The Genesis of Us-China Trade War: Analysis of United States- Sections 301-310 of the Trade Act of 1974

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Abstract

The year of 2018 caused much upheaval in the arena of international law especially the trade law. But the news which grabbed the eye-balls was the US-China trade war.[1] This was nothing but reciprocal actions from both sides to increase the tariff in order to protect the respective domestic concerns and an attempt to disrupt the trade of opposite country. This combat started with the US threatening to raise tariff against the Chinese products. The statutory framework behind this move of US was the Trade Act of 1974 of US. The sections from 301-310 empower the trade representative of US to take unilateral actions against countries causing harm to the interests of US, irrespective of the results of dispute resolution proceedings. The aim of this research is to analyze the DS-152[2] case in which the legality of the abovementioned provisions was assessed.

Keyword: International law, tariff, combat started, resolution

INTRODUCTION

In this case, the dispute was regarding section 301-310 of the Trade Act of 1974 of US. The allegations were that these provisions were in contravention to the

- Article 3, 21, 22 and 23 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU");

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[1] *A quick guide to the US-China trade war*, available at https://www.bbc.com/news/business-45899310, last seen on 11/03/2019.

[2] Panel Report on United States- Sections 301-310 of the Trade Act of 1974, WT/DS152/R.

- Articles XVI of the Marrakesh Agreement Establishing The World Trade Organization ("Marrakesh Agreement");
- Articles I, II, III, VIII and XI of GATT, 1994.

Complainant- European Communities
Respondent- US
Third Party- Brazil, Cameroon, Canada, Columbia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, Hong Kong (China), India, Israel, Jamaica, Japan, Korea, St. Lucia, and Thailand, reserved their rights to participate as third parties. However, Cameroon withdrawn from this dispute.

FACTUAL MATRIX
The European countries challenged the Trade Act, 1974 of US alleging that it gave unrestricted powers to the trade representative of US to order for unilateral investigations against any country in case of the other operating against the trade interests of the US. Further, through this act the US trade representative could make determination in case of any deviations even if the DSU proceedings have not been exhausted.

ARGUMENTS OF THE PARTIES
EUROPEAN COMMISSION-

- ✓ It was the argument of the European communities that Article 23 of the DSU prohibits unilateralism in the framework of the WTO dispute settlement procedures. It also requires the members to follow the procedures of the DSU on suspension of concessions and to wait for the authorization of dispute settlement body("DSB") before responding to a failure to comply with such rulings or recommendations.
- ✓ The European Union further claimed that these unilateral actions by the US are in contravention to the negotiations of Uruguay Round which provides an explicit prohibition on any unilateral action on the part of the governments of the countries.
- ✓ As per the European Union, the controversy regarding the unrestricted powers under section 301-310 of the trade representative was first witnessed in the EC-Banana case.
- ✓ To substantiate its claim, the European Communities relied upon the legislative history of the Trade Act of 1974. It provides that the earlier the president of the country had the discretion to take corrective steps in case any country is operating prejudicial to the interests of the US. But now, the trade representative has been vested with this power where he necessarily had to take the actions.

US-

- ✓ The US argued that a law in itself is not inconsistent with a WTO member's obligations unless that law mandates action which violates those obligations, even if the law does not preclude such action.
- ✓ The US next argued that even though the determination was required to be made within 18 months, it is required to be backed by the dispute settlement proceedings. This makes it very clear that in case of non-completion of the DSU proceedings, the US trade representative will not be able to make any kind of determinations.
- ✓ The US argued that even if it commences any investigation, it can drop that investigation later on as it did in the case of EC-Banana III case.
- ✓ Moreover, the US claimed Section 301(a)(2)(A) makes it absolutely clear the USTR need not take action when the DSB has adopted a report finding no denial of US WTO rights.

- ✓ US also argued that although a contracting party may oppose the legislation circumscribing its rights, declaring the legislation itself invalid will be an invasion to the sovereignty of the countries as this will prevent them from transacting with the non-member countries as per their own wish and who do not have any rights arising out of the Marrakesh Agreement and its covered agreement.

COUNTER BY THE EUROPEAN COMMISSION-

- ✓ The EC opposed the submissions made by the US. It argued that it is a settled law that not merely the possibility for the government to act consistently with WTO law, but requires WTO members to provide a sound legal basis in domestic law for the measures required to implement their WTO obligations.
- ✓ The European Commission not only relied upon the WTO laws like Article XVI: 4 of the Marrakesh Agreement but also on the principles of international law. Article 27 of the Vienna Convention on the Law of Treaties imposes a negative obligation to refrain from invoking the domestic law in order to justify any departure from the international obligation undertaken by a state.
- ✓ The European Commission was further asserting that each and every member country of WTO has rights and obligations towards other countries. The EC has performed their part of obligations and the same they expect from the US.

DECISION OF THE PANEL

In this case, the US gave the statement of administrative action where it agreed that section 301 of the trade act, 1974 will not be invoked unless the proceedings of the DSB have been exhausted. Therefore, there was no need to continue the case. But in case, the US departs from this very stand, the proceedings will be initiated again.

ANALYSIS

A. NATIONAL SOVEREIGNTY V. DICTATORSHIP OF WTO

In the present case, the law which was challenged was the United Trade Representative Act, 1974. It was a domestic law of US. Now here, the question arose as to whether the trade act of 1974 should be protected as US is a sovereign state or the dictatorship of WTO shall prevail. Here, sovereignty is considered to be the absolute and perpetual power vested in a commonwealth.[3]

In the DS-152 case it was reported that:

> *"The United States indicates that to put another way, international agreements are made between contracting parties. The actions of those parties towards one another may or may not violate the obligations they have undertaken vis-à-vis one another. However, the actions taken towards non-parties are not relevant to this analysis. It is one thing to conclude that a contracting party may challenge legislation mandating action towards all if that action violates an obligation with respect to contracting parties. However, if legislation permitting such action could also be challenged, contracting parties would effectively be precluded from exercising sovereign powers with regard to non-parties, except by establishing parallel sets of laws applicable to parties and non-parties, or by explicitly providing for limits in their domestic laws as to how discretion may be exercised towards parties. There is absolutely no indication in the WTO Agreement or its annexes that Members agreed to this degree of interference with the exercise of national sovereignty."*

[3] *Six Books of the Commonwealth by Jean Bodin*, 58 (M.J. Tooley).

Here, US argued that a contracting party may oppose the legislation circumscribing its rights at the WTO. However, the legislation itself cannot be declared as invalid because it will be an invasion to the sovereignty of the countries.This will prevent them from transacting with the non-member countries on their own terms and who do not have any rights arising out of the Marrakesh Agreement and its covered agreement.

Generally, in these types of cases the kind of argument given by US is that although every member is under an obligation to implement the rules of WTO but how those laws rules should be implemented should be left best to the members. This ensures that the countries are in a better position to implement the laws as per their own convenience.

In the author's opinion, a balance can be maintained between the compulsive rule making power of WTO and sovereignty of states. For this, reliance has to be placed on WTO Panel Report in DS 217.In this case,it was proposed that WTO Members have to exercise their sovereignty according to their WTO Agreement commitments", and "members are free to pursue their own domestic goals through spending so long as they do not do so in a way that violates commitments made in the WTO Agreement.[4]

This statement itself makes it clear that within a broad framework provided to the WTO members, there lies the scope of sovereignty for states when it comes to the way of implementation. A member state is required to fulfill the basic norms of WTO but beyond that it has a sovereign right to set its own laws.[5]

B. RULE OF ESTOPPEL IN DSB PROCEEDINGS

In the given case, US gave the statement of administrative action on the basis of which the matter concluded. In the statement, US agreed not to take any unilateral measure. This gives rise to an important question of whether parties are bound by their stand once taken by them.

Generally estoppels is regarded as a concept of customary international law. However, it cannot be said that this concept is completely alien to the trade law. It is a settled position of law that a man shall not be allowed to blow hot and cold i.e. to affirm at one time and deny at another.[6]It is this principle which is called as estoppels. Its common elements are to preclude Party X from denying a particular state of things against Party Y if: (1) X clearly and unambiguously represented to Y the existence of such a state; (2) Y altered its position in reliance on that representation in good faith; and (3) Y would suffer injury if the representation was groundless.[7]

In the case of Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), it was stated by ICJ that an estoppels would only arise if by its acts or declarations, Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice.[8]

In the present case, we are considering about the scope of estoppels in proceedings of DSU. Although such a principle of international law has never been applied by the panel and

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[4] Appellate Body Report on United States- Continued Dumping and Subsidy Offset Act of 2000, WT/DS 217.

[5] Trish Kelly, *Is the WTO a threat to the Environment, Public Health and Sovereignty?*, 51 Challenge 84, 90 (2008), available at https://www.jstor.org/stable/pdf/40722536.pdf?refreqid=excelsior%3Af4f9188c63a16fe814ac3d848fe1be4d, last seen on 11/03/2019.

[6] Cave v. Mills, 158 E.R. 740, 747 (1862, Courts of Exchequer and Exchequer Chamber).

[7] Mitchell, Andrew D, *Good Faith in WTO Dispute Settlement*, 7 Melbourne Journal of International Law 339 (2006), available at http://classic.austlii.edu.au/au/journals/MelbJIL/2006/14.html, last seen on 11/03/2019.

[8]Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v. Nigeria, [1998] ICJ Rep 275, ICGJ 64.

appellate body, still its scope could be considered under Article 3.7 and 3.10 which provides the respective stand:
3.7- "Before bringing a case, a member shall exercise its judgment as to whether the action under these procedures would be **fruitful**."[9]
3.10- "all members will engage in these procedures in **good faith** in an effort to resolve the dispute."[10]
There are various panel and appellate body reports which suggest that the good faith as such has not been focused specifically in any of the provisions of the Marrakesh Agreement and its covered agreements. However, its traces can be found under Article 3.10 of the Marrakesh Agreement which imposes a duty on its members to act in good faith.[11]
The above discussion reflects that the US will be estopped by the statement of administrative action it filed in this case. But the story does not end here. There are other cases which maintain that estoppels is a general principle in the international law, whereas the WTO obligations shall remain binding on the members. This means at most the estoppel principle can be harmoniously read with the binding WTO documents, it cannot override them.[12]
Hence, the US is not estopped from withdrawing from the statement of administrative action. This is why it was able to increase the tariffs on Chinese goods in 2018.

C. APPLICABILITY OF THE PRINCIPLE OF RES JUDICATA IN DSB PROCEEDINGS

The panel report suggests that dispute between the complainant and the respondent came to an end because of the statement of administrative action given by the US where it asserted that it would render determinations under Section 304 in conformity with its WTO obligations. In this regard, the panel maintained that in case the US operates in contravention to the statement of administrative action, the panel proceedings will commence again. Hence, it is very much essential to analyse this from the view point of res judicata. We will try to analyses to what extent res judicata is applicable under international law especially the international trade law.
Res judicata is considered to be as one of the well-recognized principle of international law.[13]Recognition of an award as res judicata means nothing else than recognition of the fact that the terms of that award are definitive and obligatory.[14] A decision pronounced by a judicial body; if res judicata is considered as binding on the parties to the dispute.[15]The triple identity test for res judicata suggests that for the applicability of this concept, there has to be ***same parties, same request for relief and same grounds for that request***.[16]
Here same parties would mean the same claim to be submitted by that particular individual "or someone else who has the standing to act on his behalf before the other international body".[17] Regarding the same request for relief, it is settled that the requests sought by

[9]Article 3.7, Understanding on the Rules and Procedures Governing the Settlement of Disputes [hereinafter "DSU Provisions"].
[10]Article 3.10, DSU Provisions.
[11]Panel Report on Korea- Definitive Safeguard Measure on Import of Certain Dairy Products, WT/DS98/R.
[12] EC- Measures Concerning Meat and Meat Products (Hormones), WT/DS26/ARB.
[13]Article 60, Statue of the International Court of Justice.
[14]Societe Commerciale De Belgique (Belgium v. Greece), 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).
[15] Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: IC.J. Reports 1954, p. 47.
[16] Pedro J. Martinez-Fraga, Harout Jack Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 Northwestern Journal of International Law and Business 419, 421 (2012), available at https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1026&context=njilb, last seen on 11/03/2019.
[17]DuilioFanali v. Italy, Communication No. 75/1980; U.N. Doc. CCPR/C/18/D/75/1980.

claimant in both proceedings can be partially, but has to be substantially identical.[18] As far as cause of action is concerned it is a settled law that if legal claims have already been decided by a competent tribunal, the same claim may not be raised again in another tribunal in a substantially identical cause of action between the parties.[19]

Now after providing the tests for judging the res judicata, it is important to discuss the applicability of res judicata with respect to WTO. Role of res judicata was elaborately discussed in DS-308.[20] In this case, it was maintained by the adjudicating body that the issue of res judicata would be highly unlikely in WTO. Any ruling involving the same parties, same issues and same reliefs would never likely to be repeated because the decisions of WTO are binding on its members which has necessarily to be adopted within a specific time frame. Moreover, the issue of res judicata may also arise because of the decision of non-WTO body dealing on any aspect which had a close association with the WTO matters. In this kind of situation, even if the non-WTO body has taken some stand it will not have any impact of WTO because it is well-established that the DSB exercises the compulsory and mandatory jurisdiction on WTO matters under article 23 of the DSU.

CONCLUSION

After delving deep into the analysis of the case of DS-152, we have the clarity on the scope of US Trade Act of 1974. Additionally, the author tried to explored various issues like issue of estoppel, res judicata etc. The not-so serious approach of the WTO towards these well-established principles of the public international law is the root cause for the conflict between US and China. Had there been any principle like estoppels in the WTO, the US would not have taken any action against China, which it has taken in 2018 as it would be bound by the commitment it made before the panel.

The WTO has made its dispute settlement mechanism so alien to the other aspects of the law that it has become stagnant and convoluted. On the contrary, WTO claims to cover every possible aspect of human life through its trade policy. This includes the gender, agriculture, weapons, textile and clothing; intellectual property rights through T.R.I.P.S etc. Confining itself within a systemic framework will not do any good for WTO and its related aspects. Moreover, this will restrict its growth in the future. This fact cannot be ignored that trade law under WTO itself; is a part of international law. These two are sister concerns which can and should frequently bank upon each other as and when the need arises.

[18] Antoine Fabiani Case, UN Reports of International Arbitral Awards, Vol. X pp. 83-139.

[19] DSV Silo-und VerwaltungsgesellschaftmbH v. Owners of the Sennar and 13 Other Ships, TheSennar (No. 2) [1985] 1 WLR 490.

[20] Panel Report on Mexico- Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R.