

Research on the extraterritorial application of China's antitrust laws in the context of the Sino-US trade war

Sun Wenbo

School of Law, Guangxi Normal University, Guilin, China
sunwen0421@foxmail.com

Abstract: Since 2018, the United States has increased tariffs on Chinese imported goods and launched multiple investigations against China. The United States not only imposes sanctions on China in the economic and technological fields, but also extends the trade war to the antitrust field, posing new challenges to the improvement of my country's extraterritorial application of antitrust laws. The Anti-Monopoly Law promulgated by China was officially implemented in 2008, aiming to protect consumer interests and promote healthy economic development by regulating market competition. However, in the current conflicting background of increasingly complex legal, political, and economic issues in international antitrust, there are still certain gaps in the extraterritorial application of China's Antitrust Law, such as the lack of laws to prevent foreign countries from abusing the extraterritorial application of antitrust laws. These problems and shortcomings such as the lack of international comity and the principle of comity have increasingly hindered the development of China's economy and trade in the world, and it has lost the initiative and voice in the Sino-US economic and trade game relationship. Therefore, it is of great practical significance to study the application of antitrust laws overseas.

Keywords: Sino-US trade friction, antitrust law, international comity principle

1. Introduction

Economic globalization has led to increasingly close economic and trade exchanges between countries. Trade and investment are beginning to break domestic restrictions, especially cross-border investment and mergers and acquisitions, which have become increasingly common international phenomena. In this situation, the behavior of a country's enterprises not only affects the domestic market, but may also affect the market order of other relevant countries. Therefore, the main content of this article is to explore the application of China's antitrust law overseas in the context of international trade, and analyze the role of China's antitrust law in protecting the interests of domestic enterprises and safeguarding national interests.

2. Overview of extraterritorial application of antitrust laws

2.1. The connotation of extraterritorial application of antitrust laws

A country's anti-monopoly law enforcement agencies exercise powers similar to those of judicial agencies in relation to monopolistic behavior in accordance with the law. Therefore, the application of anti-monopoly law refers to the judicial activities in which anti-monopoly law enforcement and judicial agencies specifically apply anti-monopoly laws to handle monopoly cases in accordance with legal authority and procedures.^[1] That is, a country applies its antitrust laws to regulate behaviors performed by overseas enterprises or that occur overseas but have a negative impact on domestic enterprises or markets. When a multinational company in a country implements monopolistic behavior within its own territory and has a negative impact on market competition outside the territory, the injured country can use its own antitrust law to regulate this monopolistic behavior to reduce or avoid the damage caused by this monopoly behavior to the domestic market. Article 2 of my country's Anti-Monopoly Law stipulates: "This law shall apply if monopolistic behavior outside the borders of the People's Republic of China has the effect of excluding or restricting competition in the domestic market." This shows that overseas monopolistic behaviors that restrict and exclude domestic markets are also subject to the constraints and regulations of my country's Anti-Monopoly Law. Since its promulgation and

implementation, China's Anti-Monopoly Law has undertaken an extremely important mission, which is not only reflected in safeguarding the legitimate rights and interests of consumers and maintaining a fair and orderly market competition order, but also in cultivating a good competitive culture and promoting the realization of various value goals such as fair competition.

The extraterritorial application system of the Anti-Monopoly Law is an important guarantee for maintaining good market order within my country and an important system for ensuring that national interests are effectively protected. From this perspective, Mi said that as far as my country's Anti-Monopoly Law is concerned, it has more functions than the anti-monopoly legal systems of other countries.^[2] Therefore, in the current complex economic environment, it is not only extremely necessary to coordinate and improve the contradictions and problems arising from the extraterritorial application of the Anti-Monopoly Law, it is also an important and irreversible trend.

2.2. Basic principles of extraterritorial application of antitrust laws

According to legal provisions, the country has exclusive control over all persons and property within its territory. Therefore, it can be said that territorial jurisdiction is a symbol of a country's sovereignty. "Most of the laws and regulations enacted by our country are based on the application of territorial jurisdiction, which is also applicable to the Anti-Monopoly Law. However, driven by the complexity of international civil and commercial relations, the traditional principle of territorial jurisdiction has gradually developed into the principle of objective territorial jurisdiction and the principle of subjective territorial jurisdiction. Under the current trend, the domestic legislation of sovereign countries has begun to transcend national boundaries and are unwilling to give up extraterritorial jurisdiction due to domestic laws for the sake of their own interests, such as jurisdictional constraints on violations of local laws caused by residents or foreign nationals residing abroad, or violations of domestic laws caused by foreign nationals within their own borders. However, they fundamentally emphasize the use of "people" as the basis of jurisdiction.^[3] In short, the principles of territorial and personal jurisdiction are the basic principles applicable as the legal attributes of the Anti-Monopoly Law. In the early days of the extraterritorial application of the Anti-Monopoly Law, many countries had territorial jurisdiction. The application of principles and *ratione personae* principles is very common. However, with the increasing advancement of economic globalization and the intensification of international trade disputes, the jurisdictional principles of extraterritorial application of antitrust law have begun to develop in international law, no longer limited to the two basic jurisdictional principles of the past, but have been replaced by the formation of some special jurisdictional principles.

The principle of international comity, as an important principle in the extraterritorial application of antitrust law, refers to a legal principle that recognizes the laws of other countries and relevant judicial judgments and rulings made in accordance with their laws, without affecting the formulation and implementation of their own public policies. Under the current complex economic background, the adjudication of transnational anti-competitive behavior has become increasingly complex. The resulting extraterritorial application of antitrust laws often creates conflicts between various laws and national interests in actual enforcement. In order to avoid and resolve possible law enforcement conflicts in the extraterritorial application of antitrust laws, the OECD recommends that countries follow the relevant requirements of the principle of international comity when applying extraterritorial application of antitrust laws. At present, the principle of international comity has been further refined and divided into two types of comity, namely, negative comity and positive comity. "Negative comity" means that a country ensures that its own interests are not infringed when applying its own antitrust laws, and on this basis, it gives due consideration to the interests of other countries.^[4] The starting point of negative comity is to avoid law enforcement conflicts that may arise from the extraterritorial application of antitrust laws. "Positive comity" means that when behavior occurring abroad has the effect of restricting competition in the country, based on the consideration of the other country's national interests, the other country is required to conduct relevant antitrust investigations without immediately using this difficult law. When applied, positive comity emphasizes more on national cooperation. In its specific application, it requires a high degree of trust between countries and a willingness to cooperate. However, these are moral aspects and do not have clear binding force. Since the extraterritorial application of antitrust laws not only involves individual countries, but each country's competition law policy objectives are different, and there are also certain differences in the substantive and procedural rules of each country, this will lead to The legislation, judiciary and enforcement of antitrust laws under different systems are prone to contradictions and conflicts. As one of the ways to effectively resolve antitrust extraterritorial jurisdictional conflicts, the principle of international comity plays an important

role. Therefore, the United States also actively introduces the principle of international comity when formulating domestic laws. "At the same time, through this series of judicial practices, the United States has deepened its interpretation of the principle of international comity from a legal perspective. It can be seen that in terms of extra-legal anti-monopoly application, the application of the principle of international comity can more effectively solve the problem of extraterritorial application. Conflict issues are more in line with the current economic globalization and trade needs, and have been accepted and applied by many countries.

2.3. Fields of extraterritorial application of antitrust laws

In order to occupy the market and expand market share, multinational corporations often adopt cross-border mergers and acquisitions, and quickly integrate into local economic activities through mergers and acquisitions, leveraging local market resources to accelerate the economic development of enterprises. Generally speaking, every country will not exclude multinational companies from entering its own market. However, when cross-border mergers and acquisitions give the company a higher market dominance and cause substantial damage to the country's economic market, the country will restrict this activity in accordance with antitrust laws. China explains this in the legal provisions of the Anti-Monopoly Law. When a concentration of business operators may have the effect of eliminating or restricting competition in my country's market, my country's anti-monopoly law enforcement agencies have the right to prohibit the concentration.

2.4. International Cartels and export cartel

International cartels refer to multinational companies and other companies that, in order to maximize corporate profits and achieve monopoly of the market, usually cooperate to reach some kind of agreement, through restricting product prices, controlling market supply and demand, colluding bidding, etc, in order to obtain more The purpose of great economic benefits. Generally speaking, in order to maximize their respective interests, operators with competitive relationships restrict the competition of other enterprises through cooperation agreements and restrict their development. For this reason, international cartels are expressly prohibited internationally. In order to restrict this, various countries have also supplemented and improved corresponding regulations and systems. After the antitrust law enforcement agency investigates and collects evidence, as long as it can be proven that the relevant enterprise violated this provision, the country can immediately impose jurisdiction to restrict the relevant behavior.

Different from international cartels, export cartels refer to the behavior of a country's export enterprises to reach an agreement on a country's export price and export quantity, or to divide the sales market in order to promote exports. Its advantage lies in its ability to enhance its position in the international economic market on the basis of protecting its own national interests. In international trade, only one or a few countries have the ability to implement unified price measures for export products. This can be considered monopolistic behavior, also known as an export cartel. In order to give their products an advantageous position in the international market and increase total foreign trade, many countries have given full freedom on the issue of export cartels and introduced corresponding incentives. Some even allow them to be exempted from legal liability. Through this, some countries have gained huge benefits, and they will take corresponding measures to safeguard their own interests against the export cartel behavior of other countries. On this issue, importing countries and exporting countries hold completely different attitudes. All countries hope that their countries can obtain greater benefits from international trade. Therefore, there is currently no better way to resolve this contradiction, which requires countries around the world to continuously improve their antitrust laws.

3. Problems with extraterritorial application of antitrust laws

3.1. Lack of international collaboration mechanisms and international comity and other restrictive principles

Since the promulgation and implementation of my country's Anti-Monopoly Law, due to the weakness of my country's early market economy and low degree of openness to the outside world, competition and monopoly issues in the domestic market have attracted the attention of my country's anti-monopoly law enforcement agencies, and may cause problems for enterprises from other countries in overseas markets. There is a lack of attention to the potential market monopoly that would harm the

order of competition in our country's market, and the competition and cooperation law enforcement is full of passivity and relatively conservative. However, it needs to be pointed out that "anti-monopoly law is not limited to the domestic field. It is also often used as an effective tool to safeguard national competitive interests in foreign economic and trade. This is actually a concrete manifestation of the international characteristics of anti-monopoly law." "In recent years, trade frictions between China and the United States have become increasingly intensified, and the number of cross-border antitrust lawsuits has increased sharply. Based on the need to strengthen antitrust law enforcement cooperation and effectively alleviate the monopoly risks of enterprises in both countries, China's antitrust law enforcement agencies have cooperated with U.S. antitrust law enforcement agencies in recent years. Trust agencies have signed a series of "memorandums of understanding". However, from the overall process, on the one hand, the intensity of antitrust cooperation between China and the United States is too low. In practice, the "memorandum of understanding" signed tends to be more focused on communication and learning, and is not clear and specific enough to include legal enforcement. [5] On the other hand, the level of law enforcement in China in cooperation with the US antitrust law enforcement agencies is still low. Not only because of the lack of corresponding cooperative law enforcement experience, but also the lack of corresponding cooperative support mechanisms, responses in international cooperation are often not timely and the response is not comprehensive. The result is that the initiative in the Sino-US antitrust game is not available and legitimate rights and interests are not obtained. Therefore, when dealing with disputes such as antitrust jurisdiction, it is not only necessary to build an efficient antitrust law enforcement cooperation mechanism, but also to conduct a comity analysis to provide support for the application of restrictive principles such as international comity.

3.2. Lack of legal provisions to prevent foreign countries from abusing the extraterritorial application of antitrust laws

As an important law that protects a country's economic and national interests, antitrust law is often constrained by the independence of the sovereignty of each country in its application, causing conflicts between countries. When a cross-border antitrust litigation case occurs, the key to the success or failure of the judgment lies in whether key evidence can be obtained in judicial evidence collection in other countries such as the United States. When the United States and other countries use unfair extraterritorial application of antitrust laws to Chinese companies, actively adopting blocking measures can prevent foreign antitrust authorities from abusing investigation and evidence collection and enforcement of judgments in China, and can fully and effectively protect the legitimate rights and interests of domestic enterprises. For example, in the "Vitamin C" case, because there is no prohibition clause in Chinese law against the extraterritorial application of U.S. antitrust laws, Chinese companies have no legitimate reasons to refuse investigation and evidence collection, even though the Civil Procedure Law of the People's Republic of China has provisions in the civil and commercial fields. There are similar prohibitions on cross-border evidence collection within this category, but Chinese companies cannot be given mandatory defense grounds. This resulted in the plaintiff not conducting judicial proceedings in accordance with the Hague Convention on Evidence Collection, but directly obtaining evidence from the defendant pharmaceutical companies and related parties within China. It is obvious that his behavior has seriously infringed upon the legitimate interests of our enterprises and also caused great damage to our country's judicial sovereignty. However, our country cannot rely on effective laws and regulations to prevent or sanction its behavior. In order to cope with the current complex and ever-changing economic environment and the vigorous containment and power threats of China's rapid development by Western hegemony such as the United States and Europe, attention should be paid to the corresponding improvement of the prevention mechanism for extraterritorial application of foreign anti-monopoly.

4. Suggestions for improving the extraterritorial application of China's antitrust laws

4.1. Adding the principle of international comity to the principle of extraterritorial application of antitrust laws

The principle of extraterritorial application of antitrust laws is the basis for claiming extraterritorial jurisdiction and the basis for antitrust cooperation. Like the principle of extraterritorial application of antitrust laws adopted by most countries, my country has also adopted the principle of effect as the basis for extraterritorial jurisdiction, which is conducive to ensuring my country's market security.

However, on the other hand, the effect principle only considers the interests of the country and protects the domestic market competition of the country, but ignores the interests of other countries. Therefore, simply using the effect principle as the basis for extraterritorial jurisdiction of my country's antitrust laws is prone to strong resistance from other countries, can easily lead to jurisdictional conflicts, and weaken the effect of extraterritorial application of antitrust laws. In order to reduce other countries' resistance to the extraterritorial application of my country's anti-monopoly laws and reduce conflicts, my country can limit the application conditions and scope of the principle of effect. The application of the principle of international comity lies in limiting the exercise of national jurisdiction and reconciling conflicts between countries, which is a necessary limitation for countries in the process of exercising their antitrust extraterritorial jurisdiction. In the process of extraterritorial application, the principle of positive comity is a good way to resolve conflicts in the extraterritorial application of antitrust laws. Compared with the principle of negative comity, it has superior practical significance. It embodies the spirit of active cooperation between countries.^[6] In the international environment, our country must not only protect its own interests, but also cannot ignore the interests of the countries involved in the case in the judicial process just to protect its own interests. It must show respect for the national sovereignty and interests of the countries involved. The principle of comity is used to avoid conflicts in the extraterritorial application of antitrust laws, appropriately limit the exercise of extraterritorial jurisdiction, and balance the national interests of the country and the country involved. Therefore, while combining the principles of positive comity and negative comity, we must also focus on strengthening cooperation and exchanges between countries to better alleviate conflicts in the extraterritorial application of antitrust laws and regulate unfair competition.

4.2. Bilateral agreement in place of memorandum of understanding

The reason why an agreement is the most direct and important way to resolve conflicts over the extraterritorial application of antitrust laws is that, as a type of treaty, it is more formal than a memorandum of understanding. Memorandums of understanding are relatively flexible and become enforceable once signed by the government, without the need for approval by the country's legislative body. However, after the agreement is signed, it still needs to be approved by the national legislative body. Therefore, the agreement has stronger legal binding force on both countries and can carry out detailed negotiations on major matters. It is easier for the two countries to reach consensus through friendly consultations, making the agreement pragmatic and efficient, and deepening the degree of cooperation between countries in terms of practical content. The content of the treaty can mainly include stipulating the rights and obligations of both parties, competition policies, and actively cooperating with the antitrust law enforcement agencies of both parties, notifying the other party in advance of matters related to the major interests of the other country, enhancing the transparency of law enforcement, reviewing review progress, relief measures, market competition conditions, and related matters. Market definition, analysis, etc. are stipulated. During this period, continuous exchanges will provide us with some effective systems for us to learn from. For example, Germany's antitrust law enforcement system includes the system of separation of personnel and powers, the review board system, and the "connection point theory" explored by the European Union in the field of antitrust law. These systems and theories guarantee and assist the effective implementation of extraterritorial application systems. While cooperating with other countries or regions, it is also an opportunity to understand other international anti-monopoly law extraterritorial application systems. We should take the essence and discard the dross, and provide useful experience for my country's anti-monopoly law extraterritorial application system based on my country's actual situation.

5. Conclusions

This article studies the factors that should be considered for negative and positive comity, promotes the resolution of international antitrust disputes through international cooperation, establishes the limitations of "real conflicts" on international comity, and proposes the introduction of international comity principles in the Anti-Monopoly Law. Finally, through the integration of the general theory, case practice, and relevant foreign references of the effect principle and international comity principle in the extraterritorial application of the Anti-Monopoly Law, it is proposed to improve the application standards of the effect principle in legislation, use systematic explanations to clarify the connotation of "excluding and limiting influence", unify the standards for the extraterritorial application of the Anti-Monopoly Law, and increase the limiting conditions for the application of the effect principle; Introduce the principle of international comity, emphasize the consideration of the interests of other

countries, clarify the applicable conditions of positive comity and negative comity, and add suggestions such as "genuine conflict" to the international comity principle. In the current complex international situation, it is necessary to accelerate the improvement of the extraterritorial application system of China's Anti-Monopoly Law in legislation, safeguard the legitimate rights and interests of Chinese enterprises in international trade, and avoid the infringement of national interests by cross-border monopoly behavior.

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