

Normative Analysis of Discriminatory Restrictive Measures in Anti-Foreign Adjudication Law

Tianlu Wang^{1, a}

¹School of Anhui University of Finance and Economics, Bengbu 233030, China

^a946954288@qq.com

Abstract

In the complex international situation, countries led by the United States often take improper discriminatory restrictions on other countries, other organizations and citizens, for which China promulgated the "Anti-Foreign Sanctions Law" in June 2021 to effectively protect the legitimate interests of Chinese countries, organizations and citizens, of which Articles 3, 4 and 12 all mention the crackdown on foreign discriminatory acts, but for discriminatory acts, the field of international law lacks the overall definition and interpretation of this term. It is difficult for my country to directly invoke the criteria of identification in international law to clearly define it. The accuracy of the judgment on discriminatory acts determines that the countermeasures and blocking measures taken by China in response to foreign sanctions against China can be more accurate and effective. This article attempts to explore discriminatory acts through the concretization of legal connotations in order to be able to accurately identify them.

Keywords

Anti-sanctions; Discrimination; Legal connotations.

1. Background to the Introduction of Discriminatory Restrictive Measures under the Anti-Foreign Sanctions Act

1.1. Discriminatory Acts in the United States and Other Countries Are Widespread

In the practice of international dispute settlement, the International Court of Justice and the WTO Dispute Settlement Body have decided on a number of disputes over internationally wrongful acts such as the imposition of discriminatory restrictive measures against China. For example, in the U.S. Tariff Measures on Certain Goods From China Case (DS543), the United States essentially imposed illegal discriminatory tariff measures against China under the pretext of upholding public morality under the pretext of the WTO's "General Exceptions" rule. In the U.S. Case concerning China's Steel and Aluminum Products (DS544), the United States imposed unlawful restrictions on China under the guise of the WTO," which safeguards national security.

1.2. The Introduction of Anti-discrimination Restriction Measures Is Urgent and Conforms to the Trend of The Times

The European Union, Russia, Australia, Canada, France, Switzerland, the United Kingdom, etc. have all enacted anti-sanctions laws and play a counter-response function to discriminatory acts. For example, as early as 1996, the European Union promulgated the Regulation on the Effect and Action of Resisting the Extraterritorial Application of Third-Country Legislation (Council Regulation No. 2271/96, as amended on August 7, 2018) on the issue of the long-arm jurisdiction of the United States, which by denying the extraterritorial effects and long-arm jurisdiction of relevant US laws in the EU region, stipulating that relevant EU market entities

are not required to comply with the laws and regulations on US sanctions, and refusing to recognize the judgments made by the United States under the jurisdiction of the long arm, Grant such subjects, etc., the legal right to seek compensation for losses caused by sanctions, so that the interests of such subjects are not affected by so-called sanctions; The Law on Measures Affecting (Countering) Unfriendly Acts of the United States and Other Countries adopted by Russia on June 5, 2018, stipulates that its countermeasures include: terminating or suspending international cooperation with non-friendly countries or institutions, prohibiting or restricting import and export trade related to such countries or institutions, prohibiting or restricting entities controlled by these countries from participating in Russian government procurement projects and privatization projects of state-owned assets, etc., in order to protect Russia's interests, security, sovereignty, etc., Territorial integrity and the freedoms and rights of citizens are protected from the unfriendly actions of Western hegemony such as the United States.

1.3. China's Discriminatory Restriction Response Bill Came Into Being

In September 2020 and January 2021, with the approval of the State Council, the Ministry of Commerce successively issued the Provisions on the Unreliable Entities List and the Measures for Blocking the Improper Extraterritorial Application of Foreign Laws and Measures, which not only stipulate the behavior of enterprises that may enter the Unreliable Entities List, but also explain the legal assistance and support that relevant government departments can provide to relevant enterprises and individuals.

In March 2021, the Fourth Session of the 13th National People's Congress approved the "Work Report of the Standing Committee of the National People's Congress", and clearly stated in the "main tasks for the next year" that the legal "toolbox" for responding to challenges and preventing risks should be enriched around anti-sanctions, anti-interference, and counter-long-arm jurisdiction.

In April 2021, the Chairman's Meeting of the Standing Committee of the National People's Congress proposed a legislative bill on the Anti-Foreign Sanctions Law in accordance with legal procedures. After the preliminary review of the Anti-Foreign Sanctions Law of the People's Republic of China (Draft) conducted by the 28th session of the 13th NPC Standing Committee and the second instance of the 29th Session of the 13th NPC Standing Committee, the 29th Session of the 13th NPC Standing Committee officially voted to pass the Anti-Foreign Sanctions Law of the People's Republic of China on June 10, 2021, and China's Discriminatory Restriction Response Bill was officially released.

2. The Connotation of "Discrimination" in The Anti-Foreign Sanctions Law

After the establishment of the United Nations system centered on the Charter of the United Nations, the principle of non-discrimination became a fundamental principle of international law and a fundamental principle of many important conventions in international law. In the context of international law, "discrimination" mostly refers to the differential treatment of entities under "the same or similar conditions". Specifically, it means the imposition of unfair and unequal treatment by one party on individuals or groups of persons of the other party who are in "the same or similar conditions" on the basis of improper legal grounds or other unreasonable grounds. The connotation of "discrimination" includes both the situation in which one party treats the other party differently under the same or similar conditions, as well as the situation where a party treats different other parties in the same way.

2.1. Direct Discrimination and Indirect Discrimination

Direct discrimination refers to the subjective and direct subjective and deliberate imposition of unfair and unequal treatment on a state, organization and individual by a foreign state without a legitimate legal basis or other sufficiently reasonable grounds. Direct discrimination gradually

translates into indirect discrimination with the universal application of the principle of non-discrimination in international law. Indirect discrimination is the setting of standards or the formulation of laws and regulations by foreign countries, so that all countries except China can meet the requirements of this standard or laws and regulations, and in fact form an unequal and unfair treatment of China, which is hidden and confusing.

2.2. Legal Discrimination and Factual Discrimination

Legal discrimination is the discriminatory treatment of the state, organization or individual by a foreign state through its domestic legislation. De facto discrimination refers to the fact that although a foreign country does not explicitly stipulate in its domestic law to adopt discriminatory treatment against China, the foreign country's practice in practice objectively causes the effect of discriminatory treatment against China. This kind of discrimination mainly occurs in the field of international economic and trade competition between foreign countries and China, and mainly refers to the unfair and unequal treatment of goods, services, investments, intellectual property rights, etc. from China by foreign countries through their own internal measures that are lower than national or most-favored-nation treatment. In addition, such discrimination also covers the case of unequal restrictions on the person, property and activities of Chinese citizens and the property or activities of Chinese enterprises arising from other foreign countries' political, economic or military disputes with China on the pretext of interference in China's internal affairs. Discriminatory restrictive measures are uncertain legal concepts, highly general and abstract, and their substantive connotations and epitaphs are vague, and they need to be identified and clarified by the applicators of the Chinese Countermeasure Law before they can be specifically applied. The concretization of this concept is to accurately define discriminatory restrictive measures by clarifying its conceptual basis, substantive connotation, epitaph concreteness, statutory benchmarks and identification sequence. In the identification, it should be in line with the legislative purpose, basic principles and legislative value appeals of the China Anti-Foreign Sanctions Law, and be identified within the scope framed by the connotation and extension of its conceptual meaning itself.

3. Qualitative Identification of Discriminatory Restrictive Measures

First, this concept is a highly generalized and abstract version of the unfriendly behavior of states in the practice of international economic and political exchanges. The term discriminatory restrictive measures is extremely inclusive, encompassing more and less explicit types of measures, and the distance between the concept and the specific type of reality is greatly widened. The concept of discriminatory restrictive measures is far from the specific practice of sanctions and countermeasures between states, and only the value factors remain in the concept, but there is no clear image of international practice, and it is difficult for legal applicators to accurately understand based on the literal meaning of the concept of discriminatory restrictive measures, and it is difficult to clarify the full scope of its connotation and extension only accordingly.

Second, the substantive connotation and extension of this concept are ambiguous. It is difficult for those who apply the legal concept of discriminatory restrictive measures to accurately identify them by their semantics alone. Different subjects of application of law and subjects of interpretation will form different cognitions and judgments based on their own intellectual preferences, and the emergence of this phenomenon is attributed to the lack of clarity in the substantive connotation and extension of this concept. At the level of determining the substantive connotation, it is difficult to clarify which foreign measures against China constitute restrictive measures in terms of quantity and extent, and on what basis such restrictive measures are judged to be discriminatory. At the level of determining the specifics of epitaph figuration, what type of specific measures foreign countries take against China are

discriminatory, and it is difficult to accurately determine them based on the literal meaning of legal concepts alone. Therefore, the substantive connotation and extension of this legal concept are not clear enough. The connotation core and vague extension boundaries that are difficult to accurately determine this concept lead to differences and conflicts in the identification of applicable subjects of law.

Thirdly, the concept must be applied after the judgment of a national administrative enforcer or judge. Whether the measures imposed by foreign countries against China are restrictive measures and whether they are discriminatory depends on the analysis and judgment of China's administrative law enforcement organs on the basis of the specific characteristics of foreign measures against China before taking countermeasures and blocking measures. Judges hearing claims against victims of foreign sanctions against China are also required to make specific judgments on the basis of the facts of the case as to whether the foreign measures constitute discriminatory restrictive measures against China. Such discretion should have its own relatively certain discretionary benchmark, and the more clear and specific this identification benchmark and discretionary benchmark, the more accurate the judgment of state administrative law enforcement and judges, the more accurate China's response to foreign countries in accordance with law, and the stronger the predictability of China's foreign countermeasure law.

4. The Identification Benchmarks for Discriminatory Restrictive Measures in China Are Perfect

In the field of international economic and trade dispute settlement, the WTO Dispute Settlement Body has handled a large number of disputes in which member states have violated WTO tariff concessions or other preferential obligations to set discriminatory tariff barriers and non-tariff barriers against other countries. The Court also has a small number of cases involving discriminatory restrictive measures in the field of inter-State political and international human rights disputes. In fact, the benchmarks for discriminatory restrictive measures in Our Anti-Foreign Sanctions Law can be indirectly drawn from the typology and concretization of cases involving "discriminatory" and "restrictive measures" by the WTO Dispute Settlement Body and the International Court of Justice.

First, measures could be attributed to acts or omissions of foreign States. Acts committed by a foreign State and organizations and individuals under its command and control must satisfy both the elements of "the measure is attributable to the foreign State" and "the act committed by the foreign State". Such behaviour includes both positive and negative inaction. For example, foreign countries should be accorded equal national treatment, most-favoured-nation treatment or other preferential treatment under international law and international economic law, but in practice they are not equally granted "inaction".

Second, measures are creating a derogation or threat of derogation from the legitimate rights and interests of the State and its private entities. First, the legitimate interests directly or indirectly obtained by relevant Chinese entities under international law and international economic law are facing the threat of derogation or derogation due to discriminatory measures taken by foreign countries and private entities under their command and control. Second, discriminatory restrictive measures should refer to measures taken by foreign countries against China that are taking effect and are having the impact and effect of discriminatory restrictions on China. In exceptional circumstances, measures that have ceased to be used against China but are still in effect, or that have ceased to be used against China but whose impact on the discriminatory restrictions it has caused on China continue to this day. Measures that have ended the implementation of discriminatory restrictions on China by foreign countries and the impact of discriminatory restrictions that have disappeared, and measures

that no longer have the impact and effect of discriminatory restrictions on China, china will no longer initiate countermeasures accordingly in principle.

Thirdly, the measures violate their obligations of non-discrimination under international law and international economic law. The determination of "discriminatory" is the core criterion for identifying discriminatory restrictive measures. The following identification steps are required to determine whether a domestic measure constitutes discrimination: First, to determine whether different countries subject to differential treatment and their private subjects or their goods, services, investments and intellectual property rights are in similar situations or similarities. Second, under the premise of determining the existence of similarities or similarities in the first step, it is necessary to determine whether the products, services, investments and intellectual property rights of these similar countries and their private entities have been treated differently, such as whether they are inferior to the domestic treatment of foreign countries or similar national treatment, most-favoured-nation treatment or other preferential treatment.

Fourthly, discriminatory restrictive measures are incompatible with international law standards precluding wrongfulness. The relevant measures carried out by the central and local governments of foreign countries and their authorization, entrustment, command or control of foreign private entities under their authorization, entrustment or command or control do not have international legitimacy and are in essence internationally wrongful acts because they are acts attributable to foreign States in violation of non-discriminatory obligations under international law. In order to conceal the international wrongfulness of their restrictive measures against China, foreign countries often invoke the provisions of the Draft Law on State Responsibility, such as "consent", "self-defense", "countermeasures", "force majeure", "danger" or "critical situation", in an attempt to remove the illegality of their political and military restrictive measures against China that violate their non-discriminatory obligations; Or invoke the WTO's "general exception" clause and "security exception" clause in a vain attempt to dispel the international wrongfulness of its restrictive measures against China in the international economic and international trade fields that deviate from non-discrimination obligations.

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