

Research On the Justiciability of Us Economic Sanctions in The Wto

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Abstract

Since the Second World War, the United States has frequently imposed economic sanctions on other countries, resulting in restrictions on international trade and having a huge impact on the economy of the sanctioned countries. With the US now imposing widespread economic sanctions around the world, affected countries look for relief measures. The WTO dispute settlement mechanism may play a role in normalizing international trade through legal means to alleviate the adverse effects of economic sanctions. This paper mainly studies the relationship between the US economic sanctions and the WTO dispute settlement mechanism, as well as the justiciability of US economic sanctions in the WTO through the analysis of relevant articles of the WTO-related agreements and some cases of the US economic sanctions against other countries.

Keywords: US economic sanctions, secondary sanctions, trade sanctions, financial sanctions, WTO

1. Introduction

In the international community, economic sanctions are a controversial foreign policy, and the United States is the country that uses the most economic sanctions in the world. In the past few decades, the United States has established a relatively systematic and comprehensive economic sanctions system, and it reached its peak during the Trump administration. Upholding the purpose of exerting pressure on countries that go against its will, the United States has long been intending to expand its political influence through economic sanctions. US economic sanctions have weakened the foundation of multilateral trade, stepped beyond

the boundaries of the power of sovereign states, and even caused humanitarian crises. A conclusion can be made from the observations of the economically sanctioned target countries in recent years: countries subject to sanctions often suffer heavy losses, such as Cuba, Iran, Iraq, and Russia. Economic sanctions not only make a heavy blow to an economy, but also profoundly affect the normal life of ordinary people in the sanctioned countries, such as rising unemployment, shortages of supplies, currency devaluation, and so on.

The sanctioned countries can respond to the sanctions separately by diplomatic and economic means. In particular, they must be good at using existing economic and trade mechanisms to eliminate economic obstacles and curb economic sanctions. Sanctioned countries expect relief through international intergovernmental organizations such as the United Nations and the World Trade Organization and the use of the WTO dispute settlement mechanism to counter the US economic sanctions is a systematic project. Therefore, it is necessary to start by doing research on the justiciability of US economic sanctions under the WTO rules.

2. Laws and regulations of US economic sanctions

2.1 Types of US economic sanctions

The US economic sanctions serve US foreign policy. The US Congress's sanctions legislation, the Bureau of Industry and Security, and the Office of Foreign Assets Control's sanctions enforcement form the basis of the US economic sanctions system. Trade sanctions and financial sanctions, primary sanctions and secondary sanctions, unilateral sanctions and multilateral sanctions are the theoretical classifications of economic sanctions. Classifications help to identify the different characteristics of economic sanctions created by different legislations. Trade and financial sanctions affect different economic sectors; primary and secondary sanctions have different sanction scopes; unilateral and multilateral sanctions have different legislative bodies, all of which will have a direct impact on the justiciability issue.

2.1.1 Trade sanctions and financial sanctions

Trade and finance run through international economic exchanges. The wave of globalization set off by the two industrial revolutions, two world wars, and the information industry

revolution has swept through most countries in the world. Trade and finance constitute the link connecting the economies of all countries in the world. The increase in the degree of economic interdependence among countries means that trade sanctions and financial sanctions of one country can affect other countries at the fastest speed through financial ties.

Trade sanctions usually refer to the imposition of trade embargoes, import and export restrictions, and other measures against the target country, in an attempt to completely or selectively cut off the trade ties with the target country, causing a loss of trade interests. While financial sanctions refer to the freezing, partial freezing, and control of the flow of financial assets of the target country by the sanction initiator. Others are such as hindering the target country from joining international economic organizations, freezing its overseas assets, interrupting economic cooperation, cutting off economic or technical assistance, etc.

As stated in the preamble of the General Agreement on Tariffs and Trade 1944 (hereinafter referred to as GATT): Members... “Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce”[1], restrictions arising from trade sanctions would fall within the scope of GATT 1994; while the General Agreement on Trade in Services (hereinafter referred to as GATS) proposes that: Members... “Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries”[2], financial sanctions are suspected of violating GATS.

2.1.2 Primary sanctions and secondary sanctions

According to the definition of the European Council on Foreign Relations, primary sanctions prohibit companies and natural persons in the initiating country from conducting transactions with companies and natural persons in the target country. Such sanctions apply to US nationals, goods originating in the United States, and transactions that occur within US jurisdiction[3]. In defining secondary sanctions, the article cites former US Treasury

Secretary Jack Lew: “Unlike primary sanctions, which focus on activities of US individuals and companies, secondary sanctions generally are directed towards foreign persons. These measures threaten to cut off foreign individuals or companies from the US financial system if they engage in certain conduct with a sanctioned entity, even if none of that activity touches the United States directly”[4].

Through the economic sanctions with extraterritorial jurisdiction, the United States forces companies or individuals in third countries to join its sanctions camp, in order to achieve de facto multilateral sanctions, effectively preventing target countries from seeking partners to replace the United States in international financial and trade activities, thereby strengthening the effect of sanctions[5].

During Obama administration, the United States used secondary sanctions to deter third-country entities that have commercial relations with Iran. Between 2010 and 2014, the United States continued to expand the scope of secondary sanctions, and other countries’ trade with Iran decreased significantly, which directly contributed to the compromise made by Iranian President Hassan Rouhani in September 2014 in exchange for the United States and the United Nations to ease economic sanctions. The Joint Comprehensive Plan of Action (JCPOA), agreed upon in the six-party talks on the Iranian nuclear issue in July 2015, is a major diplomatic achievement of the United States through secondary sanctions[6].

2.1.3 Unilateral sanctions and multilateral sanctions

Unilateral economic sanctions are imposed unilaterally by the sanction-initiating country. The initiator is, in principle, the victim of an internationally wrongful act. Multilateral economic sanctions, also known as collective sanctions, are economic sanctions jointly imposed by multiple countries on one or several target countries, usually implemented by intergovernmental international organizations, or by a group of countries, such as the G7 group. The United Nations-led multilateral economic sanctions have a sound legal basis, while unilateral economic sanctions lack a legal basis in international law.

According to the United Nations Charter, when a country's actions endanger world peace, the United Nations can organize member states to impose economic sanctions on the country,

as stipulated in Article 39 of the UN Charter: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”; in Article 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”; and in Article 42 “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”[7]. Although some countries have questioned the power in the UN Security Council, due to the strong position of the five permanent members, in fact, except for the sanctioned countries condemning the UN sanctions, few other member states condemn the resolutions of the Security Council.

Different from the multilateral economic sanctions adopted by the United Nations, unilateral economic sanctions have been widely questioned, and even the United Nations itself has a negative attitude towards unilateral economic sanctions. On 31 July 2019, UN Secretary-General António Guterres presented to the 74th United Nations General Assembly *Unilateral economic measures as a means of political and economic coercion against developing countries*, which states “Gravely concerned that the use of unilateral coercive economic measures adversely affects the economy and development efforts of developing countries in particular and has a general negative impact on international economic cooperation and on worldwide efforts to move towards a non-discriminatory and open multilateral trading system”[8]. This reveals to us that only unilateral economic sanctions may be brought to the WTO, while multilateral economic sanctions imposed by the UN

Security Council should be strictly observed.

2.2 Legal basis for US economic sanctions

Congress authorization, sanctions acts, and executive orders constitute the legal basis for the US economic sanctions system. The US economic sanctions laws are implemented through the Bureau of Industry and Security and the Office of Foreign Assets Control, the former has the power to control the import and export of items and the latter has the power to freeze assets, restrict transactions, and impose economic sanctions through the Specially Designated Nationals List and the Consolidated Sanctions List[9].

2.2.1 US congressional economic sanctions legislation

Article 1, Section 1 of the US Constitution delegates legislative power to Congress. It is stipulated in Article 1, Section 8 of the Constitution, and all laws must be passed by both houses[10]. As a result, the Congress can exercise its legislative power to impose economic sanctions. The laws enacted by the US Congress involving economic sanctions include two categories: authorization acts and sanctions acts. The promulgation of such acts starts by the proposal of congressmen, then the discussion of relevant committees and the submission of reports by the committees, and finally the passage of laws by the president. In practice, congressmen will propose sanctions acts immediately after incidents that infringe on US national interests. The sanctions act is timely and targeted, and can be quickly adjusted according to the diplomatic interests of the United States.

2.2.2 Executive orders of the President

The President of the United States participates in the legislation of economic sanctions by exercising the power of veto and issuing executive orders. To be precise, the "Take Care Clause" of Article 2, Section 3 of the US Constitution imposes an obligation on the President to enforce and uphold the law[11]. The President has the power to issue executive orders to implement the law, which is an implied power under the Constitution and does not require special authorization from Congress. The President can also passively exercise the veto. Under Article 1, Section 7 of the US Constitution, the president can choose to pass a sanctions bill submitted by Congress, or exercise his veto to have the bill returned to the

House[12].

For example, the scope of US economic sanctions against Venezuela is controlled by the following seven executive orders:

Issue Date	No.	Executive Orders
8 March 2015	13692	Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela
24 August 2017	13808	Imposing Additional Sanctions with Respect to the Situation in Venezuela
19 March 2018	13827	Taking Additional Steps to Address the Situation in Venezuela
21 May 2018	13835	Prohibiting Certain Additional Transactions with Respect to Venezuela
1 November 2018	13850	Blocking Property of Additional Persons Contributing to the Situation in Venezuela
25 January 2019	13857	Taking Additional Steps to Address the National Emergency With Respect to Venezuela
5 August 2019	13884	Blocking Property of the Government of Venezuela

Fig. 1. US executive orders of economic sanctions on Venezuela

Except for the first one issued by President Barack Obama, the other six executive orders were issued by President Donald Trump. It can be concluded that the executive orders at least have the effect of freezing property, suspending entry of sanctioned individuals to the United States, and prohibiting certain transactions. All executive orders are issued around new situations in Venezuela at that moment. The time interval between the issuance of Executive Order No. 13827 and No. 13835 is only two months. It can be seen that the president's executive orders are timely and well-targeted.

3. The justiciability of US economic sanctions in the WTO

According to Black's Law Dictionary, justiciability refers to “the quality or state of being appropriate or suitable for adjudication by a court”[13]. Therefore, the justiciability of US economic sanctions in the WTO refers to whether the measures of US economic sanctions

can be adjudicated by a court composed of the WTO Dispute Settlement Body.

3.1 Analysis of the justiciability of US domestic law in the WTO

Article XVI(4) of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as the WTO Agreement) states: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”[14]. Therefore, Member States' domestic legislation should be consistent with the WTO Agreement. This article puts forward clear requirements on how member states should fulfill their WTO obligations at the level of domestic law, that is, they should abide by WTO obligations through their domestic laws, regulations, and administrative orders, and any violation of WTO rules may lead to a complaint by other Member States.

In the case *DS176: United States — Section 211 Omnibus Appropriations Act of 1998*, The Appellate Body noted in paragraph 105 of its report: “Our rulings in these previous appeals are clear: the municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU”[15]. This shows that in the WTO dispute settlement, the review of domestic law is one of the key parts in the panel's hearing process. Therefore, domestic law as a piece of factual evidence can enter the scope of the panel procedure.

3.2 Analysis of the justiciability of US economic sanctions in the WTO

The legal basis for implementing US economic sanctions is the domestic law of the United States. The above research demonstrates that the US economic sanction measures, as domestic laws, are generally WTO-justifiable and can be included in the jurisdiction of the WTO. It should also be noted that the WTO has a complex system of legal rules, numerous

annexes, and various agreements, and the content of each agreement is different. Faced with the differences between the agreements, it is not enough to only clarify that the domestic law of the United States as a whole is WTO-justifiable. A more precise approach is to implement the study of justiciability into the rights and obligations of specific agreements.

Generally, US economic sanctions mainly include trade sanctions regulated by GATT and financial sanctions regulated by GATS. GATT expects to substantially reduce tariffs and other trade barriers by reaching mutually beneficial arrangements. Trade in goods affected by US economic sanctions is mainly through trade embargoes and import and export restrictions. In practice, the Bureau of Industry and Security mainly lists entities in the unverified list and the entity list, so as to restrict the export, re-export, and domestic transshipment transactions of items. Such measures violate the provisions of the GATT, which include, but not limits to, Article I: General Most-Favoured-Nation Treatment, Article II: Schedules of Concessions, Article III*: National Treatment on Internal Taxation and Regulation, Article V: Freedom of Transit, Article X: Publication and Administration of Trade Regulations, and Article XIII*: Non-discriminatory Administration of Quantitative Restrictions[16]. This shows that US economic sanctions can be brought by the sanctioned country in the WTO dispute settlement mechanism in accordance with the above-mentioned provisions of the GATT.

GATS aspires to establish a multilateral system of principles and rules for trade in services with a view to expanding such trade under conditions of transparency and progressive liberalization. When imposing economic sanctions, the Office of Foreign Assets Control adds entities in the list of specially designated nationals, controls their transactions, and freezes their assets. The OFAC's specific measures include: prohibiting entities from using the U.S. financial system; prohibiting U.S. financial institutions from conducting credit or payment business to such entities; prohibiting entities from conducting foreign exchange, gold, bonds, and digital currency transactions in the United States; prohibiting the issuance of visas to executives of entities. These sanctions may violate GATS provisions, especially Article II: Most-Favoured-Nation Treatment, Article III: Transparency, Article VI: Domestic Regulation, Article XVI: Market Access, and Article XVIII: Additional Commitments [17]. Therefore, the

sanctioned country and the third country subject to secondary sanctions can challenge the sanctions measures under the above-mentioned GATS provisions in the WTO.

Then, it should be noted that economic sanctions that are irrelevant to trade in goods and trade in services, such as an arms embargo, preventing the sanctioned country from joining an international economic organization, freezing overseas assets, suspending economic cooperation, and cutting off economic or technical assistance cannot be brought into the WTO. This is because the WTO Agreement does not regulate the rights and obligations of such actions, and there is no applicable agreement.

4. Suggestions on strategies for responding to US economic sanctions

4.1 Reduce reliance on the US dollar

The reason why the United States can frequently use economic sanctions to achieve its diplomatic goals mainly depends on the hegemony of the US dollar and the payment system of the Society for Worldwide Interbank Financial Telecommunication (SWIFT). The hegemony of the U.S. dollar is reflected in the functions it plays on a global scale, including pricing, trade settlement, and investment and financing. Nearly 20% of the economies in the world are closely watching the exchange rate mechanism of the US dollar, and the world is deeply affected by the Federal Reserve's monetary policy. The US dollar payment and settlement of international transactions are all realized through the SWIFT payment and clearing system. The United States often uses SWIFT to implement financial sanctions against other countries. For example, in 2018, the United States asked SWIFT to cut off the services of several Iranian banks, including the Iranian Central Bank, making Iran's international payment and settlement channel blocked.

Therefore, countries should actively seek cooperation with other countries, especially countries that are often subject to economic sanctions by the United States, to try to avoid using the SWIFT system. For example, the European Central Bank launched TIPS, the first cross-border electronic payment system in the Eurozone, the Russian Central Bank established the Financial Information Transmission System (SPFS), and the Chinese Central Bank organized the development of an independent RMB cross-border payment system

(CIPS). Countries should fully conduct cooperation and transactions through other countries' international payment systems, reducing dependence on the US dollar and SWIFT. In addition, in order to protect their country's power in international economic exchanges, countries should also strive to promote the internationalization of their own currencies, because only by doing so can they fundamentally and completely get rid of the US financial hegemony.

4.2 Strengthen pre-trade risk assessment

As the measures of U.S. economic sanctions become more diverse, wider, and stricter, companies should also constantly adjust their compliance policies to meet new requirements based on changes in the U.S. economic sanctions measures. When foreign enterprises conduct commercial activities, if they find that the upcoming transaction involves "American factors", they must strengthen the risk assessment before the transaction to prevent potential damages by US economic sanctions.

Since the entities included in the US sanctions lists are not fixed, OFAC and other responsible departments may add or delete entities on the lists from time to time. Foreign enterprises must check the relevant information of the transaction object in detail before each transaction, and try to avoid being subject to economic sanctions for transactions with sanctioned entities. In the review of transaction, in view of the fact that different sanction projects impose different sanctions measures on different countries, foreign companies should pay special attention to distinguishing "sensitive industries" sanctioned by different countries, and pay attention to policy updates in a timely manner to ensure transaction compliance.

When violations are discovered, enterprises should also promptly analyze the possible consequences of the violations and what remedial measures can be taken, and decide whether they should actively disclose relevant transaction information. Establish and improve the information disclosure evaluation mechanism to ensure timely and accurate evaluation when relevant behaviors are discovered, and effectively use the active disclosure mechanism to mitigate punishment.

5. Conclusion

Based on the increasingly frequent practice of U.S. economic sanctions, this paper conducts research on the justiciability of U.S. economic sanctions in the WTO. In the study, the basic theory of US economic sanctions was sorted out, the justiciability in the WTO was explained according to the WTO Agreement, and the conclusions were drawn as follows:

First, the legal basis for US economic sanctions is complete and the types of measures are diverse. The U.S. Congress is the main body of legislation, while the Bureau of Industry and Security and the Office of Foreign Assets Control are the main bodies of law enforcement. The Bureau of Industry and Security implements export controls by including natural persons and legal persons in the Unverified List, Entity List, and Trade Denied Party List, and the Office of Foreign Assets Control freezes assets and controls transactions through the List of Specially Designated Nationals.

Second, US economic sanctions are justiciable under the WTO Agreement. The agreement requires the laws of the member states to be consistent with the obligations of the agreement. Practice shows that domestic laws can be used as evidence of facts, and can also be evaluated by the appellate body as evidence of fulfillment of international obligations. WTO Member States can file violation and non-violation complaints against U.S. economic sanctions. Since economic sanctions mainly affect trade and finance, the basis for Member States to file complaints is usually the provisions of GATT and GATS.

Third, countries should make good use of measures inside and outside the WTO framework to deal with US economic sanctions. Within the framework of the WTO, the sanctioned countries can file a complaint in the WTO, claiming that the US economic sanctions violate the GATT and GATS agreements; in addition, countries should take measures such as reducing dependence on the US dollar and SWIFT system and strengthening the internationalization of their currencies to reduce damage. Enterprises should also conduct sufficient due diligence and risk assessment on transaction partners

before conducting international business activities.

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