Court File: 27761

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

The Attorney General of Canada,
on behalf of the United States of America

And

WANZHOU MENG

AFFIDAVIT OF PROFESSOR WILLIAM S. DODGE

I, WILLIAM S. DODGE, of DAVIS, CALIFORNIA, USA, MAKE OATH AND SAY THAT:

1. I have been retained by Steptoe & Johnson LLP, co-counsel for the Person Sought, to prepare an expert report in these proceedings. Attached hereto as **Exhibit "A"** to this affidavit is the report that I prepared in this matter.

2. My qualifications are set out in detail in my curriculum vitae attached hereto as **Exhibit "B"** to this affidavit.

3. I have read Rule 11-2 of the *British Columbia Supreme Court Rules* and I am aware of my duty to assist the court and not to be an advocate for any party. I have prepared my report in conformity with that Rule, and if called on to give oral or written testimony, I will give that testimony in conformity with that duty.

William S. Dodge

WILLIAM S. DODGE

Sworn to before me this
8th day of Dec., 2020

Hazel A. Lavarn-Walker

Notary Public

HAZEL A LAVARN-WALKER
NOTARY PUBLIC
PRINCE GEORGES COUNTY
MARYLAND
My Commission Expires Mar 23, 2023

EXHIBIT A

EXPERT REPORT OF PROFESSOR WILLIAM S. DODGE

1. I have been asked to give my expert opinion on three questions: (1) whether it is lawful under customary international law for the United States to apply U.S. bank fraud, wire fraud, and conspiracy statutes to a non-U.S. national, for representations made to a non-U.S. bank, outside the United States, on the basis of related U.S. dollar clearing of foreign transactions by that bank's U.S. subsidiary; (2) how principles governing prescriptive jurisdiction in customary international law are expressed in jurisprudence and legislation in the United States; and, relatedly, (3) how U.S. principles of statutory interpretation are applied to limit the extraterritorial reach of federal statutes, including the U.S. bank fraud, wire fraud, and conspiracy statutes.

RELEVANT EXPERTISE

2. I currently hold the positions of Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law at the University of California, Davis, School of Law, 400 Mrak Hall Drive, Davis, California, United States of America, where I teach International Business Transactions and International Litigation and Arbitration among other subjects.

3. From 2011 to 2012, I served as Counselor on International Law to the Legal Adviser at the U.S. Department of State. I currently serve as a member of the State Department's Advisory Committee on International Law.

4. From 2012 to 2018, I was co-reporter for the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018). The American Law Institute (ALI) is a leading nongovernmental organization dedicated to clarifying U.S. law, and its restatements of law are highly authoritative and influential. The previous version of this restatement—the *Restatement (Third) of the Foreign Relations Law of the United States* (1987)—

has been cited more than 1,200 times by U.S. courts. The *Restatement (Fourth)* has already been cited more than 40 times by U.S. courts, including the U.S. Supreme Court. I was chosen as a reporter because of my expertise on jurisdiction under international law and U.S. domestic law. In drafting the *Restatement (Fourth)*, I had responsibility for its provisions on jurisdiction, including those on the customary international law governing jurisdiction to prescribe and the principles of statutory interpretation that U.S. courts employ to determine the geographic scope of federal statutes.

5. I have written extensively about the customary international law of jurisdiction, *see, e.g.*, *Jurisdiction in the Fourth Restatement of Foreign Relations Law*, 18 Yearbook Private Int'l L. 143 (2017), and the extraterritorial reach of U.S. statutes, *see, e.g.*, *The New Presumption Against Extraterritoriality*, 133 Harv. L. Rev. 1582 (2020). The Supreme Court of the United States has relied on my work several times. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 366 (2005). The Supreme Court of Canada has recently done so as well. *See Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 para. 105 (2020).

6. I earned my B.A. *summa cum laude* from Yale University in 1986 and my J.D. from Yale Law School in 1991. I served as a law clerk for Judge William A. Norris of the U.S. Court of Appeals for the Ninth Circuit and for Justice Harry A. Blackmun of the U.S. Supreme Court. A copy of my CV is attached to this report as Exhibit B.

FACTUAL BACKGROUND

7. I have reviewed the Record of the Case for Prosecution, dated January 28, 2019 ("ROC"), the Supplemental Record of the Case for Prosecution, dated February 28, 2019 ("SROC"), and the

third superseding indictment filed against Wanzhou Meng by the United States in the U.S. District Court for the Eastern District of New York on February 13, 2020 ("Indictment").

8. The Indictment charges Meng with bank fraud in violation of 18 U.S.C. § 1344 (Count Seven), wire fraud in violation of 18 U.S.C. § 1343 (Count Nine), and conspiracy to commit those offenses in violation of 18 U.S.C. § 1349 (Counts Four and Six).

9. The factual predicate alleged for each of these charges is a meeting on August 22, 2013 in Hong Kong between Meng and a representative of HSBC. At this meeting Meng used a PowerPoint presentation in Chinese, an English translation of which was provided to HSBC on September 3, 2013. The United States alleges that the PowerPoint contained misrepresentations and that HSBC relied in part on those misrepresentations in continuing its banking relationship with Huawei and Huawei's subsidiaries and affiliates. ROC paras. 25-30; Indictment paras. 76-77, 79. As relevant to the extradition request, the theory of the prosecution appears to be that Meng's representations to a non-U.S. bank outside the United States ultimately caused U.S. dollar clearing of foreign transactions through the United States by the non-U.S. bank's U.S. subsidiary in violation of U.S. sanctions against Iran.

CUSTOMARY INTERNATIONAL LAW

10. To answer the first question, whether the application of U.S. statutes on wire fraud, bank fraud, and conspiracy would be consistent with the rules of customary international law governing jurisdiction to prescribe, I provide an overview of the relevant rules of customary international law, which are well-established. I go on to provide my analysis of how these rules would apply to wire fraud, bank fraud, and conspiracy statutes when the only connection between the alleged offender and the United States is the activity of U.S. dollar clearing. To address the second

question, I incorporate into my analysis examples of U.S. jurisprudence and legislation that adhere to the restrictions on jurisdiction to prescribe under customary international law.

11. Customary international law contains rules governing the exercise of jurisdiction by states. U.S. courts generally interpret federal statutes not to violate these rules. *See* Restatement (Fourth) § 406 ("Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe.")[1]; *see also Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

12. Customary international law "results from a general and consistent practice of states followed out of a sense of international legal right or obligation." Restatement (Fourth) § 401 comment a; *see also* International Law Commission, Draft Conclusions on Identification of Customary International Law, U.N. Doc. A/73/10 (2018), Conclusion 2 ("To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."); *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20) (customary international law requires "a settled practice" and "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it").

[1] Restatements are divided into blackletter text, comments, and reporters' notes. The blackletter text and comments represent the official position of the ALI. They are carefully reviewed by a committee of advisers who are experts in the field and are approved by votes of the ALI Council and the ALI membership. The reporters' notes are also carefully reviewed by the advisers, Council, and membership, but they are considered to represent the views of the reporters rather than the ALI. U.S. courts frequently rely on restatement reporters' notes, as well as the blackletter text and comments. *See, e.g.*, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017) (relying on reporters' note to tentative draft of Restatement (Fourth)).

13. Customary international law distinguishes among jurisdiction to prescribe (the authority to make law), jurisdiction to adjudicate (the authority to apply law), and jurisdiction to enforce (the authority to compel compliance with law). *See* Restatement (Fourth) § 401. "Customary international law imposes different rules on different kinds of jurisdiction." *Id.* § 401 comment b. Jurisdiction to prescribe requires a "genuine connection" between the subject of the regulation and the regulating state. *Id.* § 407. As discussed below, that connection may take various forms. *See infra* paras. 15-24. Jurisdiction to adjudicate is subject to international law rules of sovereign immunity but is not otherwise limited by customary international law. *Id.* § 401 comment b. Jurisdiction to enforce is strictly territorial and may not be exercised in the territory of another state without its consent. *Id.* § 432.

14. The extraterritorial application of U.S. law implicates the customary international law rules on jurisdiction to prescribe. Customary international law requires a "genuine connection between the subject of the regulation and the state seeking to regulate." *Id.* § 407; *see also* International Law Commission, Report to the General Assembly, Annex E, U.N. Doc. A/61/10 ¶ 10 (2006) ("ILC Report") (referring to "a sufficient connection to the persons, property or acts concerned"); James Crawford, *Brownlie's Principles of Public International Law* 441 (9th ed. 2019) (referring to "a genuine connection between the subject matter of jurisdiction and the territorial base or reasonable interests of the state in question"). The Government of Canada took the same view of customary international law in an *amicus* brief filed with the U.S. Supreme Court in a case involving the extraterritorial application of U.S. antitrust law, noting "the need for a 'substantial and genuine' connection to the nation asserting jurisdiction." Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 7, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542

U.S. 155 (2004). Absent such a genuine connection, a state's assertion of jurisdiction is unlawful under customary international law.

15. There are six traditional bases for jurisdiction to prescribe: territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction. Restatement (Fourth) §§ 408-413. "Multiple jurisdictional bases may combine to establish a genuine connection between the state and the subject of its regulation, although one jurisdictional basis will suffice." *Id.* § 407 comment c. States "typically justify and critique exercises of prescriptive jurisdiction based on whether an accepted basis for such jurisdiction exists." *Id.* § 407 reporters' note 1. In my expert opinion, these bases for jurisdiction do not establish, either individually or in combination, the genuine connection necessary under customary international law for the application of U.S. bank fraud, wire fraud, and conspiracy statutes to a non-U.S. national, for representations made to a non-U.S. bank, outside the United States, merely on the basis of related U.S. dollar clearing of foreign transactions by that bank's U.S. subsidiary. Therefore, such an assertion of jurisdiction is unlawful under customary international law.

16. Customary international law recognizes a state's jurisdiction "to prescribe law with respect to persons, property, and conduct within its territory." *Id.* § 408. "Territorial jurisdiction is the oldest, most common, and least controversial basis for exercising jurisdiction to prescribe." *Id.* § 408 reporters' note 1. The United States exercises jurisdiction to prescribe with respect to conduct in the United States. *Id.* § 402 reporters' note 5 (providing examples). Some U.S. statutes refer expressly to conduct in the United States. *See, e.g.*, 15 U.S.C. § 78aa(b)(1) (providing jurisdiction over government enforcement of Securities Exchange Act's fraud provisions involving "conduct within the United States that constitutes significant steps in furtherance of the violation"). Other statutes have been interpreted to apply to conduct that occurs within the United States, including

the federal wire fraud statute, 18 U.S.C. § 1343. *See, e.g.*, *Bascunan v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019) (holding "that a claim predicated on mail or wire fraud involves sufficient domestic conduct when (1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme to defraud"); *see also infra* paras. 32-33 (discussing application of U.S. presumption against extraterritoriality to federal wire fraud statute). U.S. courts have held that the exercise of jurisdiction to prescribe is consistent with international law if all or part of the conduct of the alleged offender occurred in the United States. *See, e.g.*, *United States v. Jordan*, 223 F.3d 676, 693 (7th Cir. 2000). Territorial jurisdiction cannot support the application of U.S. bank fraud, wire fraud, and conspiracy statutes when none of the conduct occurred in the United States.

17. Customary international law also recognizes a state's jurisdiction "to prescribe law with respect to conduct that has a substantial effect within its territory." Restatement (Fourth) § 409; *see also* ILC Report para. 12 ("The *effects doctrine* may be understood as referring to jurisdiction asserted with regard to the conduct of a foreign national occurring outside the territory [of] a State which has a substantial effect within that territory."). "Although effects-based jurisdiction has been controversial historically, it has become more accepted over time, though the extent to which it can be invoked remains controversial." Restatement (Fourth) § 409 reporters' note 1. Many states rely on effects jurisdiction to apply their antitrust or competition laws to anticompetitive conduct outside their territories. *Id.* § 409 reporters' note 2. The United States exercises jurisdiction to prescribe with respect to conduct abroad that causes substantial effects in the United States. *Id.* § 402 reporters' note 6 (providing examples). Some U.S. statutes refer expressly to substantial effects in the United States. *See, e.g.*, 15 U.S.C. §§ 6a & 45(3) (amending U.S. antitrust law to apply to conduct in foreign commerce only when that conduct "has a direct, substantial, and

reasonably foreseeable effect" in the United States); 15 U.S.C. § 78aa(b)(2) (providing jurisdiction over government enforcement of Securities Exchange Act's fraud provisions involving "conduct occurring outside the United States that has a foreseeable substantial effect in the United States"). Other statutes have been interpreted to apply to conduct that causes substantial effects within the United States. *See, e.g.*, *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 (1993) (holding that U.S. antitrust law "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-87 (1952) (applying U.S. trademark law to foreign conduct based on effects in the United States).

18. As a matter of U.S. domestic law, U.S. courts have held that non-U.S. nationals outside the United States may be held criminally responsible for knowingly causing transactions in the United States that violate U.S. sanctions. *See United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020) (upholding conviction); *United States v. Halkbank*, 2020 WL 5849512 (S.D.N.Y. 2020) (refusing to dismiss indictment); *United States v. Zarrab*, 2016 WL 6820737 (S.D.N.Y. 2016) (same). To the extent that a non-US bank directed the clearing of U.S. dollar transactions in the United States, that bank might be said to have caused those transactions, bringing the bank within the scope of the effects principle under customary international law. But as the ILC Secretariat has noted in discussing the extraterritorial application of sanctions, "[t]he extension of extraterritorial jurisdiction of a State and of the 'effects doctrine' to cover activities contrary to the foreign policy interest of a State has proven particularly controversial." ILC Report para. 25. Moreover, as noted above, effects in the United States would have to be deemed "substantial" for the effects principle to support the application of U.S. law.

19. First and most fundamentally, to establish effects jurisdiction under customary international law, the alleged offender's conduct outside the United States must have *caused* the U.S. dollar transactions inside the United States. Unless causation is established, the transactions cannot be considered "effects." When a non-U.S. bank retains discretion about where to clear customer transactions in U.S. dollars, its customer cannot be considered to have caused the transactions to occur in the United States. This is particularly true when the customer has advised the non-U.S. bank regarding the source of the foreign transactions, putting the bank on notice about the possibility of sanctions. If the non-U.S. bank itself made the decisions where to clear the transactions, knowing the source of the transactions, it follows logically that the transactions in the United States cannot be considered "effects" of the customer's conduct outside the United States.

20. Second, even if the non-U.S. national's conduct could be said to have caused U.S. dollar transactions to be cleared in the United States, effects jurisdiction would support the application of U.S. law to conduct outside the United States only if the effects inside the United States were considered "substantial." Restatement (Fourth) § 409. Assuming that the transactions involved payment neither from nor to the United States and that clearing was only one step in a chain that both began and ended outside the United States, such activity cannot qualify as "substantial" under any standard definition of that term. The fact that clearing certain transactions is prohibited under U.S. law does not make the effects more substantial for purposes of customary international law. A nation may not confer upon itself jurisdiction to prescribe that it would not otherwise have simply by prohibiting certain transactions and then claiming substantial effects based on the prohibition.

21. In addition to the territorial and effects principles, customary international law recognizes a state's jurisdiction "to prescribe law with respect to the conduct, interests, status, and relations

of its nationals outside its territory." *Id.* § 410. This principle, known as "active-personality" or "nationality" jurisdiction "represents one of the oldest and least controversial bases of jurisdiction." *Id.* § 410 reporters' note 1. The United States exercises jurisdiction to prescribe based on nationality. *Id.* § 402 reporters' note 7 (providing examples). Some U.S. statutes expressly regulate the conduct of U.S. citizens abroad. *See, e.g.*, 18 U.S.C. § 1956(f)(1) (providing "extraterritorial jurisdiction" over money laundering if "the conduct is by a United States citizen"). Other U.S. statutes expressly regulate U.S. residents as well as citizens. *See, e.g.*, 15 U.S.C. § 78dd-2(h)(1)(A) (applying Foreign Corrupt Practices Act to "any individual who is a citizen, national, or resident of the United States"). Other statutes have been interpreted to apply to U.S. nationals outside the United States. *See, e.g.*, *Cook v. Tait*, 265 U.S. 47, 54 (1924) (holding that U.S. tax laws apply to U.S. citizens abroad). But active-personality jurisdiction cannot support the application of U.S. bank fraud, wire fraud, and conspiracy statutes to any individual who is not a national or resident of the United States.

22. Customary international law also recognizes a state's jurisdiction "to prescribe law with respect to certain conduct outside its territory that harms its nationals." Restatement (Fourth) § 411. This principle, known as "passive-personality" jurisdiction, is widely accepted as the basis for prescribing terrorist offences and attacks on government officials. *Id.* § 411 reporters' note 1. "It is less clear whether passive-personality jurisdiction is generally accepted more broadly." *Id.* The United States exercises jurisdiction based on passive personality. *Id.* § 402 reporters' note 8 (providing examples). Most U.S. statutes that expressly refer to the U.S. nationality of the victim deal with terrorist offences. *See, e.g.*, 18 U.S.C. § 2332 (prescribing punishments for "[w]hoever kills a national of the United States, while such national is outside the United States"). U.S. statutes prohibiting crimes against U.S. officials have also been considered exercises of passive-personality

jurisdiction. *See, e.g.*, *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984) (justifying application of statute prohibiting murder of a U.S. officer, 18 U.S.C. § 1114, as an application of passive-personality principle). Passive-personality jurisdiction cannot support the application of U.S. bank fraud, wire fraud, and conspiracy statutes when the victim of the alleged fraud was not a U.S. national. To the extent that the non-U.S. victim may have shared the information it was given with a U.S. national acting within the territory of the United States, it is not passive-personality but territorial or effects-based jurisdiction that is implicated. In any event, bank and wire fraud are not in the same class as terrorist offenses and attacks on government officials, which are the typical offenses to which this principle is applied.

23. Customary international law also recognizes a state's jurisdiction "to prescribe law with respect to certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other fundamental state interests, such as espionage, certain acts of terrorism, murder of government officials, counterfeiting of the state's seal or currency, falsification of official documents, perjury before consular officials, and conspiracy to violate immigration or customs laws." Restatement (Fourth) § 412. This principle, known as the "protective principle," is strictly limited to offenses that threaten the fundamental interests of the state. *See* ILC Report para. 10 ("The *protective principle* may be understood as referring to the jurisdiction that a State may exercise with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of a State, such as a foreign threat to the national security of a State."). The United States exercises jurisdiction based on the protective principle to prohibit counterfeiting, 18 U.S.C. § 470, espionage, 18 U.S.C. §§ 792-799, and similar offenses. *See* Restatement (Fourth) § 402 reporters' note 9 (providing examples). Attempts by the U.S. Congress to rely on the protective principle with respect to narcotics offences

have met with a mixed reception in U.S. courts. *Compare United States v. Tinoco*, 340 F.3d 1088, 1108 (11th Cir. 2002) (accepting protective principle as basis for extraterritorial application of narcotics laws); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (same), *with United States v. Perlaza*, 439 F.3d 1149, 1163 (9th Cir. 2006) (rejecting protective principle as basis for extraterritorial application of narcotics laws); *United States v. Wright-Barker*, 784 F.2d 161, 168 n.5 (3d Cir. 1986) (same). The protective principle cannot support the application of U.S. bank fraud, wire fraud, and conspiracy statutes extraterritorially because preventing bank and wire fraud does not fall into the "limited class" of "fundamental state interests" covered by the protective principle. Restatement (Fourth) § 412.

24. Universal jurisdiction allows a state "to prescribe law with respect to certain offenses of universal concern, such as genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, the slave trade, and torture, even if no specific connection exists between the state and the persons or conduct being regulated." *Id.* § 413. "Because it departs from the more typical requirement of a specific connection between the state exercising jurisdiction and the person or conduct being regulated, universal jurisdiction is limited to the most serious offenses about which a consensus has arisen for the existence of universal jurisdiction." *Id.* § 413 reporters' note 1. The United States exercises universal jurisdiction over genocide, 18 U.S.C. § 1091, slavery, forced labor, and trafficking in persons, 18 U.S.C. §§ 1583-1584, 1589-1591, 1596, piracy, 18 U.S.C. § 1651, recruitment of child soldiers, 18 U.S.C. § 2442(c)(3), and torture, 18 U.S.C. § 2340A. The United States also exercises universal jurisdiction over a large number of terrorist offenses. *See* Restatement (Fourth) § 402 reporters' note 10 (providing examples). Universal jurisdiction cannot support the application of U.S. bank fraud, wire fraud, and conspiracy statutes

because there is no international consensus that such offenses are appropriate for universal jurisdiction. Indeed, I am aware of no state that exercises universal jurisdiction over such offenses.

25. None of the individual bases for prescriptive jurisdiction can establish the "genuine connection" that customary international law requires between the United States and the non-U.S. national's conduct that I have been asked to address. *Id.* § 407. Neither can they do so in combination. Territorial jurisdiction and nationality jurisdiction have no application whatsoever when the conduct occurred outside the United States and the alleged offender is not a U.S. national. The protective principle and universal jurisdiction have no application whatsoever because bank and wire fraud do not fall into the limited categories of offenses covered by those principles. Relying on passive-personality jurisdiction would require extending that principle beyond terrorist offenses and attacks on government officials and beyond situations where the immediate victim of the offense was a national of the regulating state. Effects jurisdiction would depend on considering transactions cleared through the United States as substantial effects, which in my view they cannot be for the reasons given above. In sum, customary international law does not permit the United States to apply its law extraterritorially to communications outside its territory by a non-U.S. national to another non-U.S. national that may possibly have contributed to conduct in the United States by a different party that is a U.S. national. In my expert opinion, the connections between the United States and such extraterritorial conduct are too attenuated to constitute the "genuine connection" that customary international law requires. Therefore, for the United States to assert such jurisdiction would be unlawful under customary international law.

U.S. PRINCIPLES OF STATUTORY INTERPRETATION

26. In addressing the state practice of the United States with respect to extraterritoriality, I have also been asked to address relevant U.S. principles of statutory interpretation. U.S. courts accept the rules of customary international law discussed above and "construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe." Restatement (Fourth) § 406; *see supra* para. 11. U.S. courts impose further limits on the extraterritorial application of federal statutes by applying a domestic canon of statutory interpretation known as the presumption against extraterritoriality.

27. The federal presumption against extraterritoriality is the main principle of statutory interpretation that courts in the United States use to determine the geographic scope of federal statutes. The U.S. Supreme Court has adopted a "two-step framework" for applying the presumption against extraterritoriality. *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016); *see also* Restatement (Fourth) § 404 (restating presumption against extraterritoriality); William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 Harv. L. Rev. 1582 (2020) (discussing current version of presumption and how it differs from past versions). At the first step of the analysis, a court asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco*, 136 S. Ct. at 2101. A court will examine all evidence of legislative intent, including the text, structure, and legislative history of the provision at issue. Restatement (Fourth) § 404 reporters' note 7. If there is not a clear indication of geographic scope at step one, then at the second step a court must "determine whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.'" *RJR Nabisco*, 136 S. Ct. at 2101. "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad;

but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

28. The U.S. Supreme Court has developed different tests for the geographic scope of different statutory provisions, depending on the text, structure, and "focus" of the provision. In *RJR Nabisco*, for example, the Court held that the criminal provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, applied extraterritorially based on a clear indication of geographic scope at the first step of the analysis. *RJR Nabisco*, 136 S. Ct. at 2101-03. Some of RICO's predicate offenses expressly apply extraterritorially. *See, e.g.*, 18 U.S.C. § 2332 ("kill[ing] a national of the United States, while such national is outside the United States"). The Supreme Court concluded "that Congress's incorporation of . . . extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." *RJR Nabisco*, 136 S. Ct. at 2102. Thus, the Court held that "[a] violation of § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial." *Id.* at 2103.

29. The Supreme Court adopted a narrower interpretation of RICO's private right of action. 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit . . . ."). The Court in *RJR Nabisco* found no "clear indication" that the private right of action was intended to apply extraterritorially at the first step of the analysis. *RJR Nabisco*, 136 S. Ct. at 2108. Turning to the

second step, the Court concluded based on the language of the provision that the focus of the private right of action was injury to business or property, concluding that "Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries." *Id.* at 2111.

30. In an earlier case applying the same two-step framework, the U.S. Supreme Court determined the geographic scope of the antifraud provision of the Securities Exchange Act. *See Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). At the first step, the Court found "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially." *Id.* at 265. At the second step, the Court concluded that the focus of the provision was not on the fraudulent conduct itself but rather on the transaction affected by the fraud. *See id.* at 266 ("we think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States"). The Court thus adopted a "transactional test," *id.* at 269, for the application of Securities Exchange Act § 10(b): "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70.

31. *Morrison*'s transactional test does not, however, apply to other statutory provisions prohibiting fraud. Indeed, the Supreme Court in *Morrison* expressly distinguished the securities fraud provision at issue in that case from the U.S. wire fraud statute. *Id.* at 271-72. The Court pointed out that the securities fraud provision prohibited fraud only "in connection with" a transaction, whereas the wire fraud statute prohibited the conduct itself. *Id.* The Court relied upon its earlier decision in *Pasquantino*, holding that the presumption against extraterritoriality did not bar application of the wire fraud statute to persons who used the wires in the United States as part of a scheme to defraud the Canadian government of tax revenue. *See Pasquantino*, 544 U.S. at 353.

32. The U.S. Court of Appeals for the Second Circuit has subsequently applied the presumption against extraterritoriality's two-step framework to define the scope of the wire fraud statute, which prohibits the use of the wires in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. In *Bascunan v. Elsaca*, 927 F.3d 108 (2d Cir. 2019), the Second Circuit concluded at the first step of the analysis that "[t]he mail and wire fraud statutes do not indicate an extraterritorial reach." *Id.* at 121. At the second step, the court concluded that the regulated conduct is not merely a 'scheme to defraud,' but more precisely *the use of the mail or wires in furtherance of a scheme to defraud*." *Id.* at 122 (emphasis in original). The court further noted "that 'events . . . merely incidental to the [violation of a statute]' do not have 'primacy for the purposes of the extraterritoriality analysis.'" *Id.* (quoting *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2138 (2018)). Therefore, the court held "that a claim predicated on mail or wire fraud involves sufficient domestic conduct when (1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme to defraud." *Id.*; *see also United States v. Hussain*, 972 F.3d 1138, 1145 (9th Cir. 2020) (concluding that "the 'focus' of the wire fraud statute, 18 U.S.C. § 1343, is the use of the wires in furtherance of a scheme to defraud").

33. In *Bascunan*, the Second Circuit concluded that the federal wire fraud statute applied to the defendant's conduct because it was alleged that he "repeatedly used domestic mail or wires to order a New York bank to fraudulently transfer money out of a New York bank account." 927 F.3d at 123. In *Hussain*, the Ninth Circuit upheld a conviction for wire fraud involving "phone or video conference calls among participants in the United Kingdom and California," "emails originating or terminating in California," and "press releases distributed from England to California." *Hussain*,

972 F.3d at 1145. By contrast, when alleged misrepresentations occur outside the United States, and none of them used domestic wires in furtherance of any scheme to defraud, the federal wire fraud statute does not apply.

34. In *Bascunan*, the Second Circuit also applied the presumption against extraterritoriality to determine the geographic scope of the bank fraud statute, which criminalizes "a scheme or artifice[:] (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. At the first step, the Second Circuit found that "[t]he bank fraud statute does not purport to apply to extraterritorial conduct." *Bascunan*, 927 F.3d at 124. At the second step, the court determined that the focus of the bank fraud statute was the "scheme." *Id.* Consistent with the Supreme Court's decision in *RJR Nabisco*, the court then looked for conduct in the United States relating to this focus. *See supra* para. 27 (discussing *RJR Nabisco*). "Though we do not foreclose other possibilities," the court reasoned, "this conduct is domestic when a core component of the scheme to defraud was the use of domestic mail or wires to direct the theft or misappropriation of property located within the United States and held by a domestic bank." *Bascunan*, 927 F.3d at 124. By contrast, when neither the alleged scheme to defraud nor any conduct relevant to that scheme occurs in the United States, the federal bank fraud statute does not apply.

35. The same restrictions apply to conspiracy to commit wire fraud and bank fraud under 18 U.S.C. § 1349, which provides: "Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." As a general matter, the geographic scope of ancillary criminal statutes like conspiracy, aiding and abetting, and attempt

"depends on the geographic scope of the underlying offense." Restatement (Fourth) § 404 reporters' note 10. The Second Circuit has specifically held this to be true with respect to conspiracy to commit wire fraud, *United States v. Napout*, 963 F.3d 163, 179 (2d Cir. 2020), and there is no reason to think that the answer would be different when the underlying offense is bank fraud.

36. In *Napout*, the Second Circuit held that the defendants could be convicted of conspiracy to commit wire fraud because the defendants "had used American wire facilities and financial institutions to carry out their fraudulent schemes," which placed them within the scope of the wire fraud statute itself. *Napout*, 963 F.3d at 180. As the Second Circuit said in an earlier decision on which *Napout* relied, "the presumption against extraterritoriality bars the government from using the conspiracy and complicity statutes to charge [a defendant] with any offense that is not punishable under the [statute] itself because of the statute's territorial limitations." *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018) (rejecting an attempt by the United States to use conspiracy statute to extend the Foreign Corrupt Practices Act to persons not covered by that act).

37. In summary, the federal presumption against extraterritoriality bars the application of U.S. wire fraud, bank fraud, and conspiracy statutes to a non-U.S. national for alleged conduct outside of the United States. Applying the presumption, the Second Circuit has held that the federal wire fraud statute requires that the defendant used domestic wires in furtherance of a scheme to defraud and that the federal bank fraud statute requires conduct in the United States relevant to a scheme to defraud in the United States. The Second Circuit has also held that the conspiracy statute may not be used to reach defendants who do not fall within the reach of the underlying statutes.

CONCLUSION

38. In my expert opinion, under the customary international law rules governing jurisdiction to prescribe, it is not lawful for the United States to apply U.S. bank fraud, wire fraud, and conspiracy statutes to a non-U.S. national, for representations made to a non-U.S. bank, outside the United States, on the basis of related U.S. dollar clearing of foreign transactions by that bank's U.S. subsidiary. Such transactions do not constitute substantial effects in the United States or otherwise establish the "genuine connection" with the United States that customary international law requires.

39. U.S. principles of statutory interpretation impose further limits on the extraterritorial reach of federal statutes. Applying the presumption against extraterritoriality, U.S. courts have developed different tests for the geographic scope of different statutory provisions, depending on the text, structure, and "focus" of the provision. The federal wire fraud statute requires that the defendant used domestic wires in furtherance of a scheme to defraud. The federal bank fraud statute requires conduct in the United States relevant to a scheme to defraud in the United States. And the conspiracy statute applies only when the defendant falls within the reach of the underlying statutes.