

Study on the Application of the "National Security Exception" Clause in the WTO Trade Rules

-- Take China v. the United States of Steel and Aluminum Tariff Measures Case as an Example

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Abstract: For a long time, there have been differences and disputes on the restrictive application standards of the "national security exception" (NSE) clause in the WTO trade rules, and the clarification of the application of the "NSE" clause has become an urgent problem to be solved by the WTO dispute settlement body and the international economic law community. This article will start from China v. U.S. Steel and Aluminum Tariff Measures, combining the legislative concepts, doctrinal interpretations and judicial practice to clarify the limitations of the application of the "NSE" provisions.

Keywords: NSE Clause; China v. The United States of Steel and Aluminum Tariff Measures Case; Applicable Limit.

1. Introduction

1.1. Introduction of the Case

In 2018, the U.S. Department of Commerce issued a 232 Investigative Report indicating that imports of steel and aluminum threaten or impair national security, and used this to impose additional tariffs above the most-favored-nation (MFN) rates above those committed to in the WTO on steel and aluminum products from a number of countries, including Major trading partners have introduced retaliatory measures and initiated dispute settlement procedures with the WTO in relation to the above-mentioned measures of the United States. In this case, the question of whether the application by the United States of the "NSE" provisions of the WTO trade rules is lawful and legitimate has become the focus of controversy between the two parties.

1.2. Origin of the "NSE" Provision

The essence of the "NSE" clause is the result of the voluntary cession of part of the sovereignty of member States in order to reap the benefits of free trade. In the 1920s, the Great Depression in the United States of America had a major impact on the economies of Western countries, and trade protectionism was prevalent at that time, which undoubtedly affected the stability of the global economic order, making it urgent for the leaders of a number of countries to set up a peaceful and stable international economic organization in order to form a fair and just international economic and trade system. Thus, in order to promote the global economy, the 1946 United States Draft Charter of the International Trade Organization provided for an "NSE", which was adopted by the Geneva Conference in 1947 and differentiated the security exception from the general exception, which was established as a stand-alone provision in the General Agreement on Tariffs and Trade.

1.3. Problems: Improper Application of the "NSE" Provision

In recent years, the invocation of the "NSE" clause by countries represented by the United States has gradually

deviated from the original intent of the clause's design, and unilateralism and protectionism have been practiced in the name of "national security", seriously undermining the rules-based multilateral trading system. As the problem of improper application of the "NSE" provision becomes more serious, it is crucial to clarify the limitations of the application of this provision and thus correctly define the legality of its invocation.

2. Review of the Legality of the United States' Invocation of the "NSE" Provision

2.1. The Purpose of the United States in Invoking the "NSE" Clause

In China v. United States Steel and Aluminum Tariff Measures, the United States argued that "Measure 232" was a national security measure based on the Trade Expansion Act of 1962 rather than a safeguard measure. The implementation threshold of safeguard measures is high, and the current situation of the U.S. iron and steel industry is far from reaching the serious consequences of "full derogation", so if tariffs are imposed through safeguard measures, it is very likely that the Panel of Experts will find that WTO rules have been violated, and thus bear the unfavorable consequences of suspension of equivalent concessions, and so on. Therefore, the United States invoked the WTO security exception rule, taking advantage of the fact that the interpretation of the security exception provision has not yet been changed and finalized to make light of the situation, and attempted to exclude the "232 measures" from the system of trade norms, which demonstrated its intention to seek a rebalancing of trade interests under the flexible application of trade rules[1].

2.2. The "232 Measures" of the United States does not Meet the Applicable Conditions of the "NSE" Clause

In response to the Chinese side's claim, the United States side argued that the "232 measures" were imposed pursuant to Article 21(b)(iii) in order to safeguard the United States'

"essential security interests", that Article 21(b) was "discretionary" and "non-justiciable", and that the Panel's review should be limited to confirming that the United States side had invoked the security exception, and that it did not need to examine whether or not it was in the "essential security interests", or whether or not there were any circumstances under Article 21(b)(iii), and so on. In this regard, the Panel made a targeted interpretation of the two United States defenses, finding that the "232 measures" did not meet the conditions for the use of the "NSE" clause.

Firstly, with regard to whether paragraph (b) is "self-judging" and "non-justiciable", the Group conducted a textual and grammatical analysis of article 21 (b) of the GATT in accordance with article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, and examined background documents such as the history of the negotiation of this provision during the GATT period, the negotiating positions and assertions of the member parties, and analyzed the materials provided by the parties in detail. Accordingly, the Panel found that paragraph (b), which establishes a member's right and discretion to take measures to protect its "essential security interests" under the three circumstances of paragraph (b), is not "self-determining" or "non-justiciable" as the United States argues, and that the Panel has the authority to objectively review the circumstances in which the United States invokes paragraph (b).

Secondly, with regard to whether the United States' "232 measures" comply with the provisions of article 21 (b), the Panel considered that the "exigencies of the situation" in subparagraph (iii) of the article must be "in the context of international relations" and comparable in gravity to a "war". Based on the evidence and arguments submitted in the *China v. United States Steel and Aluminum Measures Dispute*, the Panel found that the United States' "232" measures were not within the meaning of Article 21(b)(iii) of the GATT, and that they were in violation of the tariff-cutting commitments of Article 2 and the most-favoured-nation treatment of Article 1 of the GATT, and demanded that the United States rectify the inconsistencies with the WTO rules, and ensure that it complied with its obligations under the WTO rules.

3. Limitations on the Application of the "NSE" Clause

Based on the WTO trade rules on the "NSE" provisions of the text and the current invocation of the provisions of the defense of the case of the focus of the controversy, the author will be the inherent limitations of the provisions of the following four aspects of the analysis.

3.1. Limitations on the "Right to Self-determination"

As can be seen from *China v. United States Steel and Aluminum Measures*, the United States asserts that the "NSE" clause is "self-determining" and "non-justiciable" in nature. Based on the existence of this view, whether security measures implemented by WTO members have an absolute right to self-determination and whether the WTO Dispute Settlement Body has the authority to exercise jurisdiction and review the legality of security measures invoking the "NSE" clause have become the primary issues in the application of the "NSE" clause. The phrase "it considers" in article 21 (b) of the GATT is a key expression for members to determine the source of their rights. Some scholars have argued that the

GATT, through this formulation, effectively grants members the exclusive right to determine for themselves which measures are measures to safeguard essential security interests. Other scholars have argued that the expression "it considers" is misleading, and that while members' discretion should be respected, the WTO should review members' measures to prevent possible harm to the WTO system from abuse of rights[2]. In judicial practice, the DSB responded to the "right to self-determination" limitation in the case of *Ukraine v. Russia on Restrictive Measures in Transportation*. The Group adopted Ukraine's assertion that the three-part classification in article 21 (b) of GATT: (i) nuclear fissile material, (ii) arms and ammunition and (iii) other emergencies in time of war or in international relations, is a limitation on the right of members to exercise self-judgment, without which the classification would be meaningless. In conclusion, the Panel must examine the motives and measures taken by members in invoking the "NSE" clause to ensure that there is a "reasonable connection" with war or other exigencies of State relations, i.e., the judgement of "reasonable connection" does not fall within the scope of the "right of self-determination" of the members.

3.2. Limitations on "Essential National Security Interests"

"Essential national security interests" is a matter of substance, and the key issue is how to correctly define the scope of "essential national security interests"[3]. The focus of the term "essential national security interests" is on the word "essential", which, in conjunction with the interpretation given by the WTO Appellate Body in the *China Raw Materials* case, means that "essential" refers to the extremely significant importance, indispensability and necessity. Consequently, only measures involving the most essential security interests of the State fall within the scope of the "NSE" provisions. In the practice of applying the "NSE" provisions, the essential security interests invoked by members to claim that they are threatened are mainly centered on military security. There are some exceptions, however, such as in the *Swedish Footwear Import Restrictions* case. In the light of the foregoing, "essential security interests" cannot be the security interests of a particular industry of a country, but rather factors that can play an important role in the maintenance of the territory and sovereignty of member States and in the consolidation of their power and stability.

3.3. Limitations on the "Exigencies of International Relations"

The "NSE" clause lists three specific categories of matters, namely "nuclear substances", "transportation of military goods" and "other emergencies in war or international relations". Of these, "exigencies in international relations" is the most abstractly formulated and the most controversial ground for invocation in practice. From the perspective of the structure of the article, "other emergencies in international relations" are parallel with "war". According to the same interpretation principle of the treaty, "international relations emergencies" should have a similar nature to "war", that is, "international relations emergencies" should be equal to "war" in terms of seriousness and urgency. The word "emergency" in the phrase "emergency situation" can be used once to determine that an emergency situation refers to a state of danger that exists in the country and is urgent. The point is that the situation is one that should be realistic, urgent and

extreme. Consequently, a situation in which a state of "unfriendliness" between States may give rise to future hostilities, or in which there has been a state of hostile war between States, cannot be characterized as a realistic urgency, and it is therefore unreasonable to use it as a basis for determining that it is an emergency for the purpose of adopting trade-restrictive measures. In addition, in the Russian Transit Traffic Measures case, the Panel found that the three categories of application of the security exceptions enumerated in the "NSE" provision had in common that they were all closely related to a State's national defence and military interests and were necessary for the maintenance of the basic legal order of the State and the interests of public order.

3.4. Limitations of the "Principle of Good Faith"

The principle of good faith is a fundamental principle in the application of the NSE, and its limitations have played a positive role in curbing the abuse of the NSE. The principle of good faith appeared at the outset in the contractual system, closely linked to the principle of honesty and good faith, in order to induce both parties to the contract to consciously fulfill their contractual obligations in good faith and to ensure the smooth conduct of transactions. Subsequently, the principle of good faith was introduced into the system of international law and became an important principle of international law. The principle of good faith was established in international law in order to regulate the conduct of States parties and to require them to fulfil their corresponding treaty obligations, which is the embodiment of the principle of "treaties must be observed"[4]. The principle of good faith requires members to avoid "dishonesty", "bad faith" and "hypocrisy" when invoking the NSE. The WTO allows members to implement measures that deviate from WTO obligations under special circumstances based on the need to protect non-trade interests such as basic national security, but members cannot use security issues as an excuse to take protectionist measures. If the WTO members apply the "NSE"

clause in the form of trade protection in the name of national security, it is regarded as not in good faith, and the country's unilateral trade measures are not legitimate. Therefore, in order to determine the appropriateness of a member's invocation of the safety exception, it is necessary not only to determine whether the member's invocation complies with the principle of good faith performance, but also to explore whether the member's invocation of the safety exception is motivated by bad faith [5].

4. Conclusion

At present, there are endless cases similar to China v. the United States of steel and aluminum tariff measures case. All member states of WTO should clearly apply the attitude and position of the "NSE" clause, recognize that the "NSE" clause is censored, and insist that specific security measures must be subject to review. At the same time, the member states should also intensify the "NSE" clause, the trade dispute case discussion, clarify the "NSE" clause "in" national basic security interests ", " emergency in international relations "and" goodwill principle " restrictions, passive to active, to win the security exception clause case.

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