Trump's Steel and Aluminum Tariff Measures under the Perspective of Non-Violation Claims[1]

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Abstract. Trade frictions between China and the United States have been escalating with a series of trade measures taken by the United States, especially the investigation of Section 232 on steel and aluminum tariffs. For facing this trade dilemma, it is a feasible attempt for China to take the perspective of non-violation issues and use the WTO dispute settlement mechanism to break the deadlock.

Introduction

The United States Department of Commerce issued the National Security Impact Report on imports of steel [1] and the national security impact report on imports of aluminum [2] on January 11 and 17, 2018, pursuant to section 232 of the Trade Expansion Act 1962, which guarantees national security It concluded that current imports of steel and aluminum were weakening the domestic economy and threatening national security under Section 232. Based on the findings, U.S. President Donald Trump signed two presidential decrees on March 8, 2018, and March 22, 2018, respectively. It said that the United States would impose an additional tariff of 25 percent on steel and 10 percent on aluminum imports, including those from China, the European Union, Japan and Brazil .The tariff will take effect indefinitely from March 23, 2018.

In the context of the United States' attempt to justify the tariff measures under Section 232 as a national security measure by invoking the GATT 21, from the point of view of the suit for non-violation, a party to a dispute needs to argue against the fact that the Section 232 tariff measures substantially violates GATT 21, which inevitably involves the question of the WTO's ability to review the dispute. In addition to the way of initiating the action for breach of contract to resolve matters resulting from the U.S Section 232 tariff measures. [3] From another point of view, the non-violation action exists to avoid damage or invalidation of the interests of the WTO members through legal measures. Could it be a reasonable choice to resolve the issues of U.S Section 232 tariff measures?

The Advantages of Non-Violation Nullification or Impairment Litigation

Skirting the Conflict between National Sovereignty and Trade

The United States has long held the view that Article twenty-one of the GATT 1994 is a self-determining article and that its application in conformity with its content should not be subject to review by the WTO dispute settlement mechanism. [4] In response to China's request for consultations, the US expressed the same idea that national security should be a political issue, not one that could easily be examined or resolved by the WTO's dispute settlement mechanism. Each member of the WTO has the right to determine for itself what it considers necessary to protect its fundamental national security interests, as reflected in the text of Article twenty-one of the GATT 1994. [5]

State sovereignty, as the supreme power of the State and the independence of the state. As a multilateral organization to coordinate and deal with trade disputes among its members, the WTO's rights are actually the transfer of its members' economic sovereignty to a certain extent. It is worth

mentioning that in the relevant cases of non-breach of contract, the phrase "if there is no breach of contract" [6] is used as a prefix. In contrast to the double dilemma that may arise from the outcome of a default action, a non-default action for the resolution of a 232 tariff measure does not require the WTO to review whether the measure violates WTO obligations and meets the security exceptions invoked by the United States, it is only necessary to judge whether the measure is in conformity with a non-breach action, even if there is no breach of contract It does not take into account the possible conflicts between the exercise of national sovereignty and trade policies under the WTO.

To Reduce the Negative Impact of the Outcome of the Proceedings

From the point of view of non-violation litigation, to resolve the dispute caused by the Section 232 tariff measures through non-violation perspective, neither the parties to the dispute nor the dispute settlement mechanism of the WTO need expend much effort to determine whether the contested measure constitutes a breach of an obligation under the WTO, at the same time, in the context of non-breach litigation, whatever the final outcome of the dispute settlement on tariff measures which were submitted to Section 232, it will not create a sensitive situation where national sovereignty and WTO trade policies are at odds For the decision under this framework would be only a relatively safe decision as to whether or not there is an injury to trade interests and the amount of damages that the litigant would be able to obtain if the injury is real, which has a much lower negative impact than the default action. [7]

Elements of Non-Violation Claims

Non-violation claims essentially provide in Article 23, paragraph 1, Subparagraph 2, of the GATT 1994:

Loss or damage to an interest:

If, in the opinion of a contracting state, the benefit to which it is entitled, directly or indirectly, under this agreement is being lost or impaired by (b) the application by another contracting state of a measure, whether or not such measure is inconsistent with the provisions of this agreement, or if the achievement of the objectives set forth in this agreement is impeded, the State party May, in order to adjust the matter to its satisfaction, make a written request or recommendation to the State party which it considers to be concerned. The State Party concerned shall give sympathetic consideration to the request or proposal submitted.

Accordingly, the composition of a non-breach action would need to meet the following elements:

The Measures in Dispute Cannot Be Reasonably Expected

If the measure in dispute could reasonably be expected at the time when the parties were negotiating tariff concessions, then the measure would constitute a default without further consideration by the parties when the dispute arose. A non-default action can occur only if the measures in dispute cannot reasonably be expected to occur during the negotiations on tariff concessions.

Damage or Invalidity Resulting in Reasonably Expected Benefits

Professor K.S.V. Roeselare, commenting on the GATT 23 guidelines, said: The drafters of the GATT recognized that the intended benefits of tariff reductions could easily be undermined by measures not provided for in the GATT, and that measures resulting in a dispute would actually harm or invalidate the intended benefits of the other party The purpose and significance of the non-breach action is that the party then obtains damages by bringing a non-breach action. [8].

The Burden of Proof Shall Be Borne

In Litigation, it is crucial to determine which party bears or to what extent the burden of proof is placed on it [9], as is the case with non-breach actions. It has been the practice of the GATT to require a party to a non-breach complaint to present a detailed rationale to support its case Article

twenty-six, paragraph 1, item 1 of the DSU also states that the plaintiff shall provide detailed reasons in support of the claim. The reasons must also be tangible and concrete and not merely a description of the measures at issue. Only when there is a connection between the act and the result of damage, can the author of the act claim responsibility. In this regard, it is also evident that there is a causal relationship between the measures implemented by the respondent and the loss or invalidity of the benefit that could have been expected at the time of the negotiation of the tariff concession. [10] Therefore, the burden of proof for non-breach action shall be borne by the party who initiates the action.

The Solution of Tariff Measures under the WTO Mechanism

Whether a Dispute Over 232 Tariff Measures Constitutes a Non-Violation Claim

Whether or not it constitutes a security exception to Article XXI of the GATT 1994, the United States imposes additional tariffs on Chinese exports of steel and aluminum At least with China and the United States previously agreed in the GATT 1994 in the schedule of product tariff concessions in steel and aluminum tariff changes. Based on the GATT 1994 schedule of tariff concessions agreed by both China and the United States, the implementation of the 232 tariff measures cannot be expected; second, tariff measures will undoubtedly result in reduced market competitiveness and significantly reduced sales of Chinese steel and aluminium products compared with similar products as costs increase in the importing country's markets, the loss was a trade interest protected by GATT that could reasonably have been foreseen at the time of the tariff concession negotiations. In view of this, the dispute over tariff measures 232 meets the constitutive requirements of a non-violation suit.

Jurisdiction of the WTO

There are only three types of complaint cases accepted by WTO dispute settlement, which are breach of violation, non- violation and circumstance. [9] From the perspective of Justiciability, both China and the United States are members of the WTO, and both parties to the dispute are the eligible subjects of the lawsuit Through the above analysis, the 232 tariff measures of the United States can be found to be in accordance with the elements of non-breach of contract suit, which falls within the scope of the suit accepted by the WTO. [10] Although in the history of non-breach of contract litigation, there is a remedy or auxiliary system in which the plaintiff applies non-breach of contract as a remedy or an auxiliary system to prevent the loss of the suit, it is undeniable that there was even a system that did not require independent cause of action when submitting pleadings for non-violation, and that the current dispute over 232 tariff measures can be litigated if it constitutes a non-violation claims.

From the point of view of arbitrability, if a dispute arising out of the 232 tariff measure were to be decided by the application for non-violation claims, the WTO would be faced with a dilemma: no matter the outcome of the decision in favour of either party, will produce for the WTO member country sovereignty or the WTO system stability and its authority and the adverse effect. In the case of non-violation sues, how to give the final decision of the dispute settlement of the 232 tariff measure will bring the WTO panel or Appellate Body to a deadlock. Looking back at the dispute settlement of the 232 tariff measures in non-default litigation, the WTO panel or Appellate Body only needs to determine the amount of the direct or indirect reasonable expectation of benefit to the party bringing the action as well as the amount that the party against whom the action is brought should compensate for the 232 tariff measures, a decision on the non-breach claim can be made. In contrast, the 232 tariff measure dispute is more arbitrable than the non-volation dispute.

In view of this, the WTO dispute settlement mechanism has jurisdiction over non-default actions brought by the 232 tariff measure.

Dispute Settlement under the WTO Mechanism

From the standpoint of China, if China brings to the WTO A non-breach complaint against the US tariff measure 232, the WTO Dispute Settlement Mechanism shall have jurisdiction over it and shall accept it To investigate and determine, on the basis of the amount of damage or invalidity caused directly or indirectly by the measures in question to China's reasonably expected benefits in trade, and to determine the amount of damages to which China shall be entitled, the dispute caused by the 232 tariff measures has brought difficulties to the WTO dispute settlement mechanism and other members.

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References

[1] US Dept. of Commerce, The Effect of Imports of Steel on the National Security-An Investigation Conducted under Section 232 of the Trade Expansion Act of 1962 (2018).

[2] US Dep't of Commerce, The Effect of Imports of aluminum on the National Security: An Investigation Conducted under Section232 of the Trade Expansion Act of 1962 (2018).

[3] United States - Certain Measures on Steel and Aluminium Products-Request for Consultations by China, WTO Doc. WT/DS544/1, G/L/1222, G/SG/D50/1

[4] US Responses to the Panel's and Russia's Questions to Third Parties (February 20, 2018) in Russia - Measures Concerning Traffic in Transit (DS512)

[5] Fengning Li, Trump's Steel and Aluminum Tariffs, National Security, and WTO Law,China & WTO Rev. 2018:2,273-300 .

[6] Sungjoon Cho,GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?,322 Harvard international law journal 39(2) ,1998.

[7] Guest Post: Why WTO Members Should Bring Pure Non-Violation Claims Against National Security Measures.Available at https://worldtradelaw.typepad.com/ielpblog/2018/10/guest-post-why-wto-members-should-bring-pure-non-violation-claims-against-national-securit%E2%80%A6/.

[8] Zhao Weitian.On the judicial system of WTO [J].International Trade,.2001(08}:38-39.

[9] Agreed Description of the Customary Practice of the understanding Regarding Notification,Consultation,Dispute Settlement and Surveillance,GATT B.I.S.D.(37th sup.}at 210(1979}.

[10] Japan—Measures Affecting Consumer Photographic Film and Paper,WTO Doc.WT/DS44/1.Available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds44_e.htm.

[11]Deng Lu.On the action of non-violation under the system of GATT/WTO [J].Journal of Hubei Police Academy, 2014(05)

[12] Zhang Junqi.An interpretation of the PLASTICITY PROBLEM IN WTO dispute settlement [J]. Modern Law, 2011(11):140-142.