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US Law As Trade War Weapon

By **Hdeel Abdelhady** (May 21, 2018, 2:21 PM EDT)


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President Donald Trump raised eyebrows recently when he tweeted that he and President Xi Jinping of China were "working together to give massive Chinese phone company, ZTE, a way to get back into business, fast." "Too many jobs in China lost," the president continued, "Commerce Department has been instructed to get it done!"

ZTE is Zhongxing Telecommunications Equipment Corp., China's largest listed telecommunications company, and the fourth largest smartphone maker behind Apple, Samsung and LG. The United States effectively forced ZTE to "cease major operations" this month, after the U.S. Department of Commerce in April imposed an export ban on the company, blocking its access to the U.S. components needed to carry on its business, such as chips supplied by companies like Qualcomm.

The enforcement action against ZTE is significant for its severity. For violations of U.S. sanctions on Iran and North Korea and related offenses, ZTE in March 2017 was slapped with record-setting civil and criminal penalties of $1.19 billion, pleaded guilty and pledged in a settlement agreement to cooperate with U.S. authorities. In April 2018, the Commerce Department determined that ZTE, in violation of its settlement agreement, had repeatedly made false statements to the government, and activated the export "denial order" that crippled ZTE.

The details of the ZTE case merit study. But the case has broader legal and policy meaning as it puts into focus the Trump administration's apparent strategy to use U.S. sanctions, along with anti-corruption and anti-money laundering laws, as trade war weapons against economic rivals like China.

Commerce Secretary Wilbur Ross foreshadowed the administration's legal strategy on March 7, 2017, when he first announced the ZTE enforcement. "With this action," Ross stated, "we are putting the world on notice. Improper trade games are over with. ... Under President Trump's leadership, we will be aggressively enforcing strong trade policies with the dual purpose of protecting American national security and protecting American workers."

With the release of the U.S. National Security Strategy in December 2017, the Trump administration made plain what Ross had intimated in his ZTE statements. Peculiarly, the NSS characterizes U.S. "sanctions, anti-money laundering and anti-corruption measures, and enforcement actions" as "economic tools" and "tools of economic diplomacy" that "can be important parts of broader strategies to deter, coerce and constrain adversaries."

The Trump administration is correct in its assessment of the coercive power of U.S. sanctions, anti-corruption and anti-money laundering laws. But its strategy to weaponize these laws to advance affirmative economic trade objectives raises legal and policy questions.

Owing to the strength of the U.S. economy, business base and financial system, U.S. sanctions are uniquely global in reach and harsh in impact. Like ZTE now, foreign banks and others that have been on the wrong side of U.S. sanctions enforcement know this well. But while U.S. sanctions have clear economic and trade dimensions, their primary purpose is to further, as the U.S. Office of Foreign Assets Control states, "U.S. foreign policy and national security goals," such as "against targeted foreign countries and regimes, terrorists, international narcotics traffickers" and proliferators of

weapons of mass destruction.

Indeed, U.S. sanctions programs are based on laws that pertain to war and national defense or multilateral commitments, such as the International Emergency Economic Powers Act (codified at Title 50 of the United States Code, "War and National Defense") and the United Nations Participation Act of 1945 (codified at Title 22, "Foreign Relations and Intercourse").

Anti-corruption and anti-money laundering laws by their nature apply to business and financial transactions. U.S. anti-corruption law, particularly the Foreign Corrupt Practices Act, prohibits the bribery of foreign officials for business advantage by U.S. persons and others within U.S. jurisdiction. Anti-money laundering laws protect the U.S. financial system from abuse by illicit actors like drug traffickers, terrorism financiers and tax evaders. Unlike customs and other laws that facilitate and govern international market access, they are not true trade laws.

A cursory look at how U.S. government entities with relevant regulatory responsibilities approach true trade, anti-corruption and anti-money laundering laws bears this out. For example, the Office of the U.S. Trade Representative includes in its list of "U.S. Trade Laws" customs duties and export promotion laws. Sanctions, anti-corruption and anti-money laundering laws are absent from the USTR's list.

The U.S. Department of Justice houses FCPA and anti-money laundering units in its Criminal Division. The U.S. Department of Treasury bureau with primary anti-money laundering responsibility is the Financial Crimes Enforcement Network, or FinCEN. As its name suggests, FinCEN's primary concern is financial crime, not international trade.

Of course, these examples are not exhaustive. But they fairly represent the legal and policy differences between, on the one hand, true trade laws and, on the other hand, sanctions, anti-corruption and anti-money laundering laws that by their nature apply to international trade transactions (as many laws do), but that nevertheless serve distinct legal and policy objectives.

As a policy matter, the use of trade-adjacent laws as trade war weapons — or as bargaining chips — has the potential to diminish the integrity of these laws, their enforcement and the policies they serve. As former Treasury Secretary Jack Lew warned in 2016 with regard to financial sanctions: "We must be conscious of the risk that overuse of sanctions could undermine our leadership position within the global economy, and the effectiveness of our sanctions themselves." The same caution should apply to the operationalization of sanctions, anti-corruption and anti-money laundering laws for the purpose of bending foreign rivals to the United States' trade policy will.

It should be noted that while the Trump administration, or its "trade hawks," might see fit to blur legal and policy lines to deter and coerce economic rivals as a matter of international trade policy, government lawyers and other law enforcement professionals who act on law and facts in specific cases might not be inclined to obscure legal boundaries to prosecute, ratchet up or scale back enforcement to serve tangential or incidental policy ends.

That said, the Trump administration's stated plans to instrumentalize U.S. sanctions, anti-corruption and anti-money laundering laws for international trade advantage should not be overlooked or underestimated. Foreign nations, U.S. and foreign multinational companies and the professionals who advise them should take note.

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