

National Security Considerations in China's Trade Legislations: Offensive or Defensive?

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China has recently issued a series of national-security-related laws, especially after the breakout of US-China trade war. These legislations include China's new design of legal tools, such as unreliable entity list, prohibition order, anti-sanction, to tackle national-security-related trade issues. At the tipping point of global economic transformation and evolving geo-economic competition, China's new legislations deserve attention and examination. This article provides a preliminary analysis of those legislations and tries to disclose whether China's approaches to national-security-related trade issues, as reflected in those legislations, are offensive or defensive. The following three parameters: purposes, configurations, and the consistency with WTO law, are used to scrutinize those legislations.

Keywords: national security, trade, China, legislations, offensive, defensive

Introduction

With the rapid rise of China's economy, international society has been concerned about the challenges brought about by China. The Trump Administration started a trade war against China in 2018 and the Biden Administration has not revealed the deviation from its previous trade policy toward China. On May 26, 2022, the US Secretary of State Blinken delivered the lecture of the Administration's Approach to the People's Republic of China (PRC), which claimed that China posed the most serious long-term challenge to the international order (Blinken, 2022). Blinken highlighted three elements of the US strategy to curtail China, i.e., investing in the foundations of the US strength at home to improve the US competitiveness, innovation, and democracy, aligning with the US allies and partners to advance a so-called shared vision for the future, and outcompeting China in key areas (Blinken, 2022). Although Blinken stressed the US did not look for conflict or a new Cold War, the rivalry initiated by the US against China has posed challenges to China's national security.

In addition, international trade environment has experienced significant changes during the past several years. First, multilateralism pursued by the WTO has been undermined especially by the US blocking of the selection of WTO Appellate Body members. Since the outbreak of COVID-19, quite a large number of export restrictive measures were imposed on medical supplies and nearly half of the measures are still active due to the COVID-19 pandemic.¹ Those measures have interrupted global supply chains and brought about

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See the information of COVID-19 temporary trade measures updated by the International Trade Centre, <https://www.macmap.org/covid19> (last visited on May 25, 2022).

unpredictability to international trade, as well as arousing national security concerns due to the shortage of medical supplies in a time of crisis. In addition, the unexpected outbreak of war in Ukraine has severely damaged global trade of food, energy, and fertilizers, as Ukraine and Russia are key suppliers of these essential goods. What is more, the sanctions imposed by the US and its aligned members against Russia are heightening inflation risks and squeezing global economy. Although China is neutral and not imposing war-related sanctions, the US is pressuring China to take joint actions to contain Russia, thus China is struggling to handle the complicated situation that may undermine its national security.

This article examines China's legislations on national-security-related trade issues. With Section I as an introduction, Section II elaborates on the parameters of "offensive" and "defensive", which will function as a benchmark for the following analysis. Section III provides a brief overview of China's legislations on national-security-related trade issues as of 2015. Section IV examines China's legislations according to the three parameters. Section V is the conclusions.

The Parameters of "Offensive" and "Defensive"

In order to assess whether China's considerations of national security in its trade legislations are offensive or defensive, the primary task is to clarify the parameters of "offensive" and "defensive". In Black's Law Dictionary (Dictionary), "offensive" has four meanings and the first two meanings are relevant, i.e., (1) making attack, aggressive, and (2) of, relating to, or designed for attack (Garner, 2019, p. 1303). The Dictionary does not provide the meanings of "defensive", but it is illuminating to examine that of "defend". "Defend" has five meanings, of which the first meaning is related, i.e., to do something to protect someone or something from attack (Garner, 2019, p. 528). It seems whether a legislation is offensive or defensive depends on whether such legislation is designed or used to attack or protect.

While it would be hasty to conclude the parameters of "offensive" and "defensive" solely based on their liberal meanings. Considering that offensive realism and defensive realism are famous and well-studied theories in international politics, it is sensible to review relevant parts of these theories in the following text.

According to John J. Mearsheimer (2001, pp. 30-31), offensive realism is based on the following five assumptions: (1) international system is anarchic, (2) states have offensive military capabilities and possibly destroy each other, (3) states can never be sure about another states' intentions as regards whether they will be attacked, (4) survival is the primary goal of great powers, and (5) great powers are rational actors and reasonably designing the strategies to maximize their chances of survival. The major point of offensive realism is that great powers look for opportunities to move the balance of powers in their favor to be the hegemony (Mearsheimer, 2001). Therefore, states pursue expansionist policies whenever they consider the benefits outweigh the costs (Taliaferro, 2001). As regards defensive realism, anarchy of international system is also the assumption thereunder, while states' primary concern is not to maximize their power, but to maintain their positions in international system (Waltz, 1979, p. 126). In addition, defensive realists believe states prefer defense over offence through alliance and undertake moderate measures (Naqvi & Khan, 2021, p. 92). Therefore, two differences between offensive realism and defensive realism are outstanding, one is whether states are endeavored to maximize their power or maintain their positions, and the other is whether states apply expansionist or moderate measures to reach their aims.

Comparatively speaking, international trade legal system, in which China's national security consideration in its trade legislation should be examined, is kind of different from international system in which realism is rooted. The WTO has established hierarchical trade rules that WTO law is supreme and national law cannot be used to justify the violation of WTO law. However, that hierarchy is not complete, not only because WTO law has exceptions, such as general exceptions in Article 20 and security exceptions in Article 21 of the GATT 1994, which provide justifications for Members' deviation from WTO disciplines, but also the order established by the WTO has been severely undermined since the standstill of the Appellate Body. International trade legal system is in the process of transformation due to various reasons. On one hand, new trade issues, such as digital trade and carbon trading, have appeared, for which the WTO is short of relevant regulations. On other hand, many WTO disciplines, negotiated more than two decades ago, require modernization. In this context, the spheres of national security and economic globalization are colliding (Heath, 2020, p. 1026), and WTO Members are increasing their invocation of security exceptions since the WTO Dispute Settlement Body's adoption of the first panel report on Article 21 GATT in 2019.

Considering the liberal meanings and relevant theories, it is appropriate to draw the parameters of "offensive" and "defensive" from three perspectives, i.e., purposes, configurations, and the relationship between national legislations and WTO law. Therefore, the first parameter is whether a legislation is designed to maximize a state's trading power in relevant market or to maintain its current trade status, the second parameter is whether the configurations of a legislation are aggressive or moderate, and the third one is whether a legislation is in line with WTO law.

An Overview of China's National-Security-Related Trade Legislations

China's national-security-related trade legislations include a cluster of laws and regulations. National Security Law of the PRC is the fundamental law in regulating national security issues. Foreign Trade Law is the core legislation in regulating trade issues. Cyber Security Law and Data Security Law, as their names indicate, regulate national-security-related trade issues in cyber and data areas. Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures, Provisions on the Unreliable Entity List, Export Control Law, and Anti-Foreign Sanctions Law, newly adopted in the past two years, are the tools that China may employ to tackle specific national-security-related trade issues. The following text will respectively address these laws and regulations.

National Security Law

National Security Law was initially passed in 1993 and subsequently amended in 2009 and 2015. National Security Law (1993) had 34 articles, focusing on traditional security issues which included (1) plotting to subvert the government, split the State, or overthrow the socialist system, (2) joining an espionage organization or accepting a mission assigned by an espionage organization or by its agent, (3) stealing, secretly gathering, buying, or unlawfully providing State secrets, (4) instigating, luring, or bribing public officials to munity, and (5) committing any other act of sabotage endangering national security.² National Security Law (1993) did not

² Article 4 of National Security Law (1993).

address trade-related national security issues, which was mainly due to the rising multilateralism that trade frictions were usually not considered as national security issues in 1990s.

National Security Law (1993) was only slightly amended in 2009. National Security Law (2009) also did not address trade-related national security issues, which reflected that trade issue and national security issue were not so much linked in China during that period.

National Security Law (2015) includes 84 articles, with major revisions. The concept of national security in National Security Law (2015) is more comprehensive than that in 2009. According to Article 2, “national security” means

a status in which the regime, sovereignty, unity, territorial integrity, welfare of the people, sustainable economic and social development, and other major interests of the state are relatively not faced with any danger and not threatened internally or externally and the capability to maintain a sustained security status. (National Security Law, 2015)

Article 3 further indicates that economic security is the basis of national security. Therefore, national-security-related trade issue is governed by National Security Law (2015). Article 7 requires that any action taken to safeguard national security should be in accordance with the Constitution, laws, and the principle of socialist rule of law, without damaging human rights and citizens' rights and freedom.

Foreign Trade Law

Foreign Trade Law of the PRC was passed in 1994 and subsequently revised in 2004 and 2016. Foreign Trade Law (1994) had 44 articles, which was expanded to 70 articles in 2004. The 2016 version only makes a minor change to Article 10 of Foreign Trade Law (2004), while other provisions of Foreign Trade Law (2004) remain unchanged. The term of national security appeared four times in Foreign Trade Law (1994) and five times in 2004 and 2016 versions. In Foreign Trade Law (1994), “foreign trade” referred to the import and export of goods, technologies, and services.³ In order to maintain or prevent damages to national security, restriction on or prohibition of international trade might be applied.⁴ The 2004 and 2016 versions of Foreign Trade Law did not revise the definition of foreign trade, but expanded the regulation on national-security-related trade issues to cover military trade, trade of any matter of fission, or fusion or any matter that derived such matter, and any matter of foreign trade that concerned foreign trade. Therefore, any necessary measures in import and export management may be used to safeguard national security.⁵

Cyber Security Law and Digital Security Law

China's Cyber Security Law and Data Security Law were respectively passed in 2016 and 2021. These two laws were enacted against the backdrop of fast development of information and communications technology, with national security as the central concern. Trade is not directly addressed in these two laws, despite its possibility of threatening cyber security and data security in certain circumstances. It is noted that “trade” does not appear in Cyber Security Law (2016) and only appears once in Data Security Law (2021). According to Article 35 of Cyber Security Law (2016), the purchase of network products and service for the operation of critical information infrastructure should pass national security review if there is a national security risk. The

³ Article 2 of Foreign Trade Law (1994).

⁴ Articles 16(1), 17(1), 24(1) and 25(1) of Foreign Trade Law (1994).

⁵ Articles 16(1), 17(1), 26(1) and 37(5) of Foreign Trade Law (2004) and (2016).

procedure for such national security review is specified in Measures for Cybersecurity Review (2021).⁶ According to Articles 19 and 21 of Data Security Law (2021), a data trading system shall be established in China and a categorized and hierarchical data protection system shall be implemented. In addition, a data security review system shall be established to review data processing activities that may affect national security.⁷

Specific Laws and Rules in Regulating National-Security-Related Trade Issues

From 2020 to 2021, China issued four legal instruments in international economic area, which is concerned with the issue of national security. The four legal instruments are the Provisions on Unreliable Entity List (PUEL) which was issued in September 2020 by the Ministry of Commerce of the PRC, the Export Control Law that was passed in October 2020 by the Standing Committee of the Thirteenth National People's Congress (NPC) of the PRC, the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (CUEA Rules) which was issued in January 2021 by the Ministry of Commerce, and the Anti-Foreign Sanctions Law (ASL) which was issued in June 2021 by the Standing Committee of the Thirteenth NPC.

The PUEL stipulates that the Unreliable Entity List System shall be established and the engagement of the activities that threaten China's national security by a foreign entity is one of the reasons for a foreign entity to be listed in the unreliable entity list.⁸ The Export Control Law (2020) codifies export control measures that apply to dual-use items, military products, nuclear, other items such as goods, technologies, and services related to maintaining the national security and interest and performing nonproliferation and other international obligations, and technical materials and other data relating to national security.⁹ The CUEA Rules are applicable where unjustified foreign law or measures negatively affect China's national security and interests.¹⁰ The ASL (2021) is an upgraded version of the CUEA Rules and intends to establish a coordination mechanism for anti-sanction work.¹¹ Countermeasures shall be applied to the individuals and organizations directly or indirectly involved in the development, decision-making, and implementation of the discriminatory restrictive measures which unfairly discriminate against China or Chinese entities.¹²

Assessing China's Relevant Legislations Based on the Parameters

In order to assess whether China's national security considerations in its trade legislations are offensive or defensive, it needs to examine relevant legislations on the basis of the parameters of "offensive" and "defensive". Those three parameters, as mentioned above, include purposes, configurations, the relationship between the legislations and the WTO law. The following text will accordingly examine the legislations.

⁶ Measures for Cybersecurity Review is an order jointly issued by the Cyberspace Administration of China, the National Development and Reform Commission, the Ministry of Industry and Information Technology, the Ministry of Public Security, the Ministry of State Security, the Ministry of Finance, the Ministry of Commerce, the State Administration for Market Regulation, the National Radio and Television Administration, the National Administration of State Secrets Protection, and the State Cryptography Administration in 2020 and revised in 2021.

⁷ Article 24 of Data Security Law (2021).

⁸ Article 2.1 of Provisions on Unreliable Entity List (2020).

⁹ Article 2 of Export Control Law (2020).

¹⁰ Article 1 of Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (2021).

¹¹ Article 10 of Anti-Foreign Sanctions Law (2021).

¹² Articles 3 and 4 of Anti-Foreign Sanctions Law (2021).

Purposes

At least there are two forms of purposes noteworthy, the first is the stated purpose that is explicitly set out by the legislations, and the second is the implied purpose that is revealed by the measures taken under the legislations. In fact, it is rare for a legislation to expressly state its purpose is aggressive or offensive. However, the legislative background and official explanations on the legislation illuminate the legislative purposes.

China's national-security-related trade legislations were intensively issued within two periods, the period from 2015 to 2016 and from 2020 to 2021. These two periods correspond to two historical events, the putting forward of China's holistic approach to national security and the outbreak of the US-China trade war.

On April 15, 2014, President Xi Jinping initially proposed the holistic approach to national security at the first meeting of the Central National Security Council. It was emphasized that the holistic approach to national security requires a deeper and further understanding of the concept of national security that was more extensive than the one at any time in any historical period. The holistic approach covered both traditional and non-traditional security concerns, which included political security, homeland security, military security, economic security, cultural security, social security, technological security, information security, ecological security, resource security, and nuclear security (Xi, 2014). In January 2015, the Outline of National Security Strategy was passed at the meeting of the Political Bureau of the CPC Central Committee and reemphasized the guidance of the holistic approach to national security for China in the context of the new situation (Xinhua Agency, 2015). It is evident that China's view of national security has included the concern of economic security and technological security since 2015. In comparison, the White House of Obama Administration issued the US National Security Strategy in February 2015, which elaborated on the subtopics of security, economic prosperity, values, and international order. The US National Security Strategy 2015 proposed to adopt a comprehensive national security agenda and considered global economic crisis as a risk to the US security (The White House of the US, 2015, p. 2). Therefore, both China and the US adopted a similar approach to national security that included economic concern. In addition, it was indicated in the US National Security Strategy in 2015 that the US welcomed China as a peaceful rising power and sought to develop a constructive relationship with China (The White House of the US, 2015, p. 24).

The legislative background around 2015 when China started to adopt a holistic approach to national security, whilst the relationship between China and the US was generally sound without serious frustrations, helps explain why China did not make significant amendment to its Foreign Trade Law, because China's external trading environment was stable. National Security Law (2015) and Cyber Security Law (2016) indicate China's transition on its view of national security from a traditional approach to a holistic approach. At the press conference where the Office of the Central Cyberspace Affairs Commission (Office) answered the questions raised by journalists, the Office expressed that Cyber Security Law was not enacted to create trade barriers or restrict foreign access to China's market, but to safeguard the cyber space security and to strengthen the security of critical information infrastructure (Ministry of Civil Affairs of the People's Republic of China, 2022). Digital Security Law (2021) is a further attempt that China intends to protect data security at the information age. The Standing Committee of the NPC considers that Digital Security Law (2021) is a fundamental law in the area of China's national security and also an embodiment of China's holistic approach to national security (Xinhua Agency, 2021a).

While international environment for China has changed since Trump took office. The US National Security Strategy 2017 signed by President Trump considered China as a challenge to American power, not only in the terms of military defense, but also in the areas of technology, economy, and values (The White House of the US, 2017). In 2018, Trump Administration started the trade war against China by imposing tariffs and quotas on Chinese products and restricting exports of the US semiconductors and information products to China. In May 2019, Huawei Technologies Co., Ltd. (Huawei) was added to the Entity List due to the US national security concern and a license shall be required for the export, reexport, or transfer of any item subject to the US Export Administration Regulations to Huawei or any of Huawei's listed affiliates (IRS, 2020). Biden Administration did not depart from Trump Administration's policy towards China, nor were the tariffs imposed by Trump Administration removed. It was not until May 2022 that Biden Administration started to consider whether the trade-war tariffs on imports from China should be reduced or lifted in order to fight inflation within the US (Nolan, 2022). In May 2022, Biden Administration proposed the Indo-Pacific Economic Framework which is deemed as countering China's increasing economic and political influence in the region (Forough, 2022). In addition to direct conflict in trade, the US also released two controversial laws, i.e., Hong Kong Human Rights and Democracy Act of 2019 and Uyghur Human Rights Policy Act of 2020. These two laws are not only involved with human rights issues in China, but also have trade implications that negatively affect Chinese exports originated in Hong Kong (China) and Xinjiang. The disputes between China and the US, no matter whether they are straight trade issues or human rights issues, have not been well settled under the WTO due to the paralysis of WTO Appellate Body.

Given the US-China trade war and evolving power rivalry, China has explained its legislative tools to protect national security and interests. The PUEL, Export Control Law, CUEA Rules, and ASL constitute a package of the tools that China may use to protect its national security in trade area.

Before the official issuance of the PUEL, the Ministry of Commerce of the PRC announced that it would establish an unreliable entity list to respond to the unilateral measures that unfairly discriminated against Chinese entities on May 31, 2019 (The Ministry of Commerce of the People's Republic of China, 2019), just several days after Huawei was added to the US Entity List. The PUEL was finally issued on September 29, 2020. As regards whether the PUEL was issued as a countermeasure against the US restrictive measures on China's Huawei, Wechat and Tiktok, the Department of Treaty and Law of the Ministry of Commerce of the PRC stated that the issuance was one of the established work arrangements, which did not target any country or any particular entity (The Ministry of Commerce of the PRC, 2022a).

The Export Control Law (2020) has improved the legal status of previous regulations that included export control measures. Before the release of the Export Control Law (2020), six regulations, i.e., Regulation on Control of Nuclear Export (2006), Regulations on Export Control of Nuclear Dual-Use Items and Related Technologies (2007), Regulations on Export Control of Biological Dual-Use Items and Affiliated Equipment and Technologies (2006), Regulations on Export Control of Guided Missiles and Related Items and Technologies (2002), Measures on Export Control of Chemicals and Related Equipment and Technologies (2002), and Regulations on Export Control of Military Items (2002), were applicable to exports of China's controlled items (Liu & Li, 2021). To systemize the existing regulations on export control, coordinate related measures, and strengthen the enforcement efficacy is a major reason for the enactment of the Export Control Law (2020).

The CUEA Rules and the ASL, as their names suggest, aim to block extraterritorial effect of foreign sanctions and restrictive measures on Chinese entities. The Ministry of Commerce of the PRC stated that the CUEA Rules focused on protecting Chinese entities' legitimate interests and correcting other states' wrongdoings (The Ministry of Commerce of the PRC, 2021). The Standing Committee of the NPC mentioned that foreign countries' interference in China's internal issues such as the governance on Xinjiang and Tibet constituted the background for the enactment of the ASL (Xinhua Agency, 2021b).

In summary, two major factors that stimulate the formation of China's legislations on national-security-related trade issues, one is the development of new technologies that pushes China to expand its view of national security, and the other is evolving international situations especially the US containment on China. These two factors push China to update its outdated laws and enact new ones. From the legislative background and the explanations made by Chinese official departments, China has no intention to use the legal tools to maximize its economic power, but rather employing them as countermeasures when Chinese entities are discriminated against.

Configurations

Except National Security Law (2015) and Foreign Trade Law (2006) provide the legal basis for other laws and regulations to tackle national-security-related trade issues. The mechanisms or tools included in other laws and regulations constitute the core configurations and their designs and operations deserve detailed examination.

Cyber Security Law (2016) and Digital Security Law (2021) respectively establish the mechanisms of cybersecurity review and data security review. Different from data security review, cybersecurity review has specific rules on how to implement the review and thus its implementing procedure is clear. According to the Measures for Cybersecurity Review (2021), cybersecurity review shall follow the following four doctrines: (1) comprehensively preventing network security risks and promoting the application of advanced technologies, (2) adhering to the principles of due process and transparency, and respecting intellectual property rights, (3) combining *ex ante* review and ongoing supervision, and (4) making joint efforts of enterprise commitment and social supervision.¹³ Two categories of operators should apply for cybersecurity review, one is the critical information operators who consider their purchase of network products or services and may affect national security, and the other is the online platform operators who have more than one million users' private information and plan to go public abroad.¹⁴ To what extent cybersecurity review may affect trade is not clear because time is short to examine its performance as the Measures for Cybersecurity Review came into force as of February 15, 2022. As regards data security review, China has not issued implementing rules on how to conduct such a review. In addition, whether data trading management system that would be established by China according to Data Security Law (2021), may become a barrier to cross-border data flow, is not clear.

The PUEL stipulates that China would establish the Unreliable Entity List System. Foreign entities that engage in the actions that threaten China's sovereignty, national security, or interests, or violate normal market transaction principle by suspending normal transactions with or applying discriminatory measures against Chinese entities and cause serious damages to the legitimate rights and interests of Chinese entities, shall be

¹³ Article 3 of the Measures for Cybersecurity Review (2021).

¹⁴ Articles 5 and 7 of the Measures for Cybersecurity Review (2021).

added to the unreliable entity list.¹⁵ The mechanism of the unreliable entity list can be initiated either by relevant official department according to its authority or upon relevant parties' suggestions and reports.¹⁶ At the time of writing this paper, China has not added any foreign entity to the unreliable entity list.

The Export Control Law (2020) intends to establish a unified export control system, with control lists and export license as its implementing tools. According to Article 2, dual-use items, military products, nuclear, and other items such as goods, technologies, and services which are related to maintain the national security and interest and perform nonproliferation and other international obligations, are under export control. In substance, Article 2 gives broad discretion to Chinese authorities to add new items to control lists. In addition, Article 44 grants extraterritorial jurisdiction to Chinese authorities regarding any entity outside the territory of the PRC who violates the Export Control Law (2020). Generally speaking, the Export Control Law (2020) has salient features and characteristics similar with the US' export control regime (Bu, 2022). China's effort to improve its governance in export control is evident. In June 2020, the Standing Committee of the NPC decided that China would join the Arms Trade Treaty. In December 2021, China issued the Export Control White Paper which expressed its determination to modernize the export control management system and carry out international cooperation on export control (Xinhua Agency, 2021c). In April 2022, the Ministry of Commerce of the PRC issued the Regulations on Export Control of Dual-Use Items (Draft for Comments) (Draft). The Draft adheres to four principles: (1) coordinating both domestic and international situations, (2) making an overall plan based on national conditions and international reference, (3) taking into account the current and long-term development trends, and (4) improving supervision and trade facilitation (The Ministry of Commerce of the PRC, 2022b). It is still waiting for the final implementing regulations to display the performance of the Export Control Law (2020).

The CUEA Rules has borrowed the experience from the EU and grants Chinese authorities to issue prohibition orders to the effect that unjustified foreign legislation and other measures are not accepted, executed, or observed.¹⁷ As regards whether there are unjustified extraterritorial application of foreign legislation and measures, the following factors shall be taken into account: (1) whether international law or the basic principles of international relations are violated; (2) potential impact on China's national sovereignty, security, and development interests; (3) potential impact on the legitimate rights and interests of the citizens, legal persons, or other organizations of China; and (4) other factors.¹⁸ The CUEA Rules requires Chinese entities who are prohibited or restricted by foreign legislation and other measures from engaging in normal economic, trade, and related activities with a third State (or region) or its citizens, legal persons, or other organizations, to report such matters to Chinese authorities within 30 days.¹⁹ Once Chinese entities make such reports to Chinese authorities and a prohibition order is issued, Chinese entities are likely to be in a dilemma that they are either incongruent with Chinese law or against foreign law. The CUEA Rules thus includes a design, as that in the EU blocking

¹⁵ Article 2 of the Provisions on Unreliable Entity List (2020).

¹⁶ Article 5 of the Provisions on Unreliable Entity List (2020).

¹⁷ Article 7 of the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (2021).

¹⁸ Article 6 of the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (2021).

¹⁹ Article 5 of the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (2021).

statute, which permits Chinese entities to apply for exemption from compliance with a prohibition order.²⁰ If Chinese entities, who do not apply for the exemption, select to follow foreign legislation and measures, and then cause damages to other Chinese entities, those other Chinese entities may initiate legal proceedings to claim for compensation.²¹ It is noted that China has so far not issued any prohibition order, the practical effect of the CUEA Rules is not clear.

The ASL includes 16 articles, more like a comprehensive framework that generally sets out China's countermeasures against individuals and organizations involved in the development, decision-making, and implementation of the discriminatory restrictive measures against China or Chinese entities. The countermeasures include (1) refusing to issue a visa, denying entry, canceling a visa, or deportation, (2) placing under seal, impounding, or freezing movables, immovables, and other types of property in the territory of China, (3) prohibiting or restricting organizations and individuals in the territory of China from carrying out relevant transactions, cooperation, and other activities with them, and (4) other necessary measures.²² There is an argument that the ASL is the codification of China's tit-for-tat rules (Bu, 2022, p. 366), which is not completely true. The PUEL and the CUEA Rules are applicable to foreign unilateral discriminative measures only in the economic area, while the applicable scope of the ASL is broader that covers foreign measures in both economic and non-economic areas. Different from the PUEL and the CEUA Rules which have never been enforced, the ASL has been invoked to issue sanctions. For example, in December 2021, China resorted to the ASL to impose reciprocal sanctions on four US individuals in response to the US sanctions against four Chinese officials over issues related to Xinjiang (Xinhua Agency, 2021d). Therefore, the ASL is not a paper tiger, although China is restrained in applying it.

In summary, China has designed a comprehensive system of legislative tools to protect its trade-related national security, which include cybersecurity review, data security, unreliable entity list, export control, prohibition order, and anti-sanction. Nevertheless, it is not quite clear about the operation and function of those tools since some have never been used and some implementing regulations have not yet come out. As far as anti-sanction is concerned, China seems to have insisted on no-first-use principle, which is, only if foreign countries have initially imposed sanctions against China, China may adopt reciprocal countermeasures.

On the Consistency With WTO Law

WTO law permits Members to take trade-restrictive measures to protect their national security, as provided by Article XXI of the General Agreement on Tariffs and Trade (GATT 1994) and Article XIV bis of the General Agreement on Trade in Services (GATS). As regards “essential security interests” in Article XXI GATT 1994, the Panel in *Russia—Traffic in Transit* explained it was a narrower concept than “security interests” and referred to “those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally” (WTO, 1947, p. 130). The drafters of Article XXI GATT 1994 specifically designed Article XXI(b)(iii) to deal with security issues in

²⁰ Article 8 of the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (2021).

²¹ Article 9 of the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures (2021).

²² Article 6 of the Anti-Foreign Sanctions Law (2021).

times of war or other emergencies in international relations, such as pre-war situations (WTO, 1947, p. 20). Members are not free to elevate any concern to the level of an “essential security interest”, and the principle of good faith requires that Members should not use the exceptions in Article XXI to circumvent their obligations under the GATT 1994 (WTO, 1947, p. 20). As for Article XIV bis GATS, there is no relevant jurisprudence in this regard.

It must be admitted that WTO governance on national-security-related trade issues has two limitations. First, most WTO rules were negotiated during the 1990s or even around the end of the Second World War, some rules are outdated. Second, the WTO lacks relevant rules to regulate new forms of trade, such as cross-border data flow. Therefore, an examination of China’s legislations’ consistency with WTO law may shed light on whether China’s approach is offensive or defensive, but it cannot provide a complete and satisfactory answer.

Cybersecurity review and data security review, as stipulated in China’s Cyber Security Law (2016) and Data Security Law (2021), may not be covered by Article XXI GATT 1994 and Article XIV bis, especially when they are applied in peacetime. Nevertheless, given the fast development of technologies, massive data fraud and cyber-attacks were respectively ranked the number four and five among global risks (World Economic Forum, 2019). A number of states and regions, such as the US and the EU, have also adopted the mechanisms of cybersecurity review and data security review. Comparatively speaking, the question on export control’s consistency with WTO is more complex since export control is applicable to both traditional military area and new high-tech field. As to the new tools of unreliable entity list and prohibition order, China has never applied them. It cannot be presumed that relevant legislations *per se* are inconsistent with WTO law, because Chinese authorities have enough discretion to apply them in a proportionate way under the circumstances that are necessary to protect its national security. Regarding the reciprocal anti-sanctions that have been imposed by China against the US officials, they constitute countermeasures and raise doubts on whether they may violate most-favored-nation treatment principle enshrined in WTO law, despite China’s initiation of relevant proceedings under the WTO.

In fact, it is probably inappropriate for Members to rely on Article XXI GATT 1994 or Article XIV bis GATS to justify their cybersecurity measures or other unilateral measures applied in new forms of trade, because these two Articles have limited relevance and WTO law has not evolved to be adequate to respond to new policy challenges (Mishra, 2020, p. 567; Mitchell & Mishra, 2021, p. 112). While, it is terrific that the WTO 12th Ministerial Conference has successfully concluded a package of trade outcomes against the backdrop of heightened global trade tensions and the war in Ukraine. However, the function of the Appellate Body has not recovered, and the WTO needs time to reach an agreement on new issues arising from national security concerns.

Conclusions

China has benefited from its integration with global economy and thus is willing to maintain and promote the multilateralism established by the WTO. According to China’s Proposal on WTO Reform dated on May 13, 2019, tightening disciplines to curb the abuse of WTO national security exception is China’s standpoint on national-security-related trade issues.²³ Such a standpoint is congruent with China’s no-first-use principle of

²³ WT/GC/W/773, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0 (last visited on May 20, 2022).

sanctions. In general, China has no intention to destroy the WTO or WTO legal system, and most of its legislations in national-security-related trade issues function as a weapon of defensive deterrence. However, history repeats itself that China's large share of global exports, especially its export of steel products, has aroused the Trump-era sanctions of Section 232 tariffs, just like India's expanded cotton exports at the end of the 19th century caused Britain to adopt tax for the purpose of stopping India's cotton industry (Lewis, 1978, p. 8). It is the US that is undoing the WTO and not a surprise that multilateralism will encounter ups-and-downs at a tipping point of global economic transformation (Shaffer, 2018). Nevertheless, global trade requires global governance and the achievement of the WTO 12th Ministerial Conference has boosted global confidence in multilateralism. It is expected that WTO law will evolve to respond to the Members' new national security concerns.

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