

To Examine the Legitimacy of America's Long-Arm Jurisdiction Over China from the Perspective of WTO Rules

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Abstract

The WTO has set up a special dispute settlement mechanism for member states to resolve trade conflicts and disputes under the multilateral trading system. Any retaliatory measures taken by member states must be approved by the dispute settlement body. However, in dealing with trade disputes with other member countries, the United States once circumvented the platform and used the long-arm jurisdiction with American characteristics to apply its domestic laws outside the region and unilaterally retaliate against its trading partners. The abuse of long-arm jurisdiction by the United States to retaliate against Chinese enterprises, industries and even individuals has negatively affected our foreign economic and trade activities. Such behavior is not only contrary to the multilateral trade rules established by the WTO, but also inconsistent with the purpose of the dispute Settlement Body to safeguard the multilateral trading system. This paper will discuss the legality of the United States exercising long-arm jurisdiction over China and the limitations of its regulation under the framework of WTO rules.

Keywords

WTO Rules, Long-Arm Jurisdiction, Authorization Retaliatory Measures, Unilateral Protectionism.

1. Overview of the WTO dispute settlement mechanism and its authorized retaliatory measures

The WTO dispute settlement mechanism is developed on the basis of Article 23 of the General Agreement on Tariffs and Trade (GATT) and takes the Understanding on Dispute Settlement Rules and Procedures (DSU), Annex II of the WTO Agreement, as its main legal basis. The Dispute Settlement Body (DSB) of WTO dispute Settlement mechanism includes expert group and appellate body. The expert group is a non-permanent body, and the appellate body is a permanent body. The appellate body is the characteristic system of the dispute settlement mechanism. It gives the members the relief right to appeal against the judgment made by the expert group, which helps to protect the rights and interests of the parties to the dispute.

The WTO dispute settlement mechanism has effectively broken through the defects of the existing dispute settlement mechanism of the General Agreement on Tariffs and Trade, such as lack of clear procedures, lack of time limit, loose, difficult to match negotiations, Balkanization, etc., making it more purposeful in the establishment of the system. First, strictly limit the maximum duration of each hearing proceeding. Second, replace the joint negotiation matching principle with the reverse negotiation matching principle to improve the psychological efficiency of DSB. This not only significantly improves the effectiveness of dispute resolution, but also effectively prevents the disputing party from deliberately delaying the progress of the whole process in order to avoid dispute resolution. Third, it explicitly rules out the possibility of disputing member states seeking other avenues of relief. Fourth, the parties to the dispute

are prohibited from taking unilateral relief measures before the award of the dispute. Therefore, the WTO dispute settlement mechanism is more mandatory, binding, efficient and specific in terms of dispute settlement among member states.

Another highlight of WTO dispute settlement mechanism is the cross-retaliation measures authorized by DSB. If the losing party refuses to perform its obligations after the award of DSB is published, and the parties still cannot reach an agreement on the performance of obligations or compensation and relief through negotiation, the infringed party may apply to DSB to take retaliatory measures against the losing party, suspend the concession under the agreement or suspend the performance of other obligations. A member party of the same department under the same agreement shall take parallel retaliation for a breach of its obligations by another Member party. If parallel retaliatory measures are no longer possible, the member is permitted to take retaliatory measures against another member of another department under the same agreement, i.e. cross-retaliatory measures. Unilateral retaliatory measures taken by a party to a dispute without authorization by the DSB will constitute a violation of WTO obligations. The uncertainty of the validity of DSB rulings in member countries has provided a hotbed for some members to take unilateral protectionism or even unilateral retaliatory measures in violation of WTO rules. The exclusion of disputes Settlement body rulings in US domestic law provides a "legal basis" for its unilateral abuse of long-arm jurisdiction, retaliatory measures and even economic sanctions against trading partners.

2. The United States uses its long-arm jurisdiction to retaliate and impose unilateral sanctions on China

2.1. Launching Section 301 investigations and sanctions against China

On August 14, 2017, the Trump Administration requested the Office of the United States Trade Representative to initiate an investigation under Section 301 of the Trade Act of 1974 into our laws, regulations and development policies related to intellectual property rights, including technology transfer and technological innovation. In March 2018, the US trade Agency issued a Section 301 investigation report accusing China of forcing or pressuring US companies to transfer technology to China. China's licensing administration discriminates against foreign enterprises and forces American enterprises to transfer technology to Chinese enterprises in exchange; China transfers technology through investment or commercial acquisitions of US companies; China is directly or indirectly hacking into U.S. computer networks to gain access to important commercial information in order to compromise U.S. security. In fact, this is not the first time that the US has launched a Section 301 investigation against China. By 2020, the United States had launched six investigations into our country,

It will involve market access, clean energy and intellectual property rights. It will also impose sanctions on China in the form of a tariff and retaliation list and punitive tariffs. Before 2017, the main purpose of the US investigation under Section 301 against China was to strengthen the protection of US intellectual property in China and urge China to improve its domestic legislation, law enforcement and judicial guarantee system for IPR protection. At the same time, any investigation involving intellectual property rights always ends with China and the United States reaching an agreement on intellectual property protection. During this period, trade between China and the United States and Sino-US relations were not affected by the "Section 301 investigation" initiated by the United States. On the contrary, to some extent, the protection of intellectual property rights in China was promoted. The amount of trade between China and the United States has not fallen sharply. On the contrary, trade between the two countries has been further strengthened. In other words, until 2017, the Section 301 investigation against China will still mainly perform its "duty" function. Objectively, after a long time practice, improving the legal system in the field of intellectual property and transforming TRIPs rules

under WTO, our domestic protection of intellectual property conforms to the standards stipulated by WTO, and there is no lack of intellectual property protection situation. However, the United States frequently charges our country by using "301" investigation as the pretext of violating intellectual property of enterprises of other countries. Preventing our country from obtaining American technology through legal trade channels. By abusing Section 301 to investigate trade partners, the US is essentially using its long-arm jurisdiction to sanction other countries and force them to compromise to achieve its political goals.

2.2. Imposing "export control" measures against China

Economic sanctions are an important part of American foreign policy. The U.S. foreign economic sanctions system is divided into two levels: first, the first-level sanctions, one-on-one strikes against a specific target; The second is secondary sanctions, through the domestic legislation of the United States to increase contact points, infinite broadening the scope of the United States sanctions on foreigners (including entities), entity list is a common form of its expression. Entities not included in the list are required to apply in advance to the U.S. Department of Commerce for permission to export or re-export products controlled by the United States to entities on the List, otherwise it is considered a violation of the U.S. export control ban. In 2012, for example, the US Department of Commerce imposed sanctions on ZTE. On the grounds that ZTE had violated the US export control ban by exporting a batch of technology products containing software and hardware of US technology companies to Iran, the US launched an investigation and imposed sanctions on ZTE, restricting the export of technology products to ZTE by US domestic enterprises. The United States reached a provisional agreement with ZTE to lift export restrictions on supplies to ZTE in exchange for the replacement of senior executives and punishment of those involved. But then the United States again imposed sanctions on ZTE for not fully implementing the agreement, resulting in a stalemate in ZTE's operations. To stay afloat, ZTE has again been forced to strike a deal with the US, agreeing to a US regulatory Posting and a hefty fine in return for the lifting of the Commerce Department ban. Huawei, as a new high-tech enterprise of our country, also suffers from the export control measures of United States. In May 2019, the Bureau of Industrial Security (BIS) of the US Department of Commerce added Huawei Technologies Co., Ltd. and its subsidiaries to its list of entities after the US revised its domestic export administration laws and regulations in 2018, believing that Huawei has engaged in activities in the US that pose a major threat to the national security of the US. In June 2019, a total of 278 enterprises, institutions and individuals were included in the latest entity list of the US, including China's major key research institutions and advanced technology enterprises, ranking second only to Russia (318). In August 2020, the BIS announced that it would continue to tighten Huawei's access to US technology, adding 38 Huawei subsidiaries to its "entity list" and revising four existing Huawei entities list items. Among the 38 Huawei subsidiaries in 21 new countries or regions, most are cloud-related companies. Several American sanctions have cut off Huawei's ability to obtain chips from third-party suppliers, which are required to file export applications with the Commerce Department whenever they use intermediate products containing American technology in the process of making chips. If no prior application is made, the third supplier will be subject to U.S. sanctions. The US decision to sanction ZTE and Huawei is based on the US export control law and export control ban, as well as the assessment of whether it poses a threat to the US national security. The effect of sanctions on one country extends to the third party associated with it. Its long-arm jurisdiction has deteriorated, and its connotation goes far beyond resolving conflicts and disputes between private individuals in the US and abroad. Under the pretext of long-arm jurisdiction, the United States imposes "enveloping" restrictions on the development of other countries' science and technology industries, especially the chip and other electronic equipment industries.

2.3. Sanctioning Chinese entities and individuals under the pretext of "protecting human rights"

In addition to imposing sanctions on Chinese technology companies, the US has also imposed sanctions on Chinese entities and individuals under the pretext of "protecting human rights". In October 2019, Hong Kong rioters created social chaos and disrupted order in Hong Kong. The US government not only publicly expressed its support for the rioters, but also frequently sent US officials to engage with them, and even introduced human rights bills such as the Hong Kong Human Rights and Democracy Act of 2019 to interfere in China's internal affairs. In October 2019, under the banner of "protecting human rights", the US Department of Commerce added the Public Security Bureau of China's Xinjiang Uygur Autonomous Region and its 18 municipal and county public security bureaus to the sanctions list, and added eight entities, including UOB Technology, Hikvision, Hikvision and SenseTime, to the "entity list", restricting these companies from buying products or parts from the US. In December of the same year, the United States passed the Xinjiang Uyghur Human Rights Act of 2019 to impose sanctions on local government departments and officials in Xinjiang, and the US Congress also enacted legislation on "Uyghur forced labor" to pressure Xinjiang's product exports and enterprises to invest. In April 2021, the U.S. Senate passed the Strategic Competition Act of 2021, which specifically addresses the need for cooperation between the United States and its Allies to address alleged Chinese anti-human rights abuses in Tibet, Hong Kong, and Xinjiang, and calls for the establishment of joint mechanisms and programs to compel China to stop its human rights abuses and persecution of ethnic minorities. To prevent China's authoritarian governance model from being exported to the rest of the world.

3. WTO's regulation and limitation of the long-arm jurisdiction of the United States

As a matter of fact, WTO member states have repeatedly requested WTO to conduct a compliance review on the long arm jurisdiction of the United States, but the WTO has never made a substantive judgment on the compliance of the long arm jurisdiction of the United States, so that the application of the long arm jurisdiction of the United States is not bound by the WTO for a long time. The DSB has heard several cases challenging the compliance of the US long-arm jurisdiction. In the "Japan v. the United States for Retaliatory Tariffs on Imported Automobiles" case in 1995, Japan accused the United States of launching the "Super Section 301" investigation against Japan in violation of its "most-favored-nation treatment" and market access obligations under WTO rules. The case ended with the U.S. and Japan reaching an agreement outside the WTO system. Therefore, in this case, WTO did not conduct a compliance review on the long-arm jurisdiction of the United States.

In 1998, DSB conducted substantive review of the long-arm jurisdiction of the United States through the case of "European Community v. United States Section 301". At that time, the EC sued the United States based on the question of the compliance of the United States to exercise the long-arm jurisdiction procedure. Unfortunately, considering that completely denying the legitimacy of the US long-arm jurisdiction in the WTO system may lead to a backlash of unilateral protectionism by the US, the panel did not directly deny the legitimacy of the US "Section 301" under the WTO system. It held that the US "Section 301" did violate WTO regulations based on the text alone. However, the legality of the articles should not be limited to the articles themselves. The compliance of the articles should be discussed in terms of their impact on WTO rules and whether the United States faithfully performs its obligations under the WTO (Liu Ying, Liu Zhengyang, 2019). Therefore, the panel chose to split the difference, focusing instead on the EU's claims and not unilaterally taking actions inconsistent with WTO rules before the dispute settlement process was completed. The EC finally accepted the panel's

report and did not proceed with the appeal. Therefore, WTO has long arm jurisdiction over the United States in this case.

There has been no breakthrough in the review. In 2000, the EU once again filed a lawsuit against the legality of the United States' exercise of long-arm jurisdiction to the WTO, accusing the amendment of Article 306 of the Trade Act of 1974 of the United States in violation of the most favored nation treatment and the prohibition of general quantitative restrictions. However, this case failed to make the WTO conduct a deep examination of the United States' long-arm jurisdiction. In 2018, China's Ministry of Commerce submitted a case to the WTO Dispute Settlement Body on the US Section 301 investigation, questioning whether the US violated the WTO rules on prohibition of unilateral measures, most-favored-nation treatment and tariff concessions. In September 2020, the DSB ruled that the United States had acted illegally by imposing tariffs on Chinese goods in violation of WTO obligations. Although the United States may not necessarily comply with the ruling and our losses may not be materially remedied, it is still a milestone in our fight against the abuse of long-arm jurisdiction by the United States. Since December 2019, the DSB's operation has been in limbo because the number of judges has not reached the threshold required to sit a trial due to the US obstruction of its selection. In November 2020, the last member of DSB resigned, so DSB was completely in a state of suspension, and trade disputes among WTO members could not be handled through DSB.

4. Conclusion

From WTO members such as China, the European Union and Japan's doubts on the compliance of the United States' exercise of long-arm jurisdiction and DSB's determination that the United States' unauthorized tariff increase to its trading counterpart constitutes a violation of its obligations, the United States' long-arm jurisdiction does not have sufficient legitimacy under the WTO system. However, the existing WTO dispute settlement mechanism can not effectively regulate the abuse of the long-arm jurisdiction of the United States, which is actually still outside the supervision of WTO rules. The United States took unilateral retaliatory measures against its trade counterpart and obstructed the normal operation of the DSB without the authorization of the DSB, which is the provocation and destruction of the multilateral trading system of the WTO by the unilateral trade protectionism of the United States, which also reflects the urgent need for reform of the WTO dispute settlement mechanism. In July 2020, 36 countries including China and Canada plan to send representatives to set up Provisional Appellate Arbitration Arrangement (MPIA) to temporarily make up for the lack of appellate body function in DSB. However, this is not a long-term plan. China should call on more members in the WTO to actively discuss measures to promote DSB to resume normal operation as soon as possible, and discuss how to effectively supervise the United States' lawful and restrained exercise of long-arm jurisdiction outside the region within the existing WTO mechanism.

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