent and 'Could-be' Intent." Yee has ably elaborated that to assess the conduct of unilateral sanctions, there is a need to consider a question of "kind" so as to a question of "degree." Further, the so-called "long-arm jurisdiction" should be better phrased as "strong-arm jurisdiction" since sometimes long-arm jurisdiction may be lawful, whereas the current version of the long-arm jurisdiction asserted by the United States is so extreme that it is no longer lawful. To this end, attention should be paid to the level of scrutiny or standard of review that a decision-maker would apply to the assessment of intent. Following from Yee's thoughts, this note would like to elaborate further on another aspect, namely, the proportionality and necessity of unilateral sanctions.

Keywords

Proportionality, Necessity, Unilateral Sanctions, China

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1. Introduction

Professor Sienho Yee has recently published a paper in *CHINESE JOURNAL OF INTERNATIONAL LAW*, entitled, *Unilateral Sanctions: Kind and Degree; Long-arm and Strong arm Jurisdiction; Real Intent and “Could-be” Intent*.¹ Yee has elaborated that to assess the conduct of unilateral sanctions, it is necessary to consider the question of ‘kind’ in order to ask the question of ‘degree.’² Furthermore, the so-called “long-arm jurisdiction” should be better phrased as “strong-arm jurisdiction” since sometimes long-arm jurisdiction may be lawful, whereas the current version of the long-arm jurisdiction asserted by the US is so extreme that it is no longer lawful. He further states that the real intent behind the measure at issue settles the question of ‘kind’ and should be carefully identified. It is noteworthy that the intent involved in a sanctions measure also “could be” the one required to treat it as a lawful measure. Therefore, attention should be paid to the level of scrutiny or standard of review that a decision-maker would apply to the assessment of intent. Following Yee’s ideas, this note would like to elaborate further from another aspect: the proportionality and necessity of unilateral sanctions.

2. Unilateral Sanctions

“Unilateral sanctions” are regarded as “one of the least developed areas of international law.”³ Although some restrictions apply, many legal gaps or grey areas surrounding unilateral sanctions remain.⁴ As powerful states continue to deploy unilateral sanctions, nonetheless, a great deal of this practice remains unregulated or is based on questionable legality.⁵

Meanwhile, countermeasures are adopted by a state or an international organisation in response to an injury it suffered from a previous wrongful act

¹ Sienho Yee, *Unilateral Sanctions: Kind and Degree; Long-arm and Strong arm Jurisdiction; Real Intent and ‘Could-be’ Intent*,” 20 *CHINESE J. INT’L L.* (2021), <https://doi.org/10.1093/chinesejil/jmac002>.

² *Id.* at 818-9.

³ N. White & A. Abbas, *Countermeasures and Sanctions*, in *INTERNATIONAL LAW* 537 (M. Evans ed., 2014).

⁴ Alexandra Hofer, *The Proportionality of Unilateral ‘Targeted’ Sanctions: Whose Interests Should Count?*, 89 *NORDIC J. INT’L L.* 410 (2020).

⁵ D. Hovell, *Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions*, 113 *AM. J. INT’L L.* (Unbound) 144 (2019).

committed by the target state.⁶ The context to which these countermeasures should be deployed must comply with a defined proportionality threshold, as drawn from the *Gabcikovo-Nagymaros Project* case,⁷ to ensure that non-responsible actors are not justified under the countermeasure framework.

On December 1, 2018, Canadian authorities executed a US arrest warrant against a Chinese company's (Huawei) chief financial officer, a Chinese citizen, based on an alleged violation of the US sanctions against Iran.⁸ Reportedly, the US authorities are accusing Meng Wanzhou of providing banks with incorrect information on Huawei's links to a Hong Kong-based company that allegedly attempted to sell the US equipment to Iran, which violates the US sanctions.⁹ The aforementioned fact raises the issue of the necessity of imposed unilateral sanctions. Whether a sanction will achieve its objective and whether there is a causal link between the sanction and the context of its adoption is subject to further debate.

It is suggested that the US will continue to deploy unilateral sanctions as a foreign policy tool to incentivise change in a targeted state's behaviour.¹⁰ The overall objective is to ensure national security without either resorting to force or foregoing those objectives altogether.¹¹ In the US, sanctions programmes generally begin with the identification of a particular national security or foreign policy challenge.¹² The International Emergency Economic Powers Act establishes the authority to impose sanctions and delegates the authority to declare national emergencies and develop sanctions programs in response.¹³ Once the US decides to establish a sanctions program, a series of administrative processes determines the individuals and entities that should be subject to the sanctions. In addition, there is a process for sanctioned parties to have their designation adjudicated and to be able to have sanctions removed, subject to further assessment by the Treasury Department's Office of Foreign Assets

⁶ Robert Omura, *Chasing Hamlet's Ghost: State Responsibility and the Use of Countermeasures to Compel Compliance with Multilateral Environmental Agreements*, 15 REV. CURRENT L. & L. REFORM 87 (2010).

⁷ *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, 25 September 1997 I.C.J. Rep. ¶185, (Sept. 25), <https://www.icj-cij.org/en/case/92/judgments>.

⁸ Moira Warburton, *Timeline: Key Events in Huawei CFO Meng Wanzhou's Extradition Case*, REUTERS (Sept. 24, 2019), <https://www.reuters.com/article/us-huawei-tech-usa-events-timeline-idUSKBN1W81W0>.

⁹ Patrick Terry, *Unilateral Economic Sanctions and Their Extraterritorial Impact: One Foreign Policy for All?*, 18 CHINESE J. INT'L L. 426 (2019).

¹⁰ Christopher Beall, *The Emerging Investment Landscape of Post-Sanctions Iran: Opportunities, Risks, and Implications on US Foreign Policy*, 39 FORDHAM INT'L L.J. 846-7 (2016).

¹¹ David Cohen & Zachary Goldman, *Like It or Not, Unilateral Sanctions Are Here to Stay*, 113 AM. J. INT'L L. (Unbound) 146 (2019).

¹² Luis Delmonte, *Economic Sanctions, Iraq, and U.S. Foreign Policy*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 360 (2001).

¹³ 50 U.S.C. §§ 1701-06 (Supp. 1 1977).

Control.¹⁴ Otherwise, the subjects of the designation can litigate the issue in court.¹⁵ Nonetheless, it remains questionable that the US attempts to compel non-resident foreign companies and foreign citizens to comply with its sanctions laws even when these parties act outside of the US territory.

In this regard, the US must acknowledge that the country does not dominate the global economy. In addition, there is an ever-increasing number of quality foreign substitute goods and services available. Consequently, if consumers are denied access to a US product, they can easily obtain a substitute product. In the context of determining whether to impose unilateral sanctions, the economic harms to the US companies and its economy that are associated with limiting access to these markets must be fully assessed in light of the realistic benefits of such actions in today's global economy. It is observed that the US's unilateral limitation of access to foreign markets will severely affect both individual companies and the whole economy. Ultimately, it will hamper exports and put the jobs at risk at the domestic level. Therefore, unilateral sanctions have empirically been proven to be ineffective.¹⁶

3. Strong-arm Jurisdiction

The "strong-arm jurisdiction" is imposed by the US. Yee argues in his paper:

[a]t least secondary sanctions are highly likely to run afoul of a properly applied jurisdictional regime, because the connection between the imposing state and the secondary target state, entities or individuals would be getting weaker and weaker, almost non-existent (such as a sanctions-imposing state's assertion of jurisdiction on the routing of a bank transfer through its banking system, even unbeknownst to a particular target entity or individual), hardly enough to justify the exercise of jurisdiction by the imposing state.¹⁷

The US's act of imposing unilateral sanctions against Meng Wanzhou shows that the country has expanded unilateral sanctions beyond the realm of state affairs,

¹⁴ In the United States, the Treasury Department's Office of Foreign Assets Control is the agency charged with implementing sanctions and developing policy with respect to their ongoing administration.

¹⁵ *Supra* note 11, at 149.

¹⁶ R. Rennie Atterbury II, *Unilateral Sanctions: Relearning Forgotten Lessons*, 91 AM. SOC'Y INT'L L. PROC. 337-8 (1997).

¹⁷ *Supra* note 1, at 827.

thereby targeting private parties. The US's move is alarming as this can be seen as a threat to companies from developing countries that have better technology than the US counterparts.¹⁸ This will inevitably raise the concern: "Are the US's unilateral sanctions against private parties proportionate and necessary under the framework of international law?"

Article 51 of the Articles on Responsibility of States for Internationally Wrongful Acts provides:

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. Such rights would contain 'not only the effect of a wrongful act on the injured State but also the rights of the responsible State.'¹⁹

This provision will give rise to issues of degree, such as the proportionality consistent with the aim of countermeasures to re-create a balance between the rights of the injured and responsible states. It is perceived that the proper intent in implementing countermeasures is thus the one to induce a target state to cure its original violation of and comply with the law.²⁰ Furthermore, Article 49 (1) indicates that countermeasures may only be implemented against the responsible state and therefore must not affect the rights of third parties.²¹ Consequently, any limitations on the rights and interests of non-responsible actors would not be justified. There is also a need to constitute an effective means to apply pressure on those responsible for contested behaviour without unduly infringing upon the rights of third parties or the civilian population.²² Therefore, the position of third parties which may be affected would also need to be considered. More importantly, regarding the costs to civilian well-being, not only the nature of unilateral sanctions, but also their proportionality is questionable.

¹⁸ Sufian Jusoh & Tamat Sarmidi, *Unilateral Economic Sanctions: Constructive Engagement as an Alternative?*, 18 CHINESE J. INT'L L. 462 (2019).

¹⁹ *Draft Articles on Responsibility of States for Internationally Wrongful with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N, UN Doc A/CN.4/SER.A/2001/Add.1, A commentary to Article 51, at 135, ¶ 6.

²⁰ *Supra* note 1, at 824.

²¹ *Corn Products International v Mexico, Decision on Responsibility*, ICSID Case No ARB(AF)/04/01 (Jan. 15, 2008) ¶¶ 180-192.

²² *Supra* note 4, at 411.

4. Constructive Engagement

Unilateral sanctions will not only entail a limitation on the rights or interests of another party, but also raise an issue concerning whether there is not a less intrusive measure. In this vein, necessity should be included in an assessment of whether a sanction will effectively achieve its objective. Generally, the necessity of these countermeasures is limited to determining whether there is a causal link between the sanction and the context of its adoption.²³ A sanction is phrased in a manner that necessitates balancing the objective of the imposing state and the required discomfort imposed on the target state.²⁴ However, this standard is not currently applied to unilateral sanctions.

In this regard, Jusoh and Sarmidi suggested the constructive engagement which normally involves close contacts and quiet diplomacy between the states that are unhappy with the current situation and those who are supposed to be sanctioned.²⁵ For example, although the continued constructive engagement between the ASEAN and Myanmar may not produce immediate results, it still plays an important role in ensuring the stability of the Southeast Asian region.²⁶ As unilateral sanctions will have inevitably negative impact on the economy of the targeted and third states, to seek alternative ways and means to continue their trade and investment relations is therefore desirable.

5. The Unilateral Sanctions and the WTO Dispute Settlement

In addition, the World Trade Organisation (WTO) requires its 164 members to rely on its dispute-settlement mechanism to determine if a violation has occurred and what response is appropriate.²⁷ Since more than half of disputes brought before the WTO are settled amicably without reaching a final judgement,²⁸ the WTO provides a

²³ *Id.* at 403.

²⁴ *Id.* at 405.

²⁵ *Supra* note 18, at 457.

²⁶ *Id.* at 460-1.

²⁷ Stephen Garvey, *Resolving US-China IP Disputes through the WTO: A Legal Alternative to Unilateral Sanctions*, B.C. INTELL. PROP. & TECH. F. 11-2 (2018).

²⁸ WTO, *Resolving Trade Disputes Between WTO Members*, https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf.

single forum in which members can reach a negotiated settlement without resorting to further unilateral sanctions. Pursuing a claim before the WTO also offers fewer tangible advantages over the imposition of unilateral sanctions.²⁹ This will allow a member State to reaffirm its commitment to a rules-based international trading system, whereas unilateral sanctions such as imposing extra tariffs will delegitimise legitimate claims.³⁰

If unilateral sanctions are supposed to be proportionate, they should neither have adverse, negative effects on segments of the civilian population, nor they cause collateral damage to third parties. In making this assessment, the imposing state's interests should be weighed against those of the target states and of those that are not targeted but are still affected.³¹ Also, the proportionality of sanctions should include the condition of necessity. However, state practice demonstrates that the necessity of sanctions should be subjected to greater scrutiny.

6. Conclusion

Yee illustrates in his paper: “the argument must include an aspect that the intent involved in the sanctions measure also “could be” the one required for treating it as a lawful measure.”³² There is also a need to consider whether these measures enable the imposing state to achieve its goal and whether a less intrusive measure is available.³³

The complexity of globalisation and the market economy shows that a state subject to a sanction can always seek products and services from alternative markets. It is also observed that the longer sanctions last, the less effective they become. Thus, it would be beneficial to consider constructive engagement either between the states involved, or with affected private parties, as an alternative to unilateral sanctions.³⁴ In this context, regional and global organisations such as the ASEAN and the WTO play irreplaceable roles in balancing different interests among the members. Therefore, the proportionality assessment should apply to unilateral sanctions in which the interests

²⁹ *Supra* note 27, at 12.

³⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 23, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 U.N.T.S. 40 (explaining the multilateral nature of the WTO dispute resolution system).

³¹ *Supra* note 4, at 420.

³² *Supra* note 1, at 832.

³³ *Supra* note 4, at 421.

³⁴ *Supra* note 18, at 463-4.

of the imposing and target states, affected third parties, and entire international community are considered. In weighing these interests against one another, the necessity of sanctions should also be considered.

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