

Revival of US 301 and China's Management Strategy

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Abstract— On March 23, 2018, the United States made a unilateral sanction decision on the basis of the "301 Investigation" launched by the US on China on August 15th last year. China responded positively later, along with the outbreak of the trade war between China and the United States and aroused worldwide concern. First of all, this paper analyzed the development and connotation of "301 clause" and the economic and political reasons hidden behind the "301 survey": the huge trade surplus between China and the United States, as well as the surge of anti-globalization trend. Combining with the banana trade war between the United States and the Europe, we came to the conclusion that the "301 clause" has violated the following three basic principles of WTO, the most-favored-nation treatment principle, tariff protection principle and the principle of fair and just settlement of trade disputes. Although the "301 clause" has caused strong dissatisfaction among many countries, nevertheless, the WTO experts still ruled that "301 clause" does not violate the WTO dispute settlement mechanism. Finally, we argue that China should draw up some managements, like strengthening the training of internal talents, deepening the reform in the field of intellectual property rights, taking both internal and external measures together, learning from the experience of other countries, and then responding to unilateral trade protection acts in accordance with international rules. These managements must be useful for Chinese development.

Keywords— "301 Investigation", Trade between China and American, WTO Dispute Settlement Mechanism, Management Strategy

I. INTRODUCTION

The issue of intellectual property rights has always been one of the long-standing debates between China and the United States. There have been five such investigations targets on China initiated by America in history. The latest one is on August 15, 2017, US President Trump signed an administrative memorandum instructing US Trade Representative Wright Heze to launch a "301 Survey" on "China's Unfair Trade Behavior" to ensure that US intellectual property and innovative technologies are protected. The landmark event of this outbreak was on March 23, 2018, when the US Trade Representative Office announced the results of the "301 Survey", they claimed that China has hindered the development of their intellectual property in four aspects: forcing US companies to transfer technologies to China, restricting investment technology licenses on US companies, promoting Chinese corporate to investment and acquire US companies and assets, as well as supporting and implementing the computer intrusions into US businesses[1]. In the meantime, three measures have been proposed by the Trump government intending to hold Chinese development in the United States. The Sino-US trade war is on the verge of exploding, from the tariff increase in early April to the temporary suspension of interest in May, and the resumption of fire in July, which has made China realized that it is necessary to rationally treat this trade war and converting the challenge into an opportunity while proposing countermeasures.

II. THE DEVELOPMENT COURSE AND HISTORICAL APPLICATION OF "THE 301 CLAUSE"

"The 301 Clause" focuses on unfair trade practices carried out by foreign governments, which exists in the United States imagination. The United States will initiate an investigation procedure for such unfair trade practices, which is named the "301 investigation". If the investigation results show that there do have unfair trade act, the trade representative will negotiate with the relevant foreign government. If the negotiations fail to reach an agreement, and the other party's unfair trade practices still in process, the United States will implement trade retaliation against the country [2].

A. The Development and Classification of "the 301 Clause"

It was first seen in Section 252 of the Trade Expansion Act of 1962, allowing the President to retaliate against legal but "unreasonable" foreign trade practices. At that time, international trade was basically carried out under the General Agreement on Tariffs and Trade. The United States also actively participated in the negotiations of the previous rounds of the GATT. Until the mid-to-late 1960s, the United States believed that their trade interests were not effectively protected: Firstly, unilateral trade liberalization harms US interests. And secondly, there are serious shortcomings in the GATT dispute settlement mechanism. These led to the creation of "the 301 Clause". After several revisions, it has finally been perfected as an effective weapon to effectively protect US trade interests. In the revision of the Comprehensive Trade and Competition Act of 1988, the "301 Clause" clearly stipulates that the relevant powers of the President are granted to trade representatives, restricting trade retaliation as a mandatory measure and explicitly enumerating unfair trade practices.

The "301 Clause" has a narrow and broad sense and is a proactive clause. The narrow "Article 301" is the abbreviation of

the Article 301 of the US Trade Act of 1974, and it is also the "General 301 Clause" of the United States to protect its own trade. The broad term is the 1301-1310 section of the "General Trade and Competition Act of 1988", which contains the basic "General 301", the refined "Super 301" and "Special 301". The supporting measures are detailed in Table 1. Among them, "General 301" was the earliest one; "Super 301" and "Special 301" were enacted in the Comprehensive Trade and Competition Law of 1988, which together have shaped the "301 Articles" laws, regulations and systems of the United States and shows that the value culture of the American legal system is to safeguard the interests of the US trade.

TABLE I. CLASSIFICATION OF "THE 301 CLAUSE"

| Name | "General 301" | "Super 301" | "Special 301" |
|-----------------|--|---|--|
| Object | Unfair trade practices | Free trade | Countries or regions where intellectual property protection is unfavorable |
| Way | USTR submits annual reports to the Congress, including applications for "301 investigations", decisions, progress and implementation actions | USTR announces "Key Unfair Trade Practices" and "List of Trade Open Key Countries" | USTR publishes the "Special 301 Report" every year, and lists the countries of trade as "Priority Watch List", "Watch List" or "Report" depending on the protection of intellectual property rights. |
| Measure | Negotiate with the countries concerned and finally reach an agreement until the parties agree or the United States is satisfied. If the negotiations are fruitless, unilateral and mandatory retaliatory measures will be taken. | The USTR immediately launches an investigation onto the relevant key countries, requiring the relevant party to eliminate trade barriers or make compensation within 3 years after the investigation was initiated; otherwise USTR will take revenge actions. | The USTR launches a six-month "special 301 investigation" on the key countries having been listed in the list, forcing the other party to protect intellectual property rights. After the investigation is over, the STR will decide whether to take retaliatory measures according to the specific circumstances. Once the decision is made, it must be executed within 30 days without the consent of the President. |
| Characteristics | System integrity, Extensive content, Aggressive measure, Political treatment, Rule hegemony, Revenge unidirectional [3] | | |

B. The Cases of "The 301 Clause".

Table2 introduces some cases of Section 301. The earliest one originated from the "Chicken War" between the United States and the Europe in 1962. Since the completion of the US Trade Law in 1974, the US government has conducted a total of 123 "301 investigations", most of which were conducted in the pre-Reagan era before the establishment of the World Trade Organization, the number were about 49. Since the establishment of the WTO in 1995, the number has decreased significantly. From 2000 to the end of 2017, there were only five times. Ofttimes, the United States has chosen to resort to the WTO's trade dispute settlement mechanism to resolve trade conflicts with other countries. This is related to the 1998 US-European banana war, when EU accused the unilateral practice violates the rules of the WTO dispute settlement mechanism. Although the DSU expert group finally ruled that the US "301 Survey" is "not inconsistent" with the WTO dispute settlement mechanism, it also emphasizes that this conclusion was only established when the United States complied with its commitments and guarantees that it will comply with the WTO dispute settlement mechanism [4].

TABLE II. CASES OF "THE 301 CLAUSE"

| Name | Cases |
|---------------|---|
| "General 301" | Japanese Steel Case: In the 1970s and 1980s, the United States launched an investigation into the Japanese steel industry. After repeated coordination, Japan chose to compromise, voluntarily restricts steel exports, and signed the US-Japan Special Steel Import Coordination Agreement in 1976. |
| | EU Banana Case: In the 1990s, the United States used the "Article 301" to retaliate against the EU's banana import preferential system. The WTO Director General coordinated and both sides took a step back. |
| | China Clean Energy Case: In 2010, the United States launched a "general 301" survey on China's wind power and other clean energy sources. Eventually China made concessions and agreed to stop subsidies for wind power companies that use domestic rather than imported components. |
| "Super 301" | Japan's Trade Liberalization Case: In 1988, when the "Super 301" was promulgated, the United States listed Japan as a key supervisory country for trade liberalization. The US Trade Representative Office believes that Japan has closed the market in terms of computers, satellites, and forest products. The 18-month diplomatic consultation finally forced Japan to open its domestic market. |
| "Special 301" | Brazilian Drug Case: In 1987, USTR considered Brazil's lack of production methods and patent protection for drugs. In the following year, a special "301 investigation" was launched, and 100% tariffs on Brazilian paper products, non-benzene drugs and daily-use electronic products were collected as retaliation. Under pressure, the Brazilian President announced legislation to provide patent protection for medicines and related products, ensuring that the entire legislative process was completed in 1991. |
| | China's Intellectual Property Case: In 1991, China was listed by the United States as a key monitoring country. In 1992, 1995 and 1996, China and the United States signed a memorandum of understanding on intellectual property rights. The United States threatened China with a trade war. The construction of intellectual property protection has successively revised the Patent Law and the Trademark Law and promulgated laws and regulations such as the Anti-Unfair Competition Law. |

Five times in the history of the United States, the "301 Survey" was launched against China, three of which were in the field of intellectual property rights in China. As listed in Table 3, China was forced to reach three intellectual property agreements, all because of in 1991, 1994 and 1996 China has appeared in the list of key observation countries in the Special 301 Report of the year. The most recent "301 Survey" was the one that US targets at the "Made in China 2025" plan. China became the next target of the US 301 bill, and Section 301 actually established a system and procedure platform for the United States to launch its unilateral trade retaliation [5].

C. The Background of the Latest "301 Investigation"

1) *Economic reasons: the huge Sino-US trade surplus ---inconsistent division of global value chains.* One of the reasons why the United States launched the "301 investigation" was the huge trade surplus between China and the United States. The United States has been always stressing that the cargo surplus has damaged the interests of the United States, but has less considered the huge trade deficit between China and the United States. According to the announcement of the General Administration of Customs of China, China's exports to the United States in 2017 were US\$ 429.8 billion, an increase of 11.5% annually; imports from the United States were US\$ 153.9 billion, an increase of 14.5%. The trade surplus between China and the United States was \$275.8 billion, which didn't contain the deficit data in the area of service trade. As we can see from Figure 1, there are differences in the statistics of both China and the United States. This is the global value chain division of labor who determine the Sino-US trade pattern. The current trade statistics method is inconsistent to exaggerate the Sino-US trade balance.

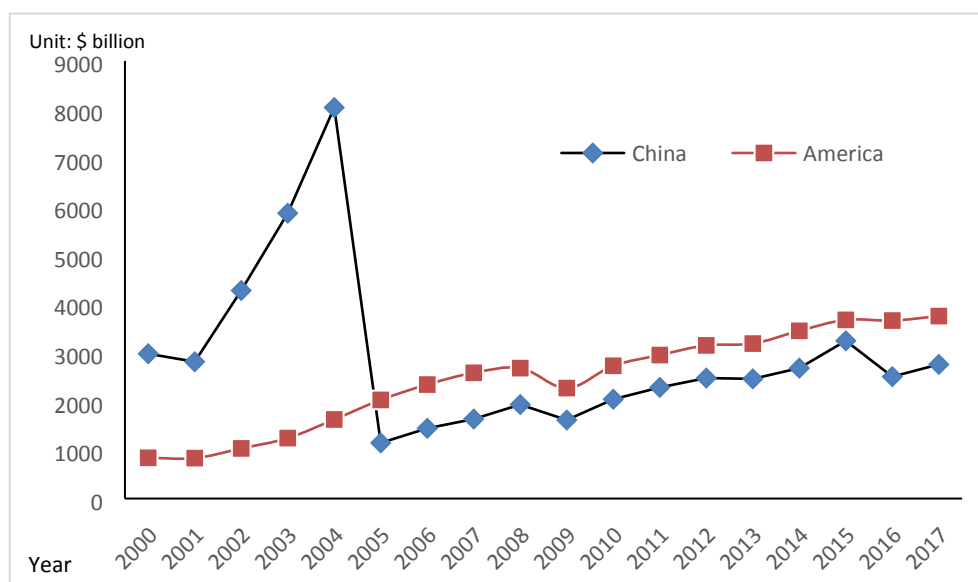


Fig. 1. Trade balance between China and America (Unit: \$ billion)

In addition to statistical inconsistencies, there are some underlying reasons. The United States will turn its point into technology transfer, intellectual property rights, and independent innovation. The measures taken against China are aimed at industrial upgrading and innovation, rather than the huge Sino-US trade imbalance, indicating that in the Sino-US economic and trade relations, the focus of the United States is no longer general products anymore but high-end products [6]. In addition, the US's export control of high-tech products to China is the main obstacle to restricting US exports to China and affecting the balance of bilateral trade. The adjustment of US industrial structure has led to the continuous development of US investment in China. Exporting from American firms in China to the United States has further increased the imbalance between Sino-US trades [7].

2) *Political reasons: changes in the world's landscape.* Since Trump became president of the United States, he made the US has withdrawn from the Trans-Pacific Partnership Agreement, the Paris Agreement, UNESCO, etc., and also asked to investigate the reasons for the huge trade deficit in the United States and reopen the negotiation in the North American Free Trade Agreement. The anti-globalization trend has surged, and the US trade policy has shifted from multilateralism to bilateralism and even unilateralism. At the end of 2017, the National Security Strategy Report issued by the US government mentioned China for 33 times, and listed China together with Russia as a "revisionist country trying to erode US security and prosperity." Sino-US relations shift from partner into "opponent". What's more, the "Special 301 Report" issued by USTR in 2016 and 2017 all listed China as a key observer, and believed that China hindered US export and investment barriers in eight aspects. Hence, a newspaper pointed out: the Sino-US trade war is actually a game between China and the United States on the dominance of the world. The positive response of China this time is a challenge to the United States. The game between the two countries will cause changes in the world structure.

III. THE "301 CLAUSE" UNDER THE FRAME OF THE WTO

WTO is a multilateral trade organization established to establish the same market for world trade. Before its establishment, unilateralism prevailed, "301 Clause" was one of the most famous international trade rules and legal systems in the world, which greatly influenced the international trade and its legal system in the 1980s and 1990s [8].

A. Section 301 conflicts with WTO rules.

WTO is pursuing the ultimate goal of profit maximization, sustainable economic development, and trade liberalization. In order to achieve this goal, we will reduce the cost of international trade by setting the principle of non-discrimination, reducing tariffs, and eliminating discriminatory treatment, to improve the welfare of all society. At the same time, in order to accelerate

the economic development of the developing countries, special exceptions have been imposed to eliminate their unequal treatment in international trade [9].

1) *The MFN principle*: MFN refers to the preferential treatment of a party to a transaction under the treaty for the goods of another country, and should not be lower than the preferential treatment for domestic goods or any other countries. It is unconditional, that is to say, the benefits and exemptions granted to any third party by the WTO members will be automatically given to the members. All members of the WTO are treated equally, and all members enjoy MFN status and must not be distinguished. Otherwise the action is considered discriminatory and violates MFN status. In the name of "national security," the Trump administration of the United States has imposed tariffs of 25% and 10% on imported steel and aluminum since the 23rd. However, Canada, Mexico, the European Union, South Korea and other countries were exempted. Although the tariffs were imposed on all importing countries, the subsequent series of exemptions made China becoming almost the biggest victim. The "Resolution No. 301" copying measure applies only to the investigating country and does not apply to all member states. That is where the "Article 301" does not fit the MFT.

2) *Tariff protection principle*: Tariffs are an important policy tool for the protection of domestic industries that the World Trade Organization allows members to use. When a country joins the WTO, they promise the highest tariff level and promise to "capped tariffs". They are not allowed to raise them without authorization. If in special cases, they need to report to the WTO. Under certain rules, they can be raised as appropriate. This principle stipulates that all countries must impose non-discriminatory tariffs, and that tariffs are for all importers of a product, not a specific enterprise or industry group. The result of the US "301 Survey" is often to impose high tariffs or 100% punitive tariffs on a certain industry in a country. For example, in the 1990s, when investigating China's intellectual property field, it imposed a 100% punitive tariff on some goods imported from China. This measure is a blatantly violation of the principle of tariff protection.

3) *Fair and equal treatment of trade disputes*: The dispute settlement mechanism of the WTO is the result of the multilateral negotiations of the Uruguay Round. It is based on a fair and reasonable basis and resolves disputes through negotiation and mediation. That is, without violating the provisions of the agreement, priority is given to the solution that can be accepted by both parties to the dispute. Article 23 of the Dispute Settlement Understanding stipulates that if a member of a party believes that the other party's practice violates the rules, it should file a lawsuit with the WTO instead of taking unilateral retaliatory measures on its own. The WTO advocates international multilateral trade and free trade. The unilateral sanctions of Section 301 violate the principle of fair and equal treatment of trade disputes.

B. Section 301 is restricted under the WTO

The United States once made a "US Administrative Statement" in 1994, stating that it would implement "Article 301" in a manner consistent with the rules of the World Trade Organization. If there is any violation of the World Trade Organization agreement, it promises to resort to a dispute settlement mechanism. At the end of the 20th century, in the banana war, the United States unilaterally announced the preliminary draft list of retaliation and sanctions schedule on the grounds of "not conforming to the WTO ruling." If the EU does not make concessions, trade sanctions will be formally implemented in early 1999. This caused the EU to file a dispute settlement case concerning the "Article 301" with the WTO. Finally, the expert group of the WTO dispute settlement body made a ruling: if seen from legally side alone, it can be initially determined that the "Article 301" does not comply with the WTO regulations, because it is obviously impossible to solve the economic and trade problems between different economies with a domestic law. However, due to the above-mentioned statement made by the US government, Section 301 can be implemented in a manner consistent with WTO regulations. That is to say, the Article 301 does not violate the WTO regulations. On the one hand, it continues to exist, on the other hand, it is bound by the "administrative action statement" [2].

C. China strives to avoid trade wars through dispute settlement mechanism.

The "301 investigation" stems from two types of administrative measures stipulated in Section 301: coercive measures and discretionary measures. Coercive measures generally apply to trade agreements or laws, policies, and practices of foreign governments that violate US international rights. Discretionary measures can exercise power outside the trade agreements or established "international legal rights". As the respondent, China has the right to believe that the "301 investigation" involves the jurisdiction of the WTO and has the right to resort to the WTO dispute settlement mechanism to negotiate with the United States and try to make a solution at the mandatory measure stage. But the final result still depends on the game between China and the United States under the WTO dispute settlement mechanism. The trade war between the two sides was resolved through negotiations between the two countries. Second, the United States made its own rulings based on the results of the investigation. Only the first option will not cause a double defeat.

IV. THE MANAGEMENT STRATEGY OF CHINA

Some scholars believe that after China's accession to the WTO, it will further integrate into global economic, get rid of all the martyrdom imposed by the United States under MFN treatment, and also reduce or even avoid the "Article 301" sanctions to a certain extent and the Revenge. However, ever since Trump took office, the anti-globalization trend has come back, and the US trade policy has undergone great changes, from multilateral to bilateral, from "freedom" to protectionist "fair competition", and also proved that there are still spaces and conditions for Article 301 to continue to exist, and there is even a tendency for it to strengthen and expand. Although the "Article 301" itself has various irrationalities, China's counter-attacks, first of all, shall see to its own problems, followed by a clear analysis of the practices investigated, to understand the true purpose of the other

party, to prescribe the right medicine, to make up for the shortcomings.

First, it responded promptly to the consultation request and actively sought the help of the WTO dispute settlement mechanism. China's accession to the World Trade Organization should rely more on DSUs, relying on a variety of frameworks to strive to resolve international disputes and resolutely defend its rights and interests [10]. Professor Dai Long said that Japan has formed a coordinated response mechanism of the "three-in-one" of the government, industry and the academic society effectively curbing the United States' intention to launch unilateral trade protectionism [11]. China is in rising, and the situation is very similar to Japan's rise. Hence, Japan's methods and countermeasures for dealing with trade disputes are worthy of reference.

The second is to expand imports from the United States, reduce trade surplus, and treat Sino-US economic and trade relations properly. As the two major economies in the WTO, about the trade issues, they are jointly balanced in the interests of "win-win cooperation, to fight both hurt" and the "you have me and I have you", so the both country shall safeguard the WTO rules and institutions together. From the perspective of the development of Sino-US economic and trade relations, balancing trade will help China's position in bilateral negotiations; from the perspective of the interests of the two peoples, it will help to seek more opportunities for cooperation and enhance communication between the peoples in the two countries.

The last is to continuously promote the process of reform and opening up and nurture high-tech talents. Continue to promote the process of reform and opening up, develop scientific and technological advantages, and exert geographical advantages, increase trade with countries along the "the Belt and Road" and other countries in Europe, Asia and Africa. Like Central Asia Natural Gas Pipeline Project, Mombasa-Nairobi Standard Gauge Railway (SGR), Tehran to Mashhad high speed railway etc.. The great achievements during the 15 years since the implementation of the high-speed railway can help China get the strong support of the international community and make up for the economic losses caused by the high tariffs of the United States. Last but not least, to cultivate high-tech talents, China needs professional legal talents to study "Article 301", the WTO dispute settlement mechanism and the domestic intellectual property legislation. The rise of a big country will surely go through all kinds of martyrdom from other countries. China needs high-level talents to plan ahead, not fear, and formulate a coordinated response mechanism suited to the national conditions.

V. SUMMARY

There is a famous saying in the Father of economics: the degree of professional output is bound by the breadth of the market. China's development in the economic market is immeasurable. This contest between China and the United States is a challenge to the international economic order; and a challenge to the "Article 301". Many countries, including the European Union, Japan, South Korea, and Brazil, have been threatened by the "Article 301", and the "Article 301" may continue to exist in the future. In the face of unfair trade accusations, on the one hand, we should actively negotiate through the WTO dispute settlement mechanism; use the professional knowledge of professionals to study the causes of trade conflicts, and the applicable provisions of the DSU, study the coordinated response mechanism suited to the national conditions, use legal means and international trade rules, to convincingly resolve trade conflicts between the two sides and even multilaterally. On the other hand, the impact of trade disputes on domestic industries can be large or small. The key is how to reduce or even turn it into positive impacts. This requires China to use existing policies to play a dominant industry and make up for the adverse effects of trade disputes.

With the economic integration and the strengthening of the multilateral trading system, whether the United States will use the "Article 301" multiple times depends on whether the development of the countries will "threats" the national interests of the United States or not, and its implementation will be subject to more and more constraints and opposition. However, as a world power, the United States has the world's first-class talents and technologies, and is also a trading partner of all countries. It is necessary for China and the rest of the world to strengthen the study of the "Article 301" and the formulation of coordination mechanisms. It is also necessary to make up the shortcomings to serve the trade development of the two countries.

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