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A Trial Discussion of the WTO Dispute Settlement Body's Review Criteria for the National Security Exception

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Abstract

The Russian transit transshipment case is the first WTO Dispute Settlement Body case to decide the question of whether the national security exception is jurisdictional. Russia argues that some of its transit prohibitions are necessary to protect its vital national security interests and seeks to justify them through Article 21(b)(iii) of GATT 1994. The interpretation and possible application of this national security exception has been the subject of much controversy, focusing on the Panel's jurisdiction over the national security exception and the discretionary scope of the invoking state to take measures. This article will describe how the panel in the Russian Transit case interpreted Article 21(b)(iii), and the different analyses of the national security exception clause in the academic community.

Keywords

National Security Exception; Dispute Resolution Body; GATT 1994.

1. Introduction

The World Trade Organization published the Dispute Settlement Body (hereinafter referred to as "DSB") report in the Russia Transit Transshipment case on April 5, 2019, and the DSB adopted the panel's report on April 26, as neither party filed an appeal. The case arose out of Russia's implementation of three transit regulations on its territory, which prohibit the transportation of non-zero tariff goods from Ukraine and goods on the sanctions list via Russian rail or road, and the bypassing of Russia for certain goods from Ukraine to Kazakhstan and Kyrgyzstan. Accordingly, Ukraine argues that the Russian regulations violate Articles 5 and 10 of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as "GATT 1994"), as well as several of its commitments under its accession protocol. Russia, on the other hand, invoked Article 21(b)(iii) of GATT 1994, arguing that the measure was necessary to protect national security and that the national security exception should be a fully discretionary matter, and therefore the DSB did not have jurisdiction to hear it.

Article 21 of GATT 1994 has a national security exception clause, which provides in paragraph (b) for the purpose of preventing any contracting party from taking any action which it considers necessary for the protection of its essential security interests. Paragraph (b) provides for the prevention of any contracting party from taking any action which it considers necessary for the protection of its essential security interests [1], but does not expressly define the terms "it considers", "necessary", "essential security interests", or "essential security interests", which has led to many controversies over the interpretation of these terms. It may become a pretext for states to interfere with international trade arbitrarily and impose trade restrictive measures under the pretext of safeguarding national security [2]. If the DSB has jurisdiction, how to establish a set of review criteria to determine the legality and legitimacy of the relevant measures[3], and whether the plaintiff state can ultimately obtain substantial and effective

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relief based on the outcome of the hearing are all issues worthy of in-depth discussion. In addition, this case is of great significance because it is the first case in which the WTO Dispute Settlement Body has interpreted and applied the national security exception..

2. Contents of the Decision in the Russian Transit Transshipment Case

2.1. The Factual Background of the Case

The deterioration of relations between Ukraine and Russia accelerated after the new Ukrainian government took office in February 2014. Although the parties to the dispute in this case have tried to avoid mentioning the transfer of power in Ukraine and the ensuing controversy, and the Panel has mentioned that its function is not to judge the aforementioned events, it believes that it is important to place this case in the context of the aforementioned events [4], and therefore provides a brief description of them.

Ukraine became a party to the Association of Independent States Free Trade Agreement (hereinafter referred to as "FTA") on October 18, 2011, along with Russia, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Maldives and Armenia, which in turn signed the Eurasian Economic Union Treaty on May 29, 2014. On May 29, 2014, Russia, Belarus and Kazakhstan signed the Treaty on the Eurasian Economic Union, which entered into force on January 18, 2015.

Although Ukraine participated in the founding negotiations of the Eurasian Economic Union (hereinafter referred to as "EaEU"), the Ukrainian government decided not to join the EaEU and instead sought economic integration from the EU due to the pro-EaEU demonstrations in Ukraine; subsequently, the new Ukrainian government signed the Ukraine - EU Association Agreement (hereinafter referred to as"Association Agreement") with the EU on March 21, 2014. On March 21, 2014, the new Ukrainian government signed the Association Agreement which aims to promote closer political and economic integration between Ukraine and Europe. As a result of the Association Agreement, Ukraine and the EU, in economic terms, established a Deep and Comprehensive Free Trade Area (hereinafter referred to as "DCFTA") on June 27, 2014 [5].

Ukraine, together with several countries, introduced a resolution in the UN General Assembly in March 2014 welcoming the ongoing efforts of the UN Secretary-General, together with the Organization for Security and Cooperation in Europe and other international and regional organizations, to support actions to deescalate the situation in Ukraine; in December 2016, the UN General Assembly adopted a resolution condemning Russia's temporary occupation of parts of Ukraine's territory, namely the Autonomous Republic of Crimea of the Russian Federation Republic and the city of Sevastopol.

Since the chain of events that followed the pro-EU demonstrations in Ukraine in 2014, a number of countries have imposed economic sanctions on Russian companies and nationals. On August 7, Russia imposed a ban on the import of certain agricultural products, raw materials and foodstuffs from countries that had imposed sanctions against it, including the United States, EU member states, Canada, Australia and Norway; in addition, Russia issued Resolution No. 778 prohibiting the transit of such goods across the Belarusian-Russian border. On August 13, 2015, the Russian government adopted Resolution No. 842 amending the content of Resolution No. 778 on import ban to include Ukraine in this ban [6]; on December 22, 2015, in response to the temporary application of the economic chapter of the Association Agreement, the Russian lower house adopted Federal Law No. 410-FZ and Presidential Decree No. 628, suspending its relations with Ukraine under the Association of Independent States FTA.

2.2. The Restrictions at Issue in This Case

2.2.1. 2016 Belarus Transit Norms

These regulations require that all international cargoes from Ukraine destined for Kazakhstan and Kyrgyzstan by road or rail in Russia must enter Russia from Belarus and comply with the

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requirements of identification seals and registration cards at specific control points on the border between Belarus and Russia and between Russia and Kazakhstan [7].

2.2.2. 2016 Non-zero Tariff Goods and the Goods Listed in Resolution No. 778 Transit Ban

The transit ban prohibits the transport of goods from Ukraine to Kazakhstan or Kyrgyzstan via Russian roads and railroads in two categories: goods subject to non-zero import tariffs under the EaEU Common Customs Tariff and goods subject to the import ban set out in Resolution No. 778. The above-mentioned goods can be transferred only if an exemption is requested by Kazakhstan or Kyrgyzstan and authorized by Russia, and the transit must still comply with the requirements of the 2016 Belarusian Transit Code.

2.2.3. Resolution No. 778 of 2014 on the Ban on Transit on the Border between Belarus and Russia

The ban on trans-shipment completely prohibits Ukraine from shipment of goods subject to control from Russia through the border post of Belarus, as well as products subject to import ban under Resolution No. 778. Other relevant requirements include that animal quarantineable goods destined for Kazakhstan or third countries may only enter Russia via the external border post of EaEU near the Russian side from November 30, 2014, and must have a permit issued by the Kazakh and Russian animal quarantine authorities for the relevant quarantine tests; furthermore, from November 24, 2014 Such goods subject to phytosanitary control to third countries, including Kazakhstan, can only be transferred [8] through the Russian border posts.

In response to the above measures, Ukraine asserts that Russia violated the first and second sentences of Article 5(2), Article 5(3), Article 5(4), Article 5(5), Article 10(1), Article 10(2), Article 10(3)(a) and the relevant paragraphs of its accession protocol under GATT 1994; in response, Russia invokes Article 21(b) of GATT 1994 (iii) national security exception and asserts that the Panel has no jurisdiction.

The Panel held that it had jurisdiction over Article 21(b)(iii) of GATT 1994 and found that the measure did satisfy the elements of this Article, i.e., that the point at which Russia applied the measures fell within the period of exigency and that Russia met the conditions in the preamble to Article 21(b) of GATT 1994 and met its burden of proof. Finally, the Panel also noted that Ukraine has met its burden of proof for most of the claims made in this case, assuming that this case was not applied in a situation of tension in international relations, but rather in a general situation.

3. Interpretation of Article 21(b)(iii) of GATT 1994

3.1. The Claim of the Disputing State on the Standard of Review of Article 21(b)(iii) of GATT 1994

With respect to the standard of review under Article 21(b)(iii) of the GATT 1994, Russia acknowledges that the Panel was indeed established pursuant to the standard mandate provision of Article 7.1 of the Dispute Settlement Rules and Procedures Understanding (hereinafter referred to as"DSU"), but believes that the Panel does not have jurisdiction to evaluate its measures under Article 21 of the GATT 1994. Russia argues that the Panel does not have jurisdiction to evaluate the measures it has taken [9] pursuant to Article 21 of the GATT 1994. Russia argues that Article 21 of GATT 1994 should be interpreted in a manner that expressly grants Member States invoking this Article exclusive discretion with respect to the necessity, form, design and structure of measures under Article 21. This provision reserves to Member States the right to take such measures as they deem necessary in time of war and other emergencies in international relations, so that Member States need only demonstrate that their measures are necessary to protect their vital security interests in time of war or other

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emergencies in international relations, and that their subjective assessments are not subject to challenge or reassessment by any other State or judicial body, since such measures are not typical of those regularly judged by WTO dispute settlement bodies. typical of trade measures regularly judged by WTO dispute settlement bodies.

Ukraine argues that Article 21 is a defense for Member States in the event of a breach of WTO obligations and is not an exception [10] to the jurisdictional rules of GATT 1994 and the DSU , i.e., the Panel still has jurisdiction to consider the facts of the case; Ukraine also argues that if the Panel did not have jurisdiction to consider Article 21, this would mean that a Member State invoking Article 21 in relation to a measure that is inconsistent with WTO provisions would have the discretion to decide whether the measure could be justified. Such a situation where a Member State invokes an exception at its own discretion would violate Article 23.1 of the DSU. Ukraine also argues that Russia only refers to the 2014 tensions in international relations and does not bear its burden of proof regarding the legal and factual elements under Article 21(b)(iii) of GATT 1994; it also argues that it is up to the Panel to make an objective judgment as to which measures are to be taken in time of war or other emergency in international relations under Article 21(b)(iii) of GATT 1994. It is for the Panel to make an objective judgment as to which measures were taken in time of war or other exigencies of international relations, and the Panel is therefore required to examine whether the measures taken by the Member invoking Article 21 were taken in good faith [11].

With respect to the standard of review under Article 21(b)(iii) of GATT 1994, Ukraine asserts that the Panel's objective assessment must include whether the Member invoking Article 21 is acting in good faith and not abusing the exception for the purpose of trade protection or trade restriction, and must examine the reasonable connection between the measure and the protection of vital security interests; furthermore, based on the meaning of Article 21(b) of GATT 1994 and an analysis of the similarities between the paragraphs of Article 20 of GATT 1994, the Article 21 justification standard must meet the requirement of a reasonable relationship between the measure and the vital security interests protected. Furthermore, based on the meaning of Article 21(b) of the GATT 1994 and analyzing the similarity of the paragraphs of Article 20 of the GATT 1994, the criteria for justification of Article 21 must meet the requirement of a reasonable relationship between the measure taken and the vital security interest protected. Ukraine also indicated that the interpretation of this article could be based on the past case law of Article 20 of GATT 1994, meaning that WTO member states have the right to determine the level of protection of the vital security interests of the measures taken, but for the protection of what they consider to be "vital security interests" and "what they consider necessary". The interpretation of the two elements of protection of what it considers to be "vital security interests" and "what it considers necessary" should again be left to the interpretation of the Panel in accordance with the rules of treaty interpretation under public international law, and not to the discretion of the Member States. Accordingly, Ukraine believes that the Panel should determine whether the interests and reasons asserted by the Respondent with respect to the measure can reasonably be considered to fall within the scope of its vital security interests and whether the measure is designed to protect the Respondent's vital security interests, i.e., that there is a reasonable relationship between the measure taken by the Respondent and the vital security interests it is protecting. If the Panel finds that the Member's measures were taken to protect its vital security interests, the Panel must further examine, based on the facts, whether the Defendant can reasonably determine that its measures were necessary to protect its vital security interests [12].

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3.2. Third Country Views on the Review Criteria of Article 21(b)(iii) of GATT 1994

A total of 17 Member States have indicated their intention to join the case as third countries, including 10 countries, including Australia, Brazil, Canada, China, the EU, Japan, Moldova, Singapore, Turkey and the United States, which have filed third country submissions in the dispute settlement process. Among them, Canada, China, the European Union and Turkey filed consultation requests with the WTO in 2018 regarding the imposition of tariffs on steel and aluminum products by the United States on national security grounds, so the following will highlight the positions of these five countries in this case.

Canada argues that when a Member invokes Article 21 of GATT 1994 in a dispute, the Panel is entitled to a judicial review of the application of this Article unless it is not one of the Panel's enabling provisions, and further explains that under the DSU, the Panel does not have the discretion to decline jurisdiction under its mandate or to refuse to perform its obligations under Article 11 of the DSU. The Member States may invoke Article 21 of GATT 1994 to defend their breaches of WTO obligations, but the structure and language of this Article is different from Article 20 of GATT 1994, and therefore Canada believes that the case law interpretation of Article 20 of GATT 1994 should not be directly applied as a reference for the interpretation of Article 21 of GATT 1994. In addition, Canada believes that Article 21(b)(iii) of GATT 1994 provides a subjective criterion for assessing the interest, the action, the necessity of the action, and whether the elements in (iii) are satisfied by the invoking State. Canada believes that the subjective standard of Article 21 of GATT 1994 and the sensitive nature of national security issues mean that the Panel must accord a high degree of deference to the invoking State in this regard, and that the Member State must demonstrate that it has acted in good faith to ensure that the elements of Article 21(b)(iii) of GATT 1994 that it invokes do exist [13].

China states that the Panel has jurisdiction over Russia's invocation of Article 21 of the GATT 1994 based on the Panel's standard terms of reference and Articles 7.1 and 7.2 of the DSU. China urges the Panel to assess Russia's invocation of Article 21(b)(iii) of the GATT 1994 with caution in order to prevent abuse of Article 21(b)(iii) of the GATT 1994 and circumvention of WTO obligations on the one hand, and to avoid bias with respect to the rights of Member States to protect their vital security interests, including the discretion of Member States with respect to their security interests, on the other hand. There should be no bias [14].

The EU considers that the so-called "it considers" only gives the invoking State the necessary discretion to determine whether there is a war or other emergency in international relations as described in sub-paragraph (iii), leaving it to the panel to examine the objective facts; in determining what constitutes a vital security interest, the panel should examine, on the basis of the reasons given by the respondent In determining what constitutes a significant security interest, the Panel shall examine whether the interest can reasonably or credibly be considered a significant security interest and whether the measure is capable of protecting the security interest from the threat, based on the reasons provided by the defendant. The EU asserts that the term "it considers" means that a Member State may in principle determine whether the measure is necessary to protect its vital security interests, but that the Panel, with due deference to the Member State, should nevertheless assess whether the invoking State reasonably considered the measure to be necessary and whether the measure was applied in good faith, an assessment that requires the invoking State to provide the Panel with an explanation as to why it has a vital security interest [15]. Finally, the EU argues that in assessing the necessity of the measure and the existence of reasonably available alternatives, the Panel should take into account, as appropriate, the interests of third countries that may be affected.

The United States initially argued that the Panel did not have the right to review a Member's invocation of Article 21 of GATT 1994, nor the decision in this dispute, because it believed that

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each Member had the right to determine what it considered necessary in matters of vital security interest, as provided for in Article 21 of GATT 1994, and that this was an inherent right of WTO Members. Subsequently, the United States stated that it did not deny that the panel in this case was established under the standard authorization clause of Article 7.1 of the DSU and therefore had jurisdiction [16]. However, it argued that there was no legal standard for a Member State to determine its vital security interests, and therefore the Panel should not be able to hear the case. The United States bases its claim on the interpretation of Article 21 of GATT 1994, in particular the preamble to Article 21(b) of GATT 1994, which states that "such measures as it deems necessary to protect its vital security interests" have a self-identified meaning [17]. The United States also believes that because of the discretionary nature of Article 21(b)(iii) of GATT 1994, any case brought by a Member State under this paragraph cannot be considered by a panel, nor can it make a recommendation on a dispute under Article 19.1 of the DSU.

4. Conclusion

After analyzing the Panel's report and the opinions of the academia, this paper concludes that the Panel and the academia have relatively similar standards for the review of vital security interests; in the part of necessity, the Panel gives the invoking state full discretion compared to the many discussions of the academia on the standard of necessity. There is still room for discussion. On the whole, the panel's opinion in this case takes a conservative position. Whether the controversy over the national security exception is resolved after this case remains to be followed up and observed.

Acknowledgments

N/A.

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