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Analysis of U.S. Response to Frequent Sanctions Against China

——International Law Dimension

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Abstract: Since the global outbreak of the new crown epidemic in 2019, the development of various countries has been affected and global economic growth has been sluggish. At the same time, economic friction between the major powers has continued, and there has been a rise in Western trade protectionism and hegemony. Western capitalist countries, represented by the United States, have imposed economic sanctions on China in an attempt to curb China's development, but there is currently a lack of an effective system of rules at the international level to regulate this phenomenon. Therefore, this paper analyzes the economic sanctions imposed by the United States on our country, based on the current legal system of our country, and in the process of comparing and learning from the advanced experience of other countries, it explores how our country should accelerate the improvement of the anti-sanctions legal system, to improve the level of judicial countermeasures effectively, and to set up legal barriers to curb the negative impact of foreign economic sanctions on our country.

Keywords: Unilateral sanctions, anti-sanctions, interdict, anti-foreign sanctions act

1. Introduction

Sanctions in modern international law are coercive measures imposed to induce a State to change its policies (behaviors) or to comply with the rules of international law. It covers political, cultural, diplomatic, economic, legal, military, and other aspects, and reflects the views of the sanctions-imposing State on certain policies or behaviors carried out by the sanctioned State. Categorized according to their nature in international law, the sanctions imposed by the United States on China are not backed by multilateral international treaties and are typical unilateral sanctions [1].

Focusing on the current situation of U.S. sanctions against China, in terms of legislation, the legal basis for U.S. sanctions against China, in addition to the general sanctions laws that do not specify the precise and specific targets and measures of sanctions, there are also special sanctions laws directly targeting China, such as the Strategic Competitiveness Act of 2021; in terms of the main body of sanctions, U.S. sanctions against China are mainly implemented by U.S. federal government departments, including the U.S. Department of the Treasury, the Office of Foreign Assets Control (OFAC) under the U.S. Department of the Treasury, and the U.S. Department of State; in terms of

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the types of sanctions measures, they can be categorized as travel bans, export/import controls and financial sanctions [2].

Catalyzed by the new crown epidemic, the norms of U.S. economic sanctions against China are also evolving, presenting 2 brand-new characteristics, i.e., unity of subject matter: expanding from independence to unity, and flexibility of form: expanding from bills to executive orders [3]. Jointness of subjects refers to the gradual shift in the structure of the subjects of sanctions from unilateral sanctions in the field of economy and trade to multilateral ones, as well as their development from a single sector to a joint one with other relevant sectors.

Formal flexibility is mainly at two levels: first, because of the complexity of the procedures required to make changes to bills and the simplicity of the process of issuing executive orders, there is greater reliance on executive orders issued by the President as a basis for sanctions; second, the sanctions regime is based on a decentralized approach, with an increasingly broad range of United States domestic laws being invoked [3]. This is particularly reflected in the ZTE and Huawei cases, where the use of criminal law as a basis for economic sanctions criminalizes the targets of sanctions.

At present, the U.S. sanctions have been reduced to a tool for implementing hegemony and interfering in China's internal affairs. In 2020 alone, the United States announced four unilateral sanctions against the Chinese side about Hong Kong-related issues, and its objective is revealed. Not only that, its sanctioning behavior also brings many legal risks to Chinese enterprises, such as the uncertainty of jurisdiction leading to increased litigation costs, and the expanded interpretation of Section 301 of the U.S. Trade Act that treats Chinese enterprises' violations of U.S. laws and regulations and foreign policy as infringement of U.S. commercial and trade interests, which would increase the risk of compliance. At the same time, by the Office of the United States Trade Representative "case" and was included in the jurisdiction of the United States courts, once the case is lost, the losing enterprise is no longer only a simple payment of civil damages and a deadline for corrective action to assume responsibility, the United States courts intend to this kind of international commercial disputes to a higher level for the settlement of the way often include export controls, economic sanctions blacklist and even personal criminal sanctions, resulting in a whole new risk of legal sanctions [4].

2. Status of China and the International Counter-sanctions Legal Regime

2.1. Exploration of China's Current Laws

On September 19, 2020, the Ministry of Commerce of the People’s Republic of China issued the Unreliable Entity List Regulations. On January 9, 2021, the Ministry of Commerce of the People’s Republic of China issued the Measures for Blocking Improper Extraterritorial Application of Foreign Laws and Measures. On June 10, 2023, the Law of the People's Republic of China on Anti-Foreign Sanctions was published and implemented.

China's Anti-Foreign Sanctions Act is characterized by the following legislative features: first, a clear position of principle. China was the first country to use the word "anti" directly in the title of a law on Anti-Foreign Sanctions Act, and the purpose of the legislation is clearly stated in Article 1 of the opening chapter of the Law as "safeguarding national sovereignty, security, and development interests and protecting the lawful rights and interests of Chinese citizens and organizations". Secondly, it is of an obvious foreign-related nature, targeting unjustified unilateral sanctions initiated by other countries, and is defensive [5]. Thirdly, it is formulated within the framework of upholding and complying with international law and is based on upholding the fundamental principles of international law and complying with the restrictive provisions of international law on the application of countermeasures [6].

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2.2. International Advanced Experience

As early as the last century, some developed countries and regions have adopted legislation to counter sanctions and blocking. The first blocking law in the world was the Business Records Protection Act, enacted in 1947 in Ontario, Canada. As the United States has expanded its power, many countries and regions have enacted or updated blocking laws and have evolved from procedural to substantive blocking. The most informative of these is Russia's Law on Measures (Countermeasures) Against the United States and Other Unfriendly Acts (Russian Counter-Sanctions Law), introduced on June 4, 2018.

The background and principled position of the Russian Anti-Sanctions Law are similar to that of China's anti-blocking legal system, so its construction of China's legal system has a greater revelation.

First, it is important to establish a legislative system underpinned by specialized laws. The Russian Counter-Sanctions Act provides an umbrella, overarching legal basis for countering unilateral U.S. sanctions from the standpoint of national legislation. In addition, the Russian Federation has subsequently enacted the Federal Law on Amendments to the Code of Arbitration Procedure of the Russian Federation to Protect the Rights of Individuals and Legal Entities in the Context of Restrictive Measures Imposed by Foreign States, Associations, and/or Unions of States, and State (Inter-State) Organizations of Foreign States or Associations and/or Unions of States, as well as the Presidential Decree on the Application of Measures for the Suppression of Unfriendly Acts Committed by Foreign States, which has increased the effectiveness and flexibility of the legal system and turned it into a system of special laws led by specific laws, backed up by special laws, and accurately counterbalanced by presidential decrees.

Second, the application of counter-sanctions includes countries that have imposed sanctions on Russia. The full title of the Russia Counter-Sanctions Act bluntly states "the United States and other countries." Moreover, by stating in the preamble that "unfriendly acts" include political or economic sanctions or other actions that threaten the territorial integrity and political and economic stability of the Russian Federation, it addresses a comprehensive range of objects and means.

Third, the Court's anti-sanctions jurisprudence has been effective. On April 13, 2021, the Arbitration Court of the City of Moscow, Russia, decided the first case of implementation of the Russian Anti-Sanctions Law based on the aforementioned Federal Law No. 171. The timely appearance of the first case allowed for the smooth implementation and use of the Russian Anti-Sanctions Act at the judicial level [7].

3. Improvement of China's Counter-Sanctions Legal System

3.1. Problems with the Existing Anti-sanctions Legal System in China

3.1.1. Decentralized and Low-ranking Laws

China's existing anti-sanctions laws and regulations are decentralized and of relatively low rank. In addition to the Anti-Foreign Sanctions Act, the Entity List and the Blocking Measures are departmental regulations, while other relevant laws are scattered in the Foreign Trade Law of the People's Republic of China, the Export Control Law of the People's Republic of China and other laws and regulations, with duplication and crossover between the contents, not forming a complete system, coupled with the fact that some of the legal provisions are generalized and overly broad, lacking in specific procedural rules, with the details yet to be implemented, which makes their practicality low [7].

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3.1.2. Lack of Clarity in the Implementation of the Responsibilities of the Competent Authorities

China's Anti-Foreign Sanctions Law only stipulates in general terms that the competent organization is "the relevant department of the State Council", and its specific competent authority is not clear. The Development and Reform Commission, the Ministry of Foreign Affairs, and the Ministry of Commerce all can implement counter-sanctions measures, but "joint control" and the lack of a clear definition of the competent authority are likely to lead to conflict or lack of coordination between law enforcement and management, making it difficult for the departments to coordinate and cooperate well, and failing to bring the effect of the law into real play [8].

3.1.3. The Scope of the Blocking is Unknown

China's Measures on Blocking provides for the scope of application ratione materiae in Article 2 in a broad and general manner, but it does not enumerate the foreign laws or blocking measures blocked in the form of a list in the first instance, which makes it difficult for the Measures on Blocking to be truly implemented.

3.2. Suggestions for Improving our Chinese Legislative System

3.2.1. Legislative Aspects

First, the "integration" of blocking and anti-sanctions laws should be promoted in an integrated manner. That is, scattered counter-sanction measures should be consolidated, supporting rules for blocking and counter-sanction working mechanisms should be drawn up, and areas where foreign countries frequently impose sanctions should be identified, targeted, and accurately blocked and countermeasures formulated. The list of foreign laws and entities blocked should be clarified. Besides, the issue of foreign sovereign immunity should be addressed as soon as possible by building on the (draft) Foreign State Immunity Act, drawing on the Russian Anti-Sanctions Act. To safeguard the enforceability of strict compliance with the blocking ban, Chinese companies should be required to strictly comply with the blocking ban and establish corporate compliance that is oriented towards China's blocking and anti-sanctions laws and regulations, i.e., ex-ante deterrence and ex-post penalties should go hand in hand. When Chinese companies violate the ban, they should be held legally responsible. To effectively take into account the interests of our multinational enterprises, the specific policy of "necessary support" in Article 11 of the Blocking Measures should be clarified, and the positive counter-reporting attitude of the Russian Federation in the first case of the Anti-Foreign Sanctions Act should be taken into account [7].

Secondly, the system of counter-sanctions authorities should be clarified, the responsibilities and powers of the administrative departments of the State Council should be delineated, the division of responsibilities of each department should be implemented, contradictions in management or management vacancies should be prevented, and coordination and cooperation with other departments should be promoted. In contrast, each department completes the work within the scope of its responsibilities. Specifically, a competent body should be defined in general terms, and the tasks, responsibilities, working procedures, and workflows of other bodies should be specified [8].

Lastly, the need for derogation from embargo countermeasures and leapfrogging negotiations should be met, i.e., firstly, China's competition law regime should be revised and improved, its extraterritorial applicability clarified, and the expansion of the main body of economic sanctions should be curbed. The Government should also establish a take-back system to fill the gaps in the system of restraining orders and their lifting and to limit the expansion of the recipients of economic

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sanctions; at the same time, it should start the study and negotiation of bilateral consultative agreements and agreements on exemptions from sanctions [3].

3.2.2. Judicial Aspects

(1) Jurisdiction of cases

First, the relevant cases should be under the jurisdiction of our courts. Such cases are very likely to involve the improper application of foreign laws or measures, and should therefore be categorized as foreign-related civil and commercial cases, according to article 266 of the Civil Procedure Law of the People's Republic of China, the relevant provisions of the Civil Procedure Law should be applied by the "law of the forum". This paper proposes to add to article 273 of the Law that "litigations arising from disputes over the improper extraterritorial application of foreign laws or measures to our country's state, citizens or organizations, or the adoption of measures by a foreign state to sanction our country's state, citizens or organizations, which ultimately result in damage to our country's interests" shall also be subject to the jurisdiction of our country's courts, thus ruling out the choice of a foreign court by agreement of the parties [7].

Secondly, there should be an increase in the number of territorial jurisdictional links. If they cannot be included in foreign-related civil and commercial cases and are under the exclusive jurisdiction of China, they should be considered for jurisdiction in our courts by the guidelines on special territorial jurisdiction for foreign-related civil and commercial cases. Although the special territorial jurisdiction set out in Article 272 of the Code of Civil Procedure covers six points of connection: the place where the contract is concluded, the place where the contract is performed, the place where the subject matter of the litigation is located, the place where the property may be seized, the place where the tort is committed, and the place where the representative office is domiciled, it is difficult to cover all the circumstances in which an action for interdiction and action to oppose a foreign sanction is brought based on a tort or a contractual dispute. Recently, the Supreme People's Court has submitted to the Standing Committee of the National People's Congress an explanation of the Draft Amendment to the Civil Procedure Law, which not only adds a new point of connection to the place of infringement but also adds the criterion of "appropriate linkage" as an underpinning measure, to lock the jurisdiction of the courts of our country employing special territorial jurisdiction [7].

Thirdly, it should be tried in the first instance by an intermediate people's court. The Provisions on Several Issues Concerning the Jurisdiction of Foreign-Related Civil and Commercial Cases came into effect on 1 January 2023, clarifying that the jurisdiction of foreign-related civil and commercial cases is based on the principle of full liberalization at the middle and lower levels, with inter-regional centralization being the exception, which means that grassroots courts throughout the country do not need to be authorized by the Supreme People's Court to handle foreign-related civil and commercial cases. However, blocking and anti-sanction litigation has a strong diplomatic function and political attributes and belongs to the "major foreign-related cases" under the jurisdiction of the intermediate people's courts, which should be tried in the first instance [7].

(2) Conditions of admissibility of cases

In the case of blocking action, the plaintiff shall provide the Ministry of Commerce of China with a blocking injunction against a foreign law or measure, and the defendant has not been exempted from it; and provide prima facie evidence that the defendant has likely complied with the foreign law or measure within the scope of the injunction, and that there have been or will be damaging consequences for the defendant, or that it has suffered losses from judgments or decisions rendered following foreign laws within the scope of the injunction, and that the defendant is likely to benefit therefrom. In the case of an anti-sanctions action, the plaintiff should provide prima facie evidence that the defendant has been included in the sanctions list published by the Ministry of Foreign Affairs of China and that it has suffered losses as a result of the sanctions imposed by the defendant; or,

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although it has not gone through the blocking or anti-sanctions process, the plaintiff can provide prima facie evidence that the defendant has suffered losses based on a discriminatory measure, such as a foreign sanction [7].

(3) International judicial assistance

The rational use of international judicial assistance, whereby a court of one State carries out certain procedural acts on behalf of a court of another State at the request of the latter, such as the service of judicial documents, the summoning of witnesses, the collection of evidence, and the recognition and enforcement of court judgments and arbitral awards, is instrumental in blocking the undue extraterritorial application of foreign laws or measures, as well as in our country's efforts to impose counter-sanctions.

Therefore, China should, first of all, refrain from recognizing and enforcing foreign court judgments and rulings involving sanctions, to prevent foreign laws and judgments from taking effect in China, thus harming China's interests; secondly, it should actively apply for the recognition and enforcement of judgments and rulings on blocking or counter-sanctions claims made by its courts, to achieve the purpose of counter-sanctions to the greatest extent possible; and lastly, it should apply for exemptions from the requirement to provide evidence by the foreign court based on the blocking injunction.

4. Conclusion

The current international situation is constantly changing, and China is facing more serious international challenges. As the imposition of unilateral sanctions against China by foreign countries has intensified, China has made attempts at the legal level to block foreign sanctions and carry out counter-sanctions. However, there are still many problems, such as the fragmentation of the relevant laws and their insufficient coercive power, and the lack of clarity in the implementation of the responsibilities of the competent authorities and the unclear scope of the blocking process. Therefore, China should start to fill the loopholes at the legislative level, co-ordinate the relevant laws to form a complete system, and, at the same time, concretize the legal provisions and meet the needs of the blockade countermeasures and leapfrogging negotiations for derogation; at the judicial level, improve the case jurisdiction, acceptance conditions and the relevant provisions of international judicial assistance, to prevent the inappropriate application of foreign laws in our country, and to promote the implementation of China's counter-sanctions. Only by continuously improving the relevant laws and regulations can we prevent foreign unilateral sanctions against China, safeguard China's legitimate rights and interests, and promote China's continuous development.

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