CHAPTER 4

JUSTIFIABLE REASONS

OVERVIEW OF RULES

1. OVERVIEW OF RULES

(1) OUTLINE

As described in "Overview of the WTO Agreements" of Part II, the WTO Agreements provide most-favoured-nation treatment, national treatment, prohibition of tariff imposition exceeding bound tariff rates, and prohibition of quantitative restrictions as the basic principles for developing/maintaining the multilateral trade system. Although the WTO Agreements aim to maintain/develop the free-trading system[1], they do not restrain implementation of legitimate domestic policies of member countries.[2]

However, accepting policies based on the rights of member countries to regulate without any limitation may result in abuse of protectionist measures that are taken under the pretext of policy objectives such as resource conservation or environmental protection. Therefore, in order to prevent abuse of the rights of member countries to regulate, the WTO Agreements contain provisions that coordinate the principles of trade liberalization with such rights. GATT Articles XX (General Exceptions) and XXI (Security Exceptions) are representative examples of such provisions, and they are collectively referred to as "justifiable reasons" in this Chapter.

(2) KEY POINTS TO INTERPRETATION OF PRECEDENTS

GATT Article XX consists of subparagraphs (a) to (j) that list the policies that may be deemed justifiable reasons, such as protection of human health, and also contains the chapeau (a clause requiring that these objectives should not be abused or used to restrict international trade in an unjustifiable manner) (see 2) (1) (a)).

As described below, justifiable reasons based on GATT Article XX have been the main points at issue in many WTO dispute settlement procedures, and there is an accumulation of precedents available. Key points regarding interpretation in the precedents are as follows:

First, decisions focus on the relationships between policy objectives and measures, and the appropriateness of the methods used. Necessary criteria of subparagraphs (a), (b) and (d), the relationship criteria of subparagraph (g), essentiality criteria of subparagraph (j) and the chapeau of GATT Article XX are examined from the view point of whether or not the measures of concern can reasonably be explained by the policy objectives, or whether more desirable measures exist.

Second, justifiable reasons are examined in the context of the content of the measures, and the existence of actual impacts on trade is not considered (see also 2. "Basic Viewpoint of the Report"

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[1] See the Preamble of the Agreement Establishing the WTO.

[2] For example, measures taken by the customs at borders to control intellectual property rights infringing products for the purpose of securing the prohibition of distribution/sales of intellectual property rights infringing products within the country (see the Customs Law).

of Preface). While on the competitive relationships between imported products and domestic products are given importance in examining justifiable reasons, changes in trade volumes also depend on various other factors, and thus it is not appropriate for them to be included in assessment of competitive relationships.

Third, precedents where a defense based on justifiable reasons were approved are quite limited (see Figures II-4-3, II-4-5, II-4-6, II-4-7, II-4-8 and II-4-9). This means that, at least most precedents, the policy objectives the respective countries raised as a basis for justification are determined to be inconsistent with the WTO Agreements. Therefore, if Japanese industries are faced with trade-restrictive measures of foreign governments and the governments justify the measures by raising some policy objectives, the measures are likely to be determined inconsistent with the WTO Agreements in light of the precedents.

2. *LEGAL FRAMEWORK*

(1) GENERAL EXCEPTIONS (GATT ARTICLE XX AND GATS ARTICLE XIV)

(a) Functions and Structure of the Articles

GATT Article XX exempts measures from being considered WTO violations based on various domestic policy goals, including protection of public morals (subparagraph (a)), protection of human, animal or plant life or health (subparagraph (b)), customs enforcement/cross-border regulations (subparagraph (d)), and conservation of exhaustible natural resources (subparagraph (g)), etc. GATT Article XX applies to every article of GATT and has the function of coordinating the rights of member countries to regulate with the trade liberalization benefits of other member countries. GATS Article XIV, which controls trade in services, has provisions similar to GATT Article XX. Since they are almost identical and only a few precedents relating to GATS Article XIV exist, GATT Article XX is mainly described in this Chapter.

GATT Article XX consists of subparagraphs (a) to (j) that list the policies that may be deemed justifiable reasons for exempting a measure from being considered a GATT violation, such as protection of human health. The chapeau of Article XX requires that these objectives not be abused and used to restrict international trade in an unjustifiable manner (see Figure II-4-1).

As described below, the significance of the respective subparagraphs is to list the 10 types of policies subject to justification, and the significance of the chapeau is to prevent abuse of justifiable reasons. Additionally, measures are examined as such in the relevant subparagraph, in others the "ways of applying measures" are examined in the chapeau.[3] This difference is important in actual practice because it has considerable effect on methods of implementing the decisions of the WTO dispute settlement procedures. That is, for measures that are determined to violate GATT due to a failure to meet the requirements in the respective subparagraphs, the implementing country is required to revise the measures. In contrast, for measures that fail to meet the requirements in the chapeau, the implementing country does not need to revise the measures, but is only required to reconsider how to apply them. The order of examining GATT Article XX has been confirmed in precedent -- the respective subparagraphs are examined first and then the chapeau.[4]

The burden of proof under GATT Article XX is, in principle, on the member countries that introduced the measures of concern (respondent countries in the WTO dispute settlement

[3] Appellate Body Report, *US – Shrimp* (DS58), para. 119

[4] Appellate Body Report, *US – Gasoline* (DS2), ps. 22

proceedings (hereinafter referred to as "respondent countries").[5] The reason for this is that respondent countries are the parties that benefit from the claimed exception.

For measures that are recognized as violating any GATT Articles to be accepted as providing justifiable reasons based on GATT Article XX, respondent countries need to claim/prove that the measures [1] are policies that fall within one of the subparagraphs of GATT Article XX and [2] do not violate one of the application methods of the chapeau. In contrast, complainant countries in WTO dispute settlement proceedings (hereinafter referred to as "complainant countries") need to claim as a counterargument to respondent countries that the measures [1] do not constitute any if the policy types set out in Article XX and/or [2] fail to fulfill one or more of the application methods set out in the chapeau (see Figure II-4-2).

The concrete contents of the Article and previous precedent cases are described below in the order of the respective subparagraphs and the chapeau. (See Chapter 2, Part II for the relationship between GATT Articles III and XXX.)

Figure II-4-1 Content of GATT Article XX

<Respective subparagraphs>

(a) Measures necessary to protect public morals

(b) Measures necessary to protect human, animal or plant life or health

(c) Measures relating to the importations or exportations of gold or silver

(d) Measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT

(e) Measures relating to the products of prison labour

(f) Measures imposed for the protection of national treasures of artistic, historic or archaeological value

(g) Measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

(h) Measures undertaken in pursuance of obligations under any intergovernmental commodity agreement

(i) Measures involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan

(j) Measures essential to the acquisition or distribution of products in general or local short supply

<Chapeau>

(1) Application in a manner which would constitute a means of arbitrary[6] or unjustifiable discrimination between countries where the same conditions prevail

(2) Application in a manner which would constitute a disguised restriction on international trade

[5] US – Gasoline (DS2), pp. 22-23

[6] See notes on GATS Article XIV.

(b) Subparagraphs of GATT Article XX

i. Protection of public morals (subparagraph (a))[7]

Structure of the article and precedents

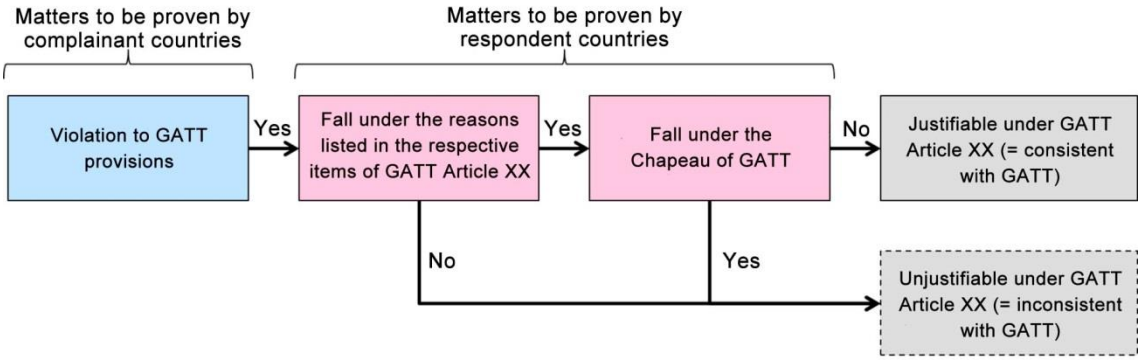
Subparagraph (a) justifies "measures necessary to protect public morals". Typically, measures that prohibit import of narcotics or obscene materials for religious/ethical reasons, etc. fall within this subparagraph. For example, import and export of pork and alcoholic beverages, etc. are prohibited in Islamic countries based on subparagraph (a).[8]

Meeting the requirements of subparagraph (a) requires that [1] the policy objective of the measure is to "protect public morals" and [2] the measure is "necessary" for achieving the policy objective.

Furthermore, GATS Article XIV subparagraph (a) includes "maintaining public order" in addition to "protection of public morals," and "public order" is footnoted as, "may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."

See Figure II-4-3 for the precedents relating to subparagraph (a).

Figure II-4-2 Framework for Interpreting GATT Article XX



[7] See the column of "Roles of public morals and public order as justifiable reasons" in 2017 Report on Compliance by Major Trading Partners with Trade Agreements.

[8] Import and export of Koran, alcoholic beverages, pork and gambling machines are prohibited in Saudi Arabia (WTO Accession Working Party report WT/ACC/SAU/61 Annex F), and import and export of publications that outrage national religious feelings or contain violent/obscene expressions are prohibited in Bangladesh (WT/TPR/S/168, ps. 142).

Figure II-4-3 Precedents Relating to Subparagraph (a) of GATT Article XX

Case No. and Title (Determining Body)	Contents of "Public morals" to protect and the relevant measure	Stage	Interpretation of the WTO Agreement (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience					
			Violated Provision	(a) [1] (Policy objective)[9]	(a) [2] (Relationship)[10]	(a) [3] (Necessity)[11]	Chapeau[12]	Conclusion
DS285: US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Panel/ Appellate Body)	Prevent organized crime by prohibiting cross-border gambling[13]	P	GATS Article XVI	○ (not distinguishing (a)[1] and (a)[2])		×	–	Unjustifiable
		AB		○ (same as above)		○	×	Unjustifiable
DS363: China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Panel/ Appellate Body)	Prevent harmful expressions by censorship of publications, etc.	P	Article 5.1 of the WTO Accession Protocol of China	○ (not distinguishing (a)[1] and (a)[2]))		×	–	Unjustifiable
		AB		○ (same as above)		×	–	Unjustifiable
DS400/401: EC – Measures Prohibiting the Importation and Marketing of Seal Products (Panel/ Appellate Body)	Secure animal welfare of seals by designating hunting methods of seals	P	GATT Articles I:1, III:4	○ (not distinguishing (a)[1] and (a)[2]))		○	×	Unjustifiable
		AB		○ (falls under)		○	×	Unjustifiable

[9] Hereinafter, in the column of (a) [1] (whether the objective falls under the policy objective under subparagraph (a)), "○" means that the measure falls within the policy objective under the subparagraph (a) and "×" means that the measure does not.

[10] Hereinafter, in the column of (a) [2] (whether the measure is related to the policy objective), "○" means that the measure is relevant to the policy objective under the subparagraph (a) and "×" means that the measure is not. In cases where the findings do not distinguish (a) [1] and (a) [2], "○" means that it was admitted as a measure taken for the purpose of regulation under subparagraph (a), and "×" means that it was not approved.

[11] Hereinafter, in the column of (a) [3] (whether the measure is necessary for the policy objective), "○" means that it was admitted that the measure was taken for the policy objective under the subparagraph (a), and "×" means that it was not admitted as such.

[12] Hereinafter, in the column of chapeau, "○" means that the application of the measure is not regarded as "arbitrary or unjustifiable discrimination" or "disguised restriction on international trade" (i.e., justification is accepted), and "×" means that the application of the measure was regarded as such (i.e., justification is not accepted).

[13] The "public order" was also claimed in this case. The panel does not strictly distinguish the public order and the public morals in the process of assessment, provided that the panel explained that, among the insisted objectives, the prevention of use of minor falls within the public morals, prevention of organized crime falls within the public order, and money laundering and protection of fraud may falls within both of public morals and public order.

DS461: Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Panel/ Appellate Body)[14]	Prevent the illicit import of products at below-threshold prices, which is used for money laundering, by imposing customs duties on a compound basis.	P	GATT Article II:1(a) and (b)	○	×	×	×	Unjustifiable
		AB		○	○	×	-	Unjustifiable
DS472/DS497 Brazil – Local Content Requirements for Automobiles etc. (Panel)[15]	Tax reduction under the conditions of using domestically manufactured products for wireless frequency signal transmitters for digital TVs for the objective of bridging the digital divide	P	GATT Articles III:2 and III:4, TRIMS Article 2.1	○	○	×	-	Unjustifiable
DS476: EU – Measures related to the Energy Industry (Panel)	Measures to impose additional conditions on foreign operators in operator certification for the purpose of stable energy supply (public order)	P	GATS Article XVII	○	○	○	×	Unjustifiable
DS477/478 Indonesia – Importation of Horticultural Products, Animals and Animal Products (Panel)[16]	Secure compliance with Halal requirements (prevent deterioration in the Halal status of imported agricultural products due to inappropriate storage and management) by imposing requirements of possessing a warehouse; prevent consumers from misrecognizing Halal products by setting limitations on their uses and distribution.	P	GATT Article XI.1	○	×	×	×	Unjustifiable

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

Policy objectives

Public morals and public order may, as concept, include a wide range of human rights and social

[14] GATT Article XX was not an issue in the compliance procedure in this case.
[15] GATT Article XX was not an issue in the Appellate Body procedure in this case.
[16] GATT Article XX clause was not an issue for the Appellate Body procedure in this case.

order and norms. According to precedent, public morals and public order are considered to be broad concepts that vary in time and place depending on a wide range of factors that include dominant social, cultural, ethical and religious values.[17] In addition, Member countries have a certain degree of flexibility to define and apply public morals and public order within their own territory in accordance with their own systems and standards of value.[18]

Furthermore, one of the characteristic points of public morals and public order is that they cover not only regulations resulting from products themselves or the nature of the products (weapons, pornography, drugs, etc.), but also regulations resulting from processes and production methods (products manufactured using child labour or forced labour, etc.). For example, in the *EU – Seal Products* Case (DS400 and DS401), the "EU public moral concerns on seal welfare" was considered "public morals" with regards to the regulatory measures against seal hunting methods (in other countries).[19]

Subparagraph (a) is an important provision for ensuring balance between a free trade system and various religious, ethical and social values. Also, taking into account that the justifiable reasons under GATT Article XX and GATS Article XIV are interpreted as limited exceptions, and that they do not necessarily cover all current legitimate domestic policies of Member countries, there is a possibility that "public morals" and "public policy" that may cover broad concepts will be actively utilized in future as justifiable reasons and that they will become practically catch-all provisions that cover regulatory objectives not included under other specified reasons. Going forward, further examinations would be needed regarding the scope of both concepts and the limitation of the discretion of the countries implementing measures based on the same concepts.

Furthermore, in all precedents including findings regarding justifications based on public morals and public order, the complaints have not disputed that the claimed regulatory objectives fall under "public morals" and "public order." This might be due to the discretionary nature of the concepts of "public morals" and "public order." However, in each precedent, the respondents' arguments were not accepted for other requirements (i.e., relationship between the objective and the measures, the "necessity" requirement under GATT Article XX (a)/GATS Article XIV (a), and/or the chapeau of both articles). Accordingly, it should be noted that there have not been any cases in which justification due to "public morals" or "public order" was accepted in conclusion.

Furthermore, after the findings of the Appellate Body in the Colombia –Measures Related to Textiles etc. (DS461), before assessing the necessary requirements to be described below ("necessity of measure"), the criteria is established for consideration of whether the measures in dispute were designed for the claimed regulatory objective, in other words, if they have some "relationship" with the regulatory objective. This sort of "relationship" will be found if there is a relationship that the measure is not incapable of contributing to the objective. These findings may reflect partly the relevant circumstances that, due to the broad range of public morals/public order concept, it is possible that respondents may bring up regulatory objectives for which the relationship with the measures in dispute is suspicious.[20]

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[17] Specific regulatory objective referred to in articles as the ones that may fall under "public morals" are regulations on s alcoholic beverages, harmful publication (pornography), gambling, servitude, child labour, animal maltreatment, drug, stimulant, firearms, abortifacient, the anti-Islam publication. Also, "public order" contains, by its terms, possibility to be construed as a catchall provision that may include "public morals", and furthermore other listed reasons too. Some articles discuss that certain regulatory purposes such as regulations of organized crime, safety measures, and securing of access to essential facilities may not be covered by "public morals" but covered by "public order",.

[18] Panel Report, *US – Gambling* (DS285), para. 6.465. About public order, see Panel Report, EU – Measures regarding Energy Industry (DS476), para.7.1153.

[19] Panel Report, *EC – Seal Products* (DS400 and DS401), paras.7.630-7.631

[20] Provided that, after the findings of the Appellate Body in DS461, the approach to examine relevance with the objective prior to

Necessity of measure

When the measures satisfy the policy objectives of subparagraph (a), the measure is justified only if the measure is "necessary" to achieve the policy objectives. That is, regulations that cannot be explained in light of the policy objectives of the measure cannot be justified. In addition, according to the precedent, as similar wording is used in subparagraphs (a), (b), and (d), the same criteria are used to determine the necessity of the challenged measure.

According to GATT precedent prior to entry into force of the WTO, determining necessity was understood to require "non-existence of alternative measures less inconsistent to the Agreement for achieving the policy objectives".[21] However, proving such "necessity" is extremely difficult, and there were strong criticisms both in theory and in practice because under these criteria respondent countries were under a heavy burden of proving that "less trade-restrictive alternative measures are not available".

According to recent precedent, determining necessity is understood as a process of weighing and balancing a series of factors. More concretely, necessity is determined through comprehensively considering the following three factors.[22] [1] importance of the policy objectives of the measures (significance of the advantages), [2] trade-restrictive effect of the measures (significance of the disadvantages), and [3] contribution of the measures to the achievement of the policy objectives (quantitatively or qualitatively demonstrating substantial contribution[23](there is no prescribed threshold for the level of contribution).[24] With regard to their mutual relationships, [1] through [3] are individually determined although, according to some precedent, if the level of substantial contribution cannot be determined, the requirement of necessity cannot be deemed to be met. On the other hand, when the trade-restrictive effect is significant, such as in cases of import prohibition, a finding of necessity is highly likely.[25] The existence of necessity is tentatively determined at this point.

When necessity is tentatively determined and complainant countries propose that a "less trade-restrictive alternative measures for achieving the same level of contribution to the measures at issue" exists, the measures of concern are compared with the alternative measures to re-examine the tentatively-determined existence of necessity.[26] Necessity is determined to exist if complainant countries cannot prove the existence of such less trade-restrictive alternative measures; it is denied otherwise. (The alternative measures must be reasonably available, from the point of view of cost and technology, to respondent countries).[27]

It is important to note that complainant countries, not respondent countries, must point out the existence of less trade-restrictive (candidate) alternative measures, and respondent countries need only prove that the (candidate) alternative measures pointed out by complainant countries are not expected to have the same level of contribution or are not reasonably available. This is because requiring respondent countries to prove necessity by adducing all possible alternative measures that they can think of and claiming/proving the inappropriateness of these measures would make the

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the review of the necessity requirements is used even for the determination regarding whether the measure falls under subparagraphs (b) and (d) which similarly provide the necessity requirement.

[21] Appellate Body Report, *Thailand – Cigarettes (Philippines)* (DS371), para. 75

[22] Appellate Body Reports, *Korea – Various Measures on Beef* (DS161), para. 164; *Brazil – Retreaded Tires* (DS332), paras. 108-119; Panel Report, *China – Raw Materials* (DS394, 395, 398), paras. 7.478-7.493.

[23] Appellate Body Report, *Brazil – Retreaded Tires* (DS332), para. 151

[24] Appellate Body Report, *EC – Seal Products* (DS400, 401), para. 5.213

[25] Appellate Body Reports, *EC – Seal Products* (DS400, 401), para. 5.213; *Brazil – Retreaded Tires* (DS332), para. 150.

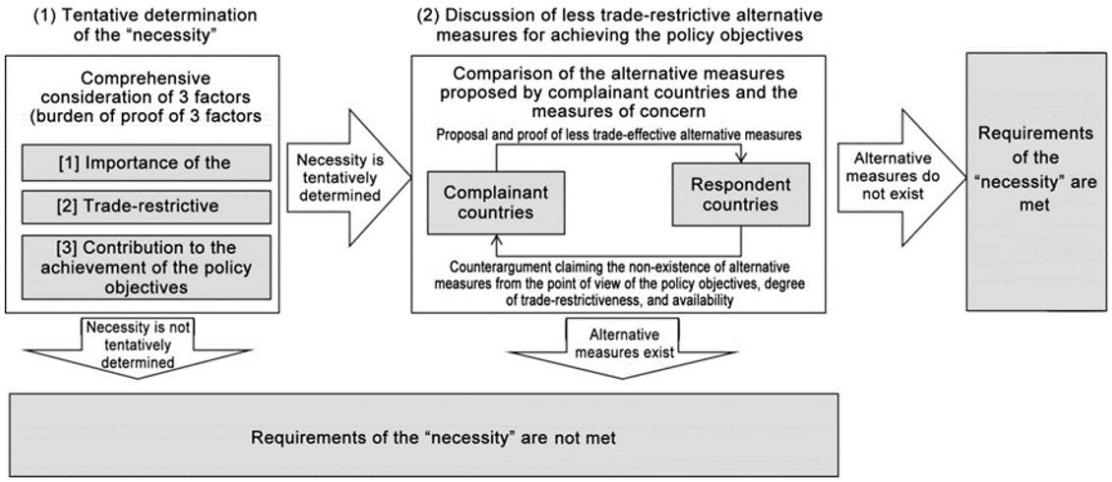
[26] Panel Report, *Brazil – Retreaded Tires* (DS332), para. 7.150.

[27] *Id*.

proof of the necessity extremely difficult.[28]

The processes for determining the necessity are summarized in Figure II-4-4.

Figure II-4-4 Processes for Determining the Necessity



<Concrete examples of determining the necessity in subparagraph (a)>

A concrete example is given below using the case of China - Publications and Audiovisual Products (DS363) as an example.[29]

In this case, the measure limiting importers of films for theatrical release and publications, etc. only to state-owned enterprises to conduct censorship for the purpose of protecting public morals was in dispute. The Panel pointed out with respect to [1] (importance of the policy objective) above that the protection of public morals was an important policy objective for China, and that advanced policies for protecting public morals were also implemented within China. With regard to [2] (trade-restrictive effect) , the Panel pointed out that, under this measure, import of such products to the Chinese market by companies other than state-owned enterprises was restricted a priori, and thus the trade-restrictive nature of the measures was high. With regard to [3] (contribution to the achievement of the policy objectives), the Chinese government claimed that limiting importers to state-owned enterprises should be justified as "private companies objected to bearing the cost of censorship". It was pointed out, however, that state-owned enterprises were also required to pursue profits, and thus the claim of the Chinese government was unjustified.

After comprehensively considering the above factors, the Panel determined that the degree of contribution of this measure to the protection of public morals was not significant and therefore concluded that the claim of necessity had not been established.

ii. Protection of human, animal or plant life or health (subparagraph (b))

Structure of article and precedents

Subparagraph (b) justifies "measures necessary to protect human, animal or plant life or health". Typically, sanitary and phytosanitary measures (also covered by the SPS Agreement), import/export restrictions and domestic regulations for the purpose of protecting the safety of food

[28] *Id*.

[29] Panel Report, *China – Publications and Audiovisual Products* (DS363), paras. 7.837-7.868.

and products, and some environmental regulations are covered by this subparagraph.

Similar to subparagraph (a), meeting the requirements of subparagraph (b) requires that [1] the policy objective of the measure is to "protect human, animal or plant life or health" and [2] the measure is "necessary" for achieving the policy objective.

Subparagraph (b) of GATS Article XIV has a provision similar to this subparagraph.

See Figure II-4-5 for the precedents relating to subparagraph (b).

Figure II-4-5 Precedents Relating to Subparagraph (b) of GATT Article XX

Case No. and Title (Determining Body)	Stage	Interpretation of WTO Agreement (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience					
		Violated Provision	(b) [1] (Policy objective)[30]	(b) [2] (Relationship)[31]	(b) [3] (Necessity)[32]	Chapeau[33]	Conclusion
UDS2: US – Gasoline (Panel)	P	GATT Article III:4	○ [not distinguishing (b)[1] and (b)[2]]		×	–	Unjustifiable
DS135: EC – Measures Affecting Asbestos and Asbestos-Containing Products (Panel/ Appellate Body)	P	GATT Article III:4	○ [not distinguishing (b)[1] and (b)[2]]		○	○	Justifiable
	AB	No violation	–		–	–	–
DS246: EC – Conditions for the Granting of Tariff Preferences to Developing Countries (Panel)	P	GATT Article XI:1	× [not distinguishing (b)[1] and (b)[2]]		×	×	Unjustifiable
DS332: Brazil – Measures Affecting Imports of Retreaded Tires (Panel/ Appellate Body)	P	GATT Article XI:1	○ [not distinguishing (b)[1] and (b)[2]]		○	×	Unjustifiable
	AB		○ [not distinguishing (b)[1] and (b)[2]]		○	×	Unjustifiable[34]
DS394/395/396 China – Measures Related to the Exportation of Various Raw Materials (Panel)	P	GATT Article XI:1	× [not distinguishing (b)[1] and (b)[2]]		×	–	Unjustifiable

[30] Hereinafter, in the column of (b)[1] (whether the objective falls under the policy objective under subparagraph (b)), "○" means that the measure falls within the policy objective under the subparagraph (b) and "×" means that the measure does not.

[31] Hereinafter, in the column of (b)[2] (whether the measure is related to the policy objective), "○" means that the measure is relevant to the policy objective under the subparagraph (b) and "×" means that the measure is not. In cases where the findings do not distinguish (b)[1] and (b)[2], "○" means that it was admitted as a measure taken for the purpose under subparagraph (b), and "×" means that it was not.

[32] Hereinafter, in the column of (b)[3] (whether the measure is necessary for the policy objective), "○" means that it was admitted that the measure was a measure taken for the policy objective under the subparagraph (b), and "×" means that it was not admitted as such.

[33] Hereinafter, in the column of chapeau, "○" means that the application of the measure is not regarded as the "arbitrary or, unjustifiable discrimination" or "disguised restriction on international trade" (i.e., justification is accepted), and "×" means that the application of the measure was regarded as such (i.e., justification is not accepted).

[34] The Appellate Body ruled that the measure to prohibit import of used tires meets the requirements under subparagraph (b), but two measures associated with the measure ([1] exemption of regulations on used tires from Mercosur because of a Mercosur dispute settlement decision and [2] an injunction against import prohibition laws/regulations by Brazilian courts) do not meet the requirements under the chapeau and are therefore unjustifiable.

DS431/432/433 China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Panel/ Appellate Body)[35]	P	GATT Article XI:1	× [not distinguishing (b)[1] and (b)[2]]		×	–	Unjustifiable
DS472/497 Brazil – Request for Local Content for Automobiles (Panel)[36]	P	GATT Articles III:2, III:4, TRIMS Article 2.1	○	○	×	–	Unjustifiable
DS477/478 Indonesia – Importation of Horticultural Products, Animals and Animal Products (Panel)[37]	P	GATT Article XI:1	○	○	×	×	Unjustifiable
DS484 Indonesia – Importation of Chicken meat and Chicken Products (Panel)	P	GATT Article XI:1	○	○	×	–	Unjustifiable

(Stage: examination stage, P: Panel, AB: Appellate Body)
Source: GATT/WTO documents

Policy objectives

With regard to the policy objectives of subparagraph (b), in many cases the Panel and Appellate Body accepted the explanation that the policy objectives claimed by respondent countries fall under subparagraph (b) (see Figure II-4-5).

More concretely, "prevention of atmospheric pollution (*US – Gasoline* (DS2))", "prohibition of import/distribution of Asbestos that is hazardous to human health and products containing Asbestos (*EC - Asbestos* (DS135))", and "prevention of propagation of mosquitoes that transmit malaria and dengue fever (*Brazil - Retreaded Tires* (DS332))" were determined to fall under the policy objectives of subparagraph (b).

However, measures whose purpose is abstract "environmental protection" are not covered by subparagraph (b), and respondent countries are required to concretely prove that the objectives of the measures of concern actually constitute "protection of human, animal or plant life or health".[38]

Cases in which the policy objectives were determined not to fall under subparagraph (b) include *China - Raw Materials* (DS394, 395, 398). China claimed that export restrictions on bauxite, etc. would result in a reduction in export demand, this would eventually lead to a reduction in domestic demand, which would contribute to pollution reduction; and therefore the measure was justifiable under subparagraph (b) of GATT XX.[39] The Panel found that "a significant amount of evidence of environmental protection that China submitted did not prove the measure to be a part of the framework for preventing environmental pollution" and rejected China's claim.[40] (No mining restriction within China was in place). In order to prove that export restrictions for the purpose of pollution reduction associated with the mining of resources fall under the policy objectives of subparagraph (b), at a minimum mining restrictions within China were considered necessary.

[35] GATT Article XX subparagraph [b] was not an issue in the Appellate Body procedure in this case.
[36] GATT Article XX was not an issue in the Appellate Body procedure in this case.
[37] GATT Article XX subparagraph [b] was not an issue in the Appellate Body procedure in this case.
[38] Panel Report, *Brazil – Retreaded Tires* (DS332), para. 7.46
[39] Panel Report, *China – Raw Materials* (DS394, 395, 398), para. 7.494
[40] Ibid. paras. 7.501-516

Necessity of measure

The necessity determination of subparagraph (b) uses the same criteria as subparagraphs (a) and (d).

<Concrete examples of determining the necessity of subparagraph (b)>

[1] With regard to the importance of the policy objectives, according to the precedent, protection of human life/health is determined to be the most essential and important policy objective and protection of animal and plant life/health is similarly important.[41]

[2] With regard to trade-restrictive effect, export duties and quotas on minerals are not as restrictive as total prohibition of export, but still have strong trade-restrictive effect.[42]

[3] With regard to contribution to the achievement of the policy objectives, proving the relationship of ends and means is necessary, but quantitative proof is not always required.[43]

iii. Customs enforcement/cross-border regulations (subparagraph (d))

Structure of article and precedents

Subparagraph (d) justifies "measures necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of [GATT]". Typically, measures to suspend imports of intellectual property rights infringing products at borders, etc. fall under this subparagraph.

Similar to subparagraphs (a) and (b), meeting the requirements of subparagraph (b) requires that [1] the policy objective of the measure is to "secure compliance with laws and regulations which are not inconsistent with the provisions of GATT" and [2] the measure is "necessary" for achieving the policy objective.

Subparagraph (c) of GATS Article XIV has a provision that is similar to this subparagraph.

See Figure II-4-6 for the precedents relating to subparagraph (d).

Figure II-4-6 Precedents Relating to Subparagraph (d) of GATT Article XX

Case No. and Title (Determining Body)	Laws and regulations to be protected	Stage	Interpretation of the WTO Agreement (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience					
			Violated Provision	(d) [1] (Policy objective)[44]	(d) [2] (Relationship)[45]	(d) [3] (Necessity)[46]	Chapeau[47]	Conclusion

[41] Panel Report, *Brazil – Retreaded Tires* (DS332), paras. 7.108-7.112

[42] Panel Report, *China – Raw Materials* (DS394, 395, 398), paras. 7.558-7.563

[43] Panel Report, *Brazil – Retreaded Tires* (DS332), paras. 7.115-7.119

[44] Hereinafter, in the column of clause (d)[1] (whether the objective falls under the policy objective under subparagraph (d)), "○" means that the measure falls within the policy objective under the subparagraph (d) and "×" means that the measure does not.

[45] Hereinafter, in the column of (d)[2] (whether the measure is related to the policy objective), "○" means that the measure is relevant to the policy objective under the subparagraph (d) and "×" means that the measure is not. In cases where the findings do not distinguish (d)[1] and (d)[2], "○" means that it was admitted as a measure taken for the purpose under subparagraph (d), and "×" means that it was not.

[46] Hereinafter, in the column of (d)[3] (whether the measure is necessary for the policy objective), "○" means that it was admitted that the measure was a measure taken for the policy objective under the subparagraph (d), and "×" means that it was not admitted as such.

[47] Hereinafter, in the column of chapeau, "○" means that the application of the measure is not regarded as the "arbitrary or, unjustifiable discrimination" or "disguised restriction on international trade" (i.e., justification is accepted), and "×" means that the application of the measure was regarded as such (i.e., justification is not accepted).

DS2: US –Gasoline (Panel)	Gasoline quality regulations (the measure recognized as violating GATT)	P	GATT Article III:4	×	–	–	Unjustifiable
DS31: Canada – Certain Measures Concerning Periodicals (Panel)	Preferential taxation of Canadian periodicals	P	GATT Article XI:1	×	–	–	Unjustifiable
DS155: Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Panel)	Value Added Tax Law, Corporate Tax Law	P	GATT Article III:2	○	○	×	Unjustifiable
DS161: Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Panel/ Appellate Body)	Unfair Competition Act for the purpose of total elimination of fraud with respect to the origin of beef	P	GATT Article III:4	○	×	–	Unjustifiable
		AB		○	×	–	Unjustifiable
DS174/290 EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Panel)	Intellectual Property Law for the purpose of protecting trademarks, etc.	P	GATT Article III:4	×	×	–	Unjustifiable
DS285: US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Panel)	Organized Crime Control Act	P	GATS Article XVI	○	×	×	Unjustifiable
DS302: Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes (Panel/ Appellate Body)	Stamp Tax Law for the purpose of securing tax revenue	P	GATT Article III:4	○	×	–	Unjustifiable
		AB		○	×	–	Unjustifiable
DS308: Mexico – Tax Measures on Soft Drinks and Other Beverages (Panel/ Appellate Body)	Obligations under international agreements with the other country (the United States)	P	GATT Articles III:2, III:4	×	–	–	Unjustifiable
		AB		×	–	–	Unjustifiable
DS332: Brazil – Measures Affecting Imports of Retreaded Tires (Panel/Appellate Body)	Fine system (the measure recognized as violating GATT)	P	GATT Article XI:1	×	–	–	Unjustifiable
DS339: China – Measures Affecting Imports	Schedule of tariff concessions regarding automobiles	P	GATT Article III:4	×	×	–	Unjustifiable

of Automobile Parts (Panel)							
DS343/345: US – Measures Relating to Shrimp from Thailand (Panel/ Appellate Body)	Laws and regulations for collecting AD duties and countervailing duties	P	GATT Articles II:1(b), X:3(a), XI:1	○	×	–	Unjustifiable
		AB		○	×	–	Unjustifiable
DS366: Colombia – Ports of Entry (Panel)	Customs Law for preventing money laundering	P	GATT Article V:2	○	×	–	Unjustifiable
DS371: Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Panel/ Appellate Body)[48]	Value Added Tax Law for securing the effectiveness of tax collection	P	GATT Article III:4	×	–	–	Unjustifiable
		AB		×	×	–	Unjustifiable
DS453: Argentina – Measures relating to Trade in Goods and Services (Panel/ Appellate Body)	Taxation laws and regulations and criminal laws and regulations for preventing corporate income tax evasion	P	GATS Articles II:1, XVI, XVII	○	○	×	Unjustifiable
		AB		○	○	--[49]	Unjustifiable
DS456: India – Certain Measures Relating to Solar Cells and Solar Modules (Panel/ Appellate Body)	Laws, regulations and treaties for providing the obligation to secure environmentally sustainable growth	P	GATT Article III:4, TRIMs Article 2. 1	×	×	-	Unjustifiable
		AB		×	-	-	Unjustifiable
DS461: Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear[50]	Laws and regulations for combating money laundering	P	GATT Article II:1(a) and (b)	○ ×	×	×	Unjustifiable
		AB		○ ○	×	×	Unjustifiable
DS477/478 Indonesia – Importation of Horticultural Products, Animals and Animal Products (Panel)[51]	Customs/quarantine Related, Food Security	P	GATT Article XI:1	× (Specific rules, obligations, or requirements contained in the WTO-consistent laws or regulations are not identified)	×	×	Unjustifiable
DS484 Indonesia – Importation of Chicken meat and Chicken Products (Panel)	(1) halal regulations, (2) consumer misconception prevention regulations, (3) ensuring personnel to comply with domestic laws relevant to halal, public sanitation,	P	GATT Article XI:1	○ ×	×	-	Unjustifiable

[48] In the subsequent compliance procedure, the panel found the inconsistencies with the Custom Valuation Agreement, but did not make findings regarding whether the measure satisfies subparagraphs (a) or (d) as the inconsistencies with the Custom Valuation Agreement cannot be justified by GATT Article XX.

[49] Neither party appealed to the Appellate Body the Panel's determination regarding the chapeau of GATT XX.

[50] GATT Article XX was not an issue in the Appellate Body procedure in this case.

[51] GATT Article XX subparagraph (d] was not an issue in the Appellate Body procedure in this case.

	consumer misconception prevention, customs							

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

Policy objectives

The policy objectives of subparagraph (d) require that the measures of concern are intended to secure compliance with laws and regulations which are not inconsistent with the provisions of GATT.

Subparagraph (d) was invoked by respondent countries as a general provision in many cases, but it is less likely than under subparagraphs (a) and (b) that they are determined not to meet the requirements of the policy objectives (see Figure II-4-6). Interpretations of subparagraph (d) adopted in the past cases are described below:

First, "laws and regulations" are understood only to include domestic laws and regulations, and not to include international agreements. In the case of Mexico - Taxes on Soft Drinks (DS308), in which the issue was whether or not the measures taken to be compliant with the obligations under NAFTA were justifiable under subparagraph (d), the Appellate Body determined that subparagraph (d) was applicable only to domestic laws on the grounds that [1] international agreements could not be associated with the wording laws and regulations used in subparagraph (d), [2] laws and regulations listed in subparagraph (d) (those relating to customs enforcement, the enforcement of monopolies, etc.) typically were domestic laws and regulations, and [3] unlike subparagraph (d), subparagraph (h) of GATT Article XX explicitly referred to international agreements.[52]

In addition, the precedent stated that it was clear from the wording that for laws and regulations to be compliant they must be consistent with GATT.[53] In EC - Trademarks and Geographical Indications (DS174) and Brazil - Retreaded Tires (DS332), laws and regulations that were supposed to comply per se were determined to violate GATT and thus were not justified.

With regard to "securing compliance", the measures of concern needed to be designed to secure compliance with the laws and regulations.[54] That is, measures that cannot be explained in light of the objectives of securing compliance are deemed not to be measures for "securing compliance". However, the performance level shall be determined by respondent countries, and so, for example, measures without binding effect or effect of non-performance may be acceptable.[55]

Necessity of measure

The necessity determination of subparagraph (d) uses the same criteria as subparagraphs (a) and (b).

<Concrete examples of determining the necessity of subparagraph (d)>

A concrete example is given below using the case of Dominican Republic - Import and Sale of Cigarettes (DS302).

In this case, the dispute involved a measure to prohibit the affixation of tax stamps outside of the Dominican Republic and to require the affixation of tax stamps on individual packages under the supervision of tax authority inspectors within the Dominican Republic for the purpose of

[52] Appellate Body Report, *Mexico – Taxes on Soft Drinks* (DS308), paras. 69-80
[53] Panel Report, *EC – Trademarks and Geographical Indications* (DS174), para. 446
[54] Appellate Body Report, *Korea – Various Measures on Beef* (DS161), paras. 157-158
[55] Appellate Body Report, *Mexico – Taxes on Soft Drinks* (DS308), para. 74

preventing unlawful import and tax evasion of cigarettes. The Panel determined that [1] with regard to the importance of the policy objectives, i.e. securing tax revenue, was the most important interest for a country, in particular for developing countries such as the Dominican Republic. [2] With regard to the trade-restrictive effect, export was still possible despite existence of the measure, and since export of cigarettes from Honduras (complainant country) to the Dominican Republic was increasing, a strong trade-restrictive effect could not be determined. [3] With regard to contribution to the achievement of the policy objectives, it was determined that the measure did not prevent counterfeiting of tax stamps, unlawful import or tax evasion of cigarettes; instead, police enforcement would play more important roles. As a conclusion, necessity was preliminarily determined.[56]

Honduras proved that a system which would allow foreign producers to affix revenue stamps at the production stage before import and secure performance through inspection/verification before shipping would be a less trade-restrictive alternative measure, and the Dominican Republic did not establish that this alternative would not achieve the same level of protection and achievement of its objectives.[57] As a result, the Panel concluded that the requirement of necessity had not been met.

iv. Cases of conservation of exhaustible natural resources (subparagraph (g))

Structure of article and precedents

Subparagraph (g) justifies measures relating to the conservation of exhaustible natural resources. Precedents have involved restrictions on production/consumption of oil and minerals for the purpose of resource conservation within the country, etc.

Meeting the requirements of subparagraph (g) requires that [1] the policy objective of the measure of concern is to "conserve limited natural resources", [2] the measure is "relating" to the conservation of limited natural resources, and [3] the measure is implemented alongside restrictions on domestic production or consumption.

See Figure II-4-7 for the precedents relating to subparagraph (g).

Figure II-4-7 Precedents Relating to Subparagraph (g) of GATT Article XX

Case No. and Title (Determining Body)	Stage	Interpretation of the WTO Agreement (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience					
		Violated Provision	(g) [1] (Policy objective)[58]	(g) [2] (Relationship)[59]	(g) [3] (Balance with domestic regulation)[60]	Chapeau[61]	Conclusion

[56] Panel Report, *Dominican Republic – Import and Sale of Cigarettes* (DS302), Panel Report, paras. 212-226

[57] *Id*., paras. 227-232

[58] Hereinafter, in the column of clause (g)[1] (whether the objective falls under the policy objective under subparagraph (g)), "○" means that the measure falls within the policy objective under the subparagraph (g) and "×" means that the measure does not.

[59] Hereinafter, in the column of (g)[2] (whether the measure is related to the policy objective), "○" means that the measure is relevant to the policy objective under the subparagraph (g) and "×" means that the measure is not. In cases where the findings do not distinguish (g) [1] and (g) [2], "○" means that it was admitted as a measure taken for the purpose under subparagraph (g), and "×" means that it was not.

[60] Hereinafter, in the column of (g)[3] (whether the measure satisfies the requirement of available equivalent domestic regulation), "○" means that it was admitted that the measure satisfies the requirement, and "×" means that it was not admitted as such.

[61] Hereinafter, in the column of chapeau, "○" means that the application of the measure is not regarded as the "arbitrary or, unjustifiable discrimination" or "disguised restriction on international trade" (i.e., justification is accepted), and "×" means that the application of the measure was regarded as such (i.e., justification is not accepted).

DS2: US –Gasoline (Panel/ Appellate Body)	P	GATT Article III:4	○	×	–	–	Unjustifiable
	AB		○	○	○	×	Unjustifiable
DS58: US – Import Prohibition of Certain Shrimp and Shrimp Products (Panel/ Appellate Body)	P	GATT Article XI:1	–	–	–	×[62]	Unjustifiable
	AB		○	○	○	×	Unjustifiable
Compliance procedure of the same case (Panel/ Appellate Body)	P		○	○	○	○	Justifiable
	AB		○	○	○	○	Justifiable
Compliance procedure of DS381: US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products[63] (Panel/Appellate Body)	P	GATT Articles I:1 and III:4	○	○	○	○	(partly) justifiable
	AB		–	–	–	×	Unjustifiable
Second compliance procedure of the same case (Panel/Appellate Body)	P		○ (no dispute between the countries)			○	Justifiable
	AB		–	–	–	○	Justifiable
DS394/395/398: China – Measures Related to the Exportation of Various Raw Materials (Panel/ Appellate Body)	P	GATT Article XI:1	○	×	×	–	Unjustifiable
	AB		○	×	×	–	Unjustifiable
DS431/432/433: China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Panel/ Appellate Body)	P	GATT Article XI:1	×	×	×	×	Unjustifiable
	AB		×	×	×	×	Unjustifiable
DS472/497 Brazil – Request for Local Content for Automobiles (Panel)[64]	P	GATT Articles III:2 and III:4, TRIMS Article 2.1	○	×	×	–	Unjustifiable

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

Policy objectives

The policy objectives of subparagraph (g) require that the measures of concern are intended for

[62] The panel examined the chapeau before subparagraph (g), but this approach was explicitly rejected by the Appellate Body on the grounds that examination of the chapeau, which analyzes application methods of the measure, should take place after examining the measure per se under each subparagraph (see 2 (1) (a)).

[63] In the original procedure, only the inconsistencies with TBT Agreement was an issue, and GATT Article XX was not.

[64] GATT Article XX was not an issue in the Appellate Body procedure in this case.

"conservation of exhaustible natural resources".

According to the precedent, "exhaustible natural resources" are broadly understood, and include minerals, non-living natural resources (coal, oil, natural gas, etc.) as well as environmental resources such as "clean air" (*US - Gasoline* (DS2)).

Living resources are also included as natural resources. The Appellate Body in the *US - Shrimp* (DS58) case construed GATT as an agreement whose focus evolved over time, and concluded that sea turtles, a living resource, were included as natural resources because both living and non-living resources were included as natural resources in other environmental protection agreements/declarations, and sea turtles were listed as an endangered species in the Washington Convention, etc.[65]

The *US - Shrimp* (DS58) case can also be a useful reference regarding whether or not the measure to protect exhaustible natural resources outside the territory of implementing countries is justifiable under subparagraph (g). In this case, the issue of whether or not the US measure was one to protect the environment outside the US was raised, and it was determined that sea turtles are "exhaustible natural resources", because They are highly migratory animals and their migration range extended into US territorial waters; therefore a sufficient nexus existed between sea turtles and the US.[66] This case is an example where the existence of a sufficient nexus between implementing countries and exhaustible natural resources outside their regions was determined. In the absence of such nexus, however, it is still unclear whether or not implementing countries can take measures to protect exhaustible natural resources outside their territory. A similar argument may apply in the context of subparagraph (b) regarding whether implementing countries can take measures to protect life or health of humans or animals outside their territory.

With regard to the interpretation of "conservation", the Panel Report in the *China - Rare Earth* case (DS431, 432, 433) determined that economic growth could also be considered in the interpretation of "conservation", but that the right to control domestic and overseas distribution of mineral resources that have been mined and would be placed in market transactions could not be determined under the WTO Agreement. This means that not allowing transactions of resources in order to benefit future generations may be accepted as "conserving", but distributing resources in such a manner as to give priority to domestic industries cannot be interpreted as "conserving".

Relationship of measures and objective

When a measure of concern falls within the policy objectives of subparagraph (g), the measure is justified only if the measure is "relating" to the conservation of exhaustible natural resources. The relationship criteria of subparagraph (g) are distinct from the criteria of subparagraphs (a), (b) and (d). However, they share a common determination framework that the measures that cannot be explained in light of the policy objectives of the measures cannot be justified.

According to precedent, these criteria require that "a close and genuine relationship of ends and means exists between the objectives of the measure and the structure/design of the measure".[67] That is, measures whose structures, etc. cannot be explained in light of the objectives of the measures cannot be justified.

<Examples of the relationship determination of subparagraph (g)>

In the US - Shrimp (DS58) case, "relationship" was affirmed on the grounds that the scope of application was not disproportionately wide in relation to the policy objective in light of structure

[65] *Id*., paras. 128-131
[66] *Id*., para. 133
[67] *Id*., paras. 137-142; Appellate Body Report, *China – Raw Materials* (DS394, 395, 398), paras. 355

and design of the measure (principle of proportionality between the objectives and scope of application).[68]

In the China - Raw Materials case (DS394, 395, 398), relationship was denied on the grounds that, while mining restriction was deemed more effective than export prohibition for conserving domestic resources, no mining restriction was implemented in China, and the volume of minerals mined actually increased after introduction of the measure.[69]

Balance with domestic regulation

Lastly, the measures need to be "made effective in conjunction with restrictions on domestic production or consumption". According to the precedent, this requirement is understood as requiring the measures to operate so as to conserve an exhaustible natural resource or be applied jointly and work together with restrictions on domestic production or consumption.[70]

In addition, when the measures are implemented in conjunction with restrictions on domestic consumption, with regard to the level of restrictions, equality is not required in treating imported products and domestic products equally, but even-handedness is required.[71]

The Panel Report in the China - Rare Earth elements, etc. (DS431, 432, 433) case stated that the balance required here was regulatory or structural balance, and would not be determined by the actual effect. The Report then found that export restrictions that imposed structural burdens only on foreign users was problematic. The Appellate Body ruled that the Panel erred in determining that even-handedness should be discussed in addition to the requirements provided for in Article XX(g). However, the Appellate Body supported the idea of considering regulatory/structural balance, and concluded, by supporting the Panel's ruling that the measure could not be justified under Article XX(g).

v. Measures essential to the acquisition or distribution of products in general or local short supply(subparagraph (j))

Structure of article and precedents

Subparagraph (j) is a regulation that admits justification of measures that are essential for acquiring/distributing products for which domestic/local supply is insufficient.

According to the text of the provision, the followings are necessary for justification to be admitted based on subparagraph (j): (1) the policy objective of the measures is to acquire/distribute products for which there is generally or regionally a supply shortage; (2) the measures are "essential" for the objective; (3) the measures is consistent with the principle that all Member countries are entitled to an equitable share of the international supply of such products; and (4) as soon as the insufficient supply of the product is resolved, the measures will be terminated.

Taking into account that subparagraph (j) is the only subparagraph of Article XX that requires that the relationship between the objective and measures be essential, that the aforementioned requirements of (3) and (4) are imposed, and that a review of the need for the subparagraph is specifically scheduled under the subparagraph, it can be considered that the instances in which justification based on subparagraph (j) is accepted are substantially limited.

While there had not been any precedents regarding this subparagraph for many years, there have

[68] Appellate Body Report, *US – Shrimp* (DS58), para. 141
[69] Panel Report, *China – Raw Materials* (DS394, 395, 398), paras. 7-416-435
[70] Appellate Body Report, *China – Raw Materials* (DS394, 395, 398), paras. 353-361.
[71] Appellate Body Report, *US – Gasoline* (DS2), ps. 22.

been some cases in recent years where claims and/or findings have been made for justification based on subparagraph (j) for the local content requirement for solar batteries etc., and import restriction measures for natural gas, regarding whether such measures are essential to ensure security of energy supply (ensuring a status in which the imposing country does not need to depend on on particular or foreign supply sources, and thus preparing for future supply shortages). However, at this point in time, there have been no cases in which the measure satisfies the requirements under subparagraph (j).

See Figure II-4-8 for the precedents relating to subparagraph (j).

Policy objectives

With regard to the requirement of short supply, in *India – Solar Cells* (DS456), it was found that: (1) the short supply requirement would be satisfied when supply to meet demand cannot be prepared, regardless of whether the supply source is domestic or foreign, it does not suffice to have insufficient domestic production ability (and to be dependent on imports), and that: (2) the future supply shortage, even in case the current supply does not run short, may still suffice the requirement only when this risk of future supply shortage is imminent. Furthermore, the panel in *EU - Energy Industry Measure* (DS476) has found that the risk of future supply shortage is not enough to satisfy the requirement, and there must be a current supply shortage.

Essentiality of measure to the objective

The “essentiality” under subparagraph (j) is interpreted as requiring a closer relationship than “relation” (subparagraph (g)) and “necessity” (subparagraphs (a), (b) and (d)). In line with this point, the panel in *India - Solar Cells* (DS456) found that, with regard to India’s claims under both subparagraphs (d) and (j) based on the similar reasons, measures that do not fulfill the necessity requirement under subparagraph (d) would not fulfill the essentiality requirement under subparagraph (j).

Regarding the analysis framework of this subparagraph, the Appellate Body in this case found that: (1) the analysis framework of both elements in GATT Article XX subparagraph (d), namely, “whether measures were designed for the objective under subparagraph (d)” and “whether the measures are necessary for the objective under subparagraph (d)”, applies to the analysis of subparagraph (j) as well; (2) with regard to the requirement of “design”, in case it can be confirmed that the measures are incapable of achieving the regulatory objective, it is not necessary to examine the requirements of necessity and/or essentiality; and (3) the balancing process under the necessity requirement of subparagraph (d) (including importance of objective, contribution to objective, trade restrictiveness, consideration for alternative measures) are also related to the analysis of the essentiality requirement under subparagraph (j).

Other conditions

There have been no precedents regarding the aforementioned requirements (3) and (4).

Figure II-4-8 Precedents Relating to Subparagraph (j) of GATT Article XX

Case No. and Title (Determining Body)	Stage	Interpretation of the WTO Agreement (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience					
		Violated Provision	(j) [1] (Policy objective)[72]	(j) [2] (Essentiality)[73]	(j) [3] (equivalence of share, termination on cessation)[74]	Chapeau[75]	Conclusion
DS456: India – Certain Measures Relating to Solar Cells and Solar Modules (Panel/ Appellate Body)	P	GATT Article III:4, TRIMs Article 2.1	×	×	–	–	Unjustifiable
	AB		×	×	–	–	Unjustifiable
DS476: EU - Energy Regulations (Panel)	P	GATT Articles I:1, III:4	×	–	–	–	Unjustifiable

(2) CHAPEAU OF GATT ARTICLE XX

(a) Structure and precedents

Even if the measures formally fall within the respective subparagraphs of GATT Article XX, disguised protectionist measures were not justified.

From the point of view of preventing abuse of justifiable reasons, the chapeau states that two types of application methods are not justified. More concretely, the chapeau provides that measures applied [1] "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or [2] "a disguised restriction on international trade" are not justifiable.

It was determined in precedents that the chapeau is an expression of the principle of good faith, a general principle of international laws, and prohibits abuse of measures that formally meet the requirements of one of the subparagraphs of Article XX. The Appellate Body stated that "the task of interpreting and applying the clause is, hence, essentially a delicate one of locating and making out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions of the GATT"[76] and "the location of this line of equilibrium may move as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ".[77] Therefore, interpretation of the chapeau

[72] Hereinafter, in the column of clause (j)[1] (whether the objective falls under the policy objective under subparagraph (j)), "○" means that the measure falls within the policy objective under the subparagraph (j) and "×" means that the measure does not.
[73] Hereinafter, in the column of (j)[2] (whether the measure is related to the policy objective), "○" means that the measure is relevant to the policy objective under the subparagraph (j) and "×" means that the measure is not.
[74] Hereinafter, in the column of (j)[3] (whether the measure is necessary for the policy objective), "○" means that it was admitted that the measure was a measure taken for the policy objective under the subparagraph (j), and "×" means that it was not admitted as such.
[75] Hereinafter, in the column of chapeau, "○" means that the application of the measure is not regarded as the "arbitrary or, unjustifiable discrimination" or "disguised restriction on international trade" (i.e., justification is accepted), and "×" means that the application of the measure was regarded as such (i.e., justification is not accepted).
[76] Appellate Body Report, *US – Shrimp* (DS58), paras. 158-159
[77] Appellate Body Report, *Brazil – Retreaded Tires* (DS332), para. 224

involves coordination of the rights of member countries to regulate with the trade liberalization benefits of other member countries.

GATS Article XIV has a provision similar to that of the chapeau of GATT Article XX.

See Figure II-4-8 for the precedents relating to the chapeau. As shown in II-4-8, in many of the precedent cases, the requirements of the respective subparagraphs were met, but the requirements of the chapeau were not, and thus the measures were not justified. Therefore, understanding what is recognized as discrimination under the chapeau can offer good guidance in case Japanese industries are faced with trade-restrictive measures of foreign governments (see 2) (1) (a) for the relationship between violations of the respective subparagraphs/clauses and methods of implementing the decisions under the chapeau).

The concrete contents of the clause and previous precedent cases are described below:

Figure II-4-9 Precedents Relating to the Chapeau of GATT Article XX

Case No. and Title (Determining Body)	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate Body) *Note: Evaluation of ○ or × is only for the purpose of convenience				
		Violated Provision	Subparagraph of Article XX[78]	Chapeau [1] (Application in a manner of arbitrary or unjustifiable discrimination)[79]	Chapeau [2] (Application in a manner of disguised trade-restrictive restriction)[80]	Conclusion
DS2: US – Gasoline (Panel/ Appellate Body)	P	GATT Article III:4	× (subparagraph (g))	–	–	Unjustifiable
	AB		○ (subparagraph (g))	×	×	Unjustifiable
DS58: US – Import Prohibition of Certain Shrimp and Shrimp Products (Panel/ Appellate Body)	P	GATT Article XI:1		×	–	Unjustifiable
	AB		○ (subparagraph (g))	×	–	Unjustifiable
Compliance procedure of the same case (Panel/ Appellate Body)	P		○ (subparagraph (g))	○	○	Justifiable
	AB		○ (subparagraph (g))	○	– (not appealed)	Justifiable
DS135: EC – Measures Affecting Asbestos and Products Containing Asbestos (Panel/ Appellate Body)	P	GATT Article III:4	○ (subparagraph (b))	○	○	Justifiable
	AB	No violation	–	–	–	–
DS155: Argentina –	P	GATT	○	×	–	Unjustifiable

[78] Hereinafter, in the column of subparagraphs of Article XX, "○" means that the measure satisfies the requirements under the relevant subparagraph and "×" means that the measure does not.

[79] Hereinafter, in the column of chapeau [1], "○" means that the application of the measure does not constitute the "arbitrary or unjustifiable discrimination" (i.e., justification is admitted), and "×" means that the application of the measure constitutes the "arbitrary or unjustifiable discrimination" (i.e., justification is not admitted.)

[80] Hereinafter, in the column of chapeau [2], the marker shows that "○" means that the application of the measure does not constitute the "disguised restriction on international trade" (i.e., justification is admitted), and "×" means that the measure constitutes "disguised restriction on international trade" (i.e., justification is not recognized.)

Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Panel)		Article III:2	(subparagraph (d))			
DS246: EC – Conditions for the Granting of Tariff Preferences to Developing Countries (Panel)	P	GATT Article I:1	× (subparagraph (b))	×	–	Unjustifiable
DS285: US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Panel/Appellate Body)	P	GATS Article XVI	○ (subparagraph (a) of Article XIV)	×	×	Unjustifiable
	AB		○ (subparagraphs (a) and (c) of Article XIV)	×	×	Unjustifiable
DS332: Brazil – Measures Affecting Imports of Retreaded Tires (Panel/ Appellate Body)	P	GATT Article XI:1	○ (subparagraph (b))	×	×	Unjustifiable
	AB		○ (subparagraph (b))	×[81]	×	Unjustifiable
DS381: US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Panel/Appellate Body)	P	GATT Articles I:1, III:4	○ (subparagraph (g))	(x) (eligibility requirement) ○ (y) (certifying and tracking requirements) ×	–	(x) Justifiable (y) Unjustifiable
	AB		–	[82]	–	Unjustifiable
Secondary compliance proceedings of the same case (Panel/Appellate body)	P		○ (no dispute between the parties)	○	–	Justifiable
	AB		–	○	–	Justifiable
DS400/401 EC – Measures Prohibiting the Importation and Marketing of Seal Products[83]	P	GATT Articles I:1, III:4	○ (subparagraph (a))	×	–	Unjustifiable
	AB		○ (subparagraph (a))	×	×	Unjustifiable

[81] The Appellate Body found that the measure to prohibit import of used tires meets the requirements of subparagraph (b), but two measures associated with the measure ([1] exemption of regulations on used tires from Mercosur countries because of a Mercosur arbitration decision and [2] an injunction against import prohibition laws/regulations by Brazilian courts) do not meet the requirements of the chapeau and are therefore unjustifiable.

[82] The Appellate Body reversed the panel's finding regarding the measure taken to comply, stating that the eligibility requirement, the certification requirement and the tracking requirement should have been analyzed integrally, not separately as three elements. Further, the Appellate Body determined that it could not complete a legal determination because the panel did not find enough facts that are required as a precondition to such determination (i.e., injury risk of relevant fishing methods). However, the Appellate Body found that at least the setting of conditions under the determination clause (a clause that requires certification by an observer when a competent agency determines that certain conditions are met) is based on arbitrary discrimination with regard to the conditions therein (even if no additional facts are found by the panel), and therefore the measure taken to comply was not justified under GATT Article XX.

[83] This case was also brought to the European Court of Justice and a judgment that the measure in dispute was legal under EU laws became final on April 25, 2013.

(Panel/ Appellate Body)						
DS431/432/433 China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Panel/ Appellate Body)	P	GATT Article XI:1	× (subparagraph (g))	×	×	Unjustifiable
	AB		–	–		–
DS453: Argentina – Measures Relating to Trade in Goods and Services (Panel/ Appellate Body)	P	GATS Articles II.1, XVI, XVII	○ (GATS XIV subparagraph (c))	×	-	Unjustifiable
	AB		○ (GATS XIV subparagraph (c))	-[84]	-	Unjustifiable
DS461: Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Panel/ Appellate Body)	P	GATT Article II.1 (a) and (b)	× (subparagraphs (a) and (d))	×	×	Unjustifiable
	AB		× (subparagraphs (a) and (d))	-	-	Unjustifiable
DS476 EU - Energy Regulations (Panel)	P	GATS Article XIV (a)	○ (subparagraph (a))	×	-	Unjustifiable
DS477/478 Indonesia – Importation of Horticultural Products, Animals and Animal Products (Panel)	P	GATT Article XI:1	× (provided that no findings for certain measures)	×	-	Unjustifiable
	AB		Regarding some measures which lack findings of applicability of subparagraphs, the panel's GATT Article XX conclusion is moot	-	-	The conclusion of violation to GATT Article XI:1 is maintained even with the moot portion.

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

(b) Arbitrary or unjustifiable discrimination between countries where the same conditions prevail

With regard to the first type of application method, where measures are applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail are prohibited. Here, this discrimination does not amount to inconsistency with the national treatment obligation of GATT Article III. It requires special attention that this type, arbitrary or unjustifiable discrimination is not justified under Article XX notwithstanding that it does not formally violate the national treatment obligation of GATT Article III.[85]

This type of application method was in dispute in many dispute settlement proceedings, and the

[84] Neither party appealed to the Appellate Body the Panel's determination regarding the chapeau of GATS Article XIV.

[85] Appellate Body Report, *US – Gasoline* (DS2), p. 23.

analysis of whether there was discrimination between countries where the same conditions prevail focused on whether or not there was a rational connection between the measure and the objective. Interpretation of "between countries where the same conditions prevail" varies from case to case; no standard criteria exist. However, it is understood not only that [1] cases where the measures are applied differently to countries where the same conditions prevail are included, but also [2] cases where the measures are applied uniformly to countries where the same conditions do not prevail are included.

<Concrete examples of the determination of the chapeau (first type)>

Concrete examples of the determination of the clause with regard to the first type are given below.

In the *US - Shrimp* (DS58) case, a measure requiring implementation of a program to avoid sea turtle by-catch equivalent to that in the US was in dispute. The four reasons that the Appellate Body gave in determining that the measures violated the first type of discrimination set out in the chapeau are as follows: [1] the US did not consider the different situations of each country, but uniformly enforced the certification processes on all complainant countries, etc.; [2] while negotiations on sea turtle protection were conducted with other shrimp exporting countries, negotiations did not take place with the complainant countries; [3] the complainant countries were provided a transition period shorter than that provided to other shrimp exporting countries; and [4] the US did not provide sufficient technology transfer support to the complainant countries when compared to other shrimp exporting countries.[86]

In the *EC - Tariff Preferences* (DS246) case, imposition of preferential duties on Pakistan, etc. for the purpose of combating drug trafficking was in dispute. The fact that different treatment was given to Pakistan and Iran could not be explained in light of the objective of the measure, and therefore the measure was determined to be discriminatory and not in conformity with the chapeau.[87]

In the *US - Gambling* (DS285) case, partially allowing domestic service suppliers to supply cross-border gambling services was in dispute. It was determined that whether or not discrimination existed should be determined from the wording of laws and regulations, and not just based on the results of application in the individual cases.[88]

In the *Brazil - Retreaded Tires* (DS332) case, the fact that imports of recycled tires from the EU were prohibited while imports of recycled tires from Mercosur member countries were not was in dispute. The Appellate Body rejected the assertion that the decision should be based only on the effects of the discrimination (decrease in trade volume, and random and capricious implementation) without considering the objective of the measure. It said that the assessment of whether the discrimination was arbitrary or unjustifiable should be made in light of the objective of the measure.[89]

In the *US - Tuna* (DS381) case, the Appellate Body in the compliance procedure reviewed compliance measures relating to – (1) the eligibility requirement (the fishing method of setting on dolphins is ineligible for the dolphin-safe label), (2) the certification requirements (certification by independent observers is required for attaching the dolphin-safe label), and (3) the tracking requirements (it must be indicated that tuna meeting conditions for the dolphin-safe label are isolated from other tuna). It concluded that "discrimination between countries where the same

[86] Appellate Body Report, *US – Shrimp* (DS58), paras. 161-176.
[87] Panel Report, *EC – Tariff Preferences* (DS246), paras. 228-234.
[88] Appellate Body Report, *US – Gambling* (DS285), paras. 353-357.
[89] Appellate Body Report, *Brazil – Retreaded Tires* (DS332), paras. 227-231.

conditions prevail," as used in the chapeau of GATT Article XX, refers to the fact that, with respect to tuna from Mexico, the US and third countries, tuna fishing causes risks of harm to dolphins in this case, and thus such tuna are under the same prevailing conditions. In doing so, the Appellate Body rejected a US argument that the relevant conditions for tuna products with different risks of harm are not the same.

Then, it found that, at least with regard to the determination clause (see Note 2 of Figure II-4-8 above) for certification and tracking requirements, practices of labeling upon certification by an observer are not ensured for all circumstances where risks of harm to dolphins are similarly high, and as a result, the certification and tracking requirements imposed on the large purse-seine fishery conducted in the Eastern Tropical Pacific Ocean, where tuna from Mexico originate, differ from those imposed on others. Therefore the design of the compliance measure has aspects that are difficult to reconcile with the objective of protecting dolphins from harm. Accordingly, it ruled that this constitutes arbitrary and unjustifiable discrimination, and is not justified under GATT Article XX[90].

(c) Disguised restriction on trade

With regard to the second type of application method, "disguised restriction on trade", the precedent cases are limited when compared to the first type, "arbitrary or unjustifiable discrimination" (see Figure II-4-9).

According to the precedent, it was determined that [1] discrimination which is arbitrary or not justifiable, and [2] a disguised restriction on international trade, should be read side by side; however, precise guidance was not provided. In addition, in many cases, application of the same measure was determined to overlap both [1] and [2] (see Figure II-4-8). For example, in the *US – Gasoline* case (DS2), individually applying the baselines to domestic gasoline, with consideration given to the cost for producers, while baselines were applied uniformly to imported gasoline, was determined to be an unjustifiable discrimination and also a disguised restriction on international trade.[91]

Similar to the first type, whether or not a disguised restriction exists is determined based on the content of the measures[92] (see (ii)). In addition, a decision should be based not only on the application results, but also on the objective of the measure.[93]

(3) JUSTIFICATION OF NON-GATT MEASURES

As described in 2) (1), GATT Article XX is used for exemptions to obligations of GATT provisions. A question arises as to whether it can be used to justify non-GATT measures.

(a) WTO Accession Protocol of China

With regard to the measures violating the WTO Accession Protocol of China, there were three precedent cases in which invocation of GATT Article XX was in dispute.

First, in the *China - Publications and Audiovisual Products* (DS363) case, China's measure that grants the right to import publications and films for theatrical release, etc. only to state-owned enterprises and not to foreign enterprises was in dispute. China claimed that even if the measure

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[90] Appellate Body Report, *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Article 21.5*, paras. 7.359-7.360.

[91] Appellate Body Report, *US – Gasoline* (DS2), p. 25.

[92] Panel Report, *EC – Asbestos* (DS135), para. 8.236.

[93] Appellate Body Report, *Brazil – Retreaded Tires* (DS332), paras. 238-239.

violated Article 5.1 (right to trade) of the WTO Accession Protocol of China, the measure was justified under subparagraph (a) of GATT Article XX. The Appellate Body determined that Article XX was applicable to the WTO Agreements "in a manner consistent with the WTO Agreements" and [2] that measures justified under exemption provisions of the WTO Agreements were also included[94] because Article 5.1 of the WTO Accession Protocol of China preserved the rights of China, as since obligations were "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".[95] Therefore, the Appellate Body was concluded that GATT Article XX could be invoked with regard to measures alleged to violate Article 5.1 of the WTO Accession Protocol of China.

In the *China – Raw Materials* (DS394, 395, 398) case, China's imposition of export duties on nine items of raw materials was in dispute. China claimed that even if the measure violates Article 11.3 (prohibition of export duties) of the WTO Accession Protocol of China, China claimed that justification under subparagraph (g) of GATT Article XX should be accepted. The Panel determined that GATT XX may not be invoked because Article 11.3 of the WTO Accession Protocol of China uniformly prohibits export duties and lacks the provision for preserving China's rights as was the case in Article 5.1 of the same Protocol.[96] Similar decisions were maintained in the Panel Report and the Appellate Body Report on the *China - Rare Earth* elements, etc. (DS431, 432, 433).

(b) Other Agreements (SPS Agreement, TBT Agreement, Agreement on Subsidies, etc.)

As described in (i), according to the precedent, in determining whether or not GATT Article XX may be invoked in the WTO Accession Protocol of China, the specific wording of the Articles at issue determines whether GATT Article XX is applicable. It may be considered from this determination that whether specific wording of each non-GATT agreement is intended for the application of GATT Article XX or not will be used as the criterion.

On the other hand, taking into consideration that the TBT Agreement and the Agreement on Subsidies do not contain wording that deals with the application of GATT Article XX, invocation of GATT Article XX as an affirmative defense for justifying violations of the respective agreements is not considered possible. However, the TBT Agreement controls measures based on non-trade concerns as well as trade concerns, and Articles 2.1 and 2.2 of the TBT Agreement allows consideration of the policy objectives of the measure in much the same manner as would be the case under GATT Article XX.

(4) SECURITY EXCEPTIONS (GATT ARTICLE XXI AND GATS ARTICLE XIV:2)

(a) Functions and Structure of the Articles

While GATT Articles XX and XIV are used to exempt measures based on various domestic policies, measures taken for security purposes are justified under GATT Article XXI. ATS Article XIV: 2 has provisions that are similar to those of GATT Article XXI.

GATT Article XXI consists of subparagraphs (a) to (c) (see Figure II-4-9).

Figure II-4-9 Contents of GATT Article XXI

[94] Appellate Body Report, *China – Publications and Audiovisual Products* (DS363), para. 223
[95] *Id*., para. 218
[96] Panel Report, *China – Raw Materials* (DS394, 395, 398), paras. 121-129, 149-160

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

GATT Article XXI has a different structure than that of GATT Article XX in the following respects: First, under GATT Article XXI, a member country can determine "its essential security interests". Second, GATT Article XXI does not have provisions to prevent abuse as in the chapeau of GATT Article XX, and thus each member country is granted broad discretion.

Unlike GATT Article XX, the interpretation of GATT Article XXI has never been presented to the Appellate Body in a WTO dispute settlement proceeding.

(b) Concrete Example

Although there have been no cases in which there has been a decision by a Panel or the Appellate Body involving GATT Article XXI, disputes involving import restrictions implemented for the purpose of security had been involved in the GATT prior to the coming into force of the WTO.[97] In addition, after establishment of WTO issues relating to measures implemented because of security concerns have been raised; they include the following:

i. Security Trade Control

Export restrictions on goods/technologies that can be used for the development of armaments and weapons of mass destruction are implemented in each country for the purpose of maintaining domestic and international peace and security. See Column "Security Trade Control" in Part III for details.

ii. Helms-Burton Act

The Helms-Burton Act, which imposes US economic sanctions against Cuba, was the only case in which WTO dispute settlement procedures were initiated in relation to GATT Article XXI. However, no Panel examinations took place and the Panel ceased to exist in 1998) (see "Unilateral Measures" in Chapter 3 "The United States", Part I of 2016 edition for details).

[97] As an example, the ban of exports to South Africa by the UN member countries following the adoption of the resolution condemning the policy of apartheid by South Africa and the resolution to prohibit export of arms, ammunition, and military vehicles by the United Nations Security Council in 1977 were cited ((GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition (1995) (P.605)). Another example was the import quota system for shoes introduced in Sweden in 1975, which was suspected of being inconsistent. Sweden claimed that the measure was intended to maintain domestic production capacity to prepare for a period of war and other emergencies in international relations, and thus was in line with the spirit of GATT Article XXI. However, many GATT member countries questioned the consistency of the measure with the Agreements, and the measure was abolished in 1977 (L/4250, L/4250/Add.1, L/4254).

iii. Import/Export Restrictions on Conflict Diamonds

Since 1998, the issue involving transactions of conflict diamonds that had been a funding source of anti-government forces in the Angolan Civil War has been a concern of the international community. In 2000 and 2001, the UN Security Council adopted resolutions to impose sanctions on Angola (Resolution 1173 (1998) and Resolution 1295 (2000)), Sierra Leone (Resolution 1306 (2000), Resolution 1343 (2001)), and Liberia (Resolution 1343 (2001)).

The Kimberley Process Certification Scheme for discussing regulations on transactions of rough diamonds was initiated in May 2002. As a result, a framework document proving a basic international certification system for international transactions of rough diamonds was agreed in November 2002, and the system came into force on January 1, 2003.

However, this system, which restricts imports of rough diamonds not consistent with the framework, was suspected of being inconsistent with the WTO Agreements, and Japan in cooperation with Sierra Leone proposed a waiver of most-favoured-nation treatment obligations (GATT Article I) and general elimination of quantitative limitations (GATT Articles XI and XIII) with regard to measures imposing total prohibition of imports/exports of diamonds to non-contracting party countries of the Kimberley Process Certification Scheme. The waiver based on Article IX:3 of the Agreement Establishing the WTO to exempt obligations of member countries under the WTO Agreement with the consent of member countries; see 2) (2) (d) of Chapter 1) was granted upon in February 2003; it is closely related to GATT Article XXI.

A waiver was used to resolve the issue because this measure was difficult to justify under GATT Article XXI for the following reasons: [1] With regard to subparagraph (b) of GATT Article XXI, the measure concerning local conflicts in remote locations might not be considered countries' "essential security interests", [2] with regard to (ii) of subparagraph (b) of GATT Article XXI, it is difficult to prove that traffic in conflict diamonds actually was a funding source of anti-government forces and thus it might not be considered "traffic … carried on … indirectly for the purpose of supplying a military establishment", and [3] with regard to subparagraph (c) of GATT Article XXI, the UN resolution only prohibited imports of conflict diamonds from Angola, etc., and thus total prohibition of imports/exports of conflict diamonds in non-contracting party countries of the Kimberley Process Certification Scheme might not be considered an "action in pursuance of its obligations under the United Nations Charter".

3. ECONOMIC VIEW AND SIGNIFICANCE

Justifiable reasons for GATT Articles XX and XXI play a role of coordinating the trade liberalization benefits with trade restrictions associated with the implementing of legitimate domestic policies.

The principles of trade liberalization described in each Chapter of Part II are established to secure economic rationality. However, even a measure that deviates from the principles of trade liberalization can still be justified if the objective of the measure is to achieve legitimate domestic policies. If justifications were accepted too easily, this would allow member countries to take arbitrary measures and might result in the free-trading system losing substance. Therefore, coordinating the interests of member countries and thereby establishing an effective free-trade system is an important element in application of these Articles.

MAJOR CASES

(1) US - Gasoline (DS2)

(See "US-Import Restriction on Gasoline" of 4. "Major Cases" in Chapter 2, Part II)

(2) US - Shrimp (DS56)

(See "(2) US - Import Restrictions on Shrimp and Shrimp Products" of 5. "Major Cases" in Chapter 3, Part II)

(3) EC - Asbestos (DS135)

(See "France's (EU) Ban on the Import and Distribution of Asbestos and Products Containing Asbestos" of 4. "Major Cases" in Chapter 2, Part II)

(4) US - Gambling (DS285)

(See "3) United States - Online Gambling Services" of 3. "Major Cases" in Chapter 12, Part II)

(5) Dominican Republic - Import and Sale of Cigarettes (DS302)

The Dominican Republic introduced this measure that required the affixation of tax stamps on the individual packages of both domestic and imported cigarettes under the supervision of tax authority inspectors within the Dominican Republic.

Jamaica, an exporting country of cigarettes to the Dominican Republic, requested WTO consultations in October 2003 claiming that this measure violated GATT Article III:4 on the grounds that although the measure seemingly imposed the same obligations on both domestic and imported products, additional costs were actually imposed only on imported products.

No agreement was reached in the consultations, and so DSB decided to establish a Panel in January 2004; the Panel sent the final report to member countries in November of the same year.

In the Panel examinations, the Dominican Republic claimed that the measure was consistent with GATT Article III: 4 and, if not, was justifiable under subparagraph (d) of GATT XX. The Panel determined that the measure resulted in less favourable treatment for imported products, and this constituted discrimination. The Panel then determined that the measure did not meet the "necessity" requirement under subparagraph (d) of GATT Article XX and so was not justifiable under that subparagraph.

In the determination of "necessity" by the Panel, Jamaica proposed a less trade-restrictive alternative measure of "distributing tax stamps to foreign importers and allowing them to affix the tax stamps on the products in foreign countries before exporting the products", but the Dominican Republic argued that it was not proven that the objectives could be achieved by this alternative measure.

The Dominican Republic appealed to the Appellate Body, but the Appellate Body supported the Panel decision and the decision became final.

(6) Brazil - Retreaded Tires (DS332)

(See "(3) Measures Relating to Brazil's Import of Recycled Tires" of 5. "Major Cases" in Chapter 3, Part II)

(7) China - Publications and Audiovisual Products (DS363)

(See "5) China - Regulations Related to Electronic Payment Services" of 3. "Major Cases" in Chapter 12, Part II)

(8) Colombia - Ports of Entry (DS366)

There were 26 customs ports used for international trade in Colombia, but imports of textiles, apparel and footwear were limited to 11 ports for the purpose of preventing customs fraud. The above-mentioned items from Panama (produced in Panama or imported from Panama) were further limited to the Bogotá and Barranquilla airports.

However, products from Panama imported to countries other than Colombia that went through Colombia for "transshipment" could go through any of the above-mentioned 11 ports.

Panama requested WTO consultations with Colombia, claiming that the measure violated GATT Articles I, X, and XI, but no agreement was reached in the consultations. A Panel was established in October 2007, and its final report was sent to member countries in April 2009.

In the Panel examinations, Colombia claimed that the measure did not violate the above-mentioned GATT Articles and, if it did, was justifiable under subparagraph (d) of GATT Article XX. The Panel determined that the measure violated the respective GATT Articles, and the measure did not meet the "necessity" requirement under subparagraph (d) of GATT Article XX, and thus was not justifiable.

(9) US - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381)

(See (3) of 2. "Major Cases" in Chapter 11)

(10) China - Raw Materials (DS394, 395, 398)

(See "(4) China - Measures relating to the export of raw materials" of 4. "Major Cases" in Chapter 3 "Export Restrictions" <Reference>, Part II)

(11) EC - Measures Prohibiting the Importation and Marketing of Seal Products (DS400, 401)

(See (6) of 2. "Major Cases" in Chapter 11 "Standards and Conformity Assessment Systems", Part II)

(12) India - Certain Measures Relating to Solar Cells and Solar Modules (DS456)

This is a case in which the U.S. claimed that measures taken by India to require local content regarding solar batteries and solar battery modules introduced in January 2010, were inconsistent with GATT Article III:4 and TRIMs Agreement Article 2.1, and requested consultations to India in April 2014. The panel report was made public in February 2016.

The panel found that the measures in this case were inconsistent with GATT Article III:4 and TRIMs Agreement Article 2.1. Furthermore, India claimed justification under GATT Article XX subparagraphs (d) and (j), arguing that these measures are taken to ensure continuous supply of available solar batteries, etc. to India's solar energy operators and achieved stable supply of green energy. In this regard, the panel found regarding subparagraph (j) that "supply shortage" here means (1) a situation in which a volume of supply to meet the demand cannot be procured regardless of if

the supply source is domestic or overseas (therefore, the "supply shortage" requirement cannot be satisfied for the sole reason that domestic production capacity is lacking), and (2) that, the risk of future supply shortage in case of no current supply shortage can satisfy the "supply shortage" requirement only when this risk is imminent. The panel accordingly concluded that the measures at issue do not fall under the purpose of subparagraph (j) "supply shortage." Furthermore, regarding subparagraph (d), as any relationship is not recognized that these measures are actually for ensuring compliance with legal obligations in various laws and regulations as India claims, the measures at issue do not meet the requirement of "to secure compliance with laws or regulations" under subparagraph (d).

Furthermore, regarding the necessity requirement under subparagraph (d) and the essentiality requirement under subparagraph (j), the panel found that the measures that do not meet the former requirement also do not meet the latter requirement either. Furthermore, the panel found that, the general analysis framework for the former requirement may also be applicable to the latter requirement, and, as it is not demonstrated that the measures at issue can ensure continuous access to available supply of solar batteries, etc., , the necessity requirement and the essentiality requirement are not fulfilled.

India filed an appeal in April 2016 and the Appellate Body published a report in September of the same year. The Appellate Body found that: (1) the analysis framework of both elements in GATT Article XX subparagraph (d), which are "whether measures were designed for the objective under subparagraph (d)" and "whether they are necessary for the objective under subparagraph (d)", applies to the analysis under subparagraph (j); that (2) in case it can be confirmed that the measures are incapable of achieving the regulatory objective in terms of "design" elements, it is not necessary to examine the necessity/essentiality requirements; and (3) the balancing process for the necessity requirement under subparagraph (d) (which include the examination of importance of objective, contribution to objective, trade restrictiveness, alternative measures) are also related to the analysis of the essentiality requirement under (j). Furthermore, the Appellate Body upheld the findings of the panel that the measures at issue do not satisfy the requirements under subparagraphs (d) and (j).

(13) Colombia - Import Restrictions on Textiles, Apparel and Footwear (DS461)

In this case, Panama claims that the compound customs system for textiles, apparel and footwear introduced by Colombia in January 2013, exceeds the concession rates and thus is inconsistent with GATT Article II, and requested consultations in June of the same year. The panel report was made public in November 2015.

The panel found that these measures are inconsistent with GATT Article II. Also, while Colombia claimed that the objective of these measures was to prevent money laundering using illegal importing (illegally cheap importing) and therefore the measures are justified under GATT Article XX (a), the panel found that it was not demonstrated that the measures are designed to prevent money laundering, even though prevention of money laundering is a policy with the objective of protecting public moral in Colombia.

The Appellate Body report was published in June 2016, and it stated that compound customs are not incapable of preventing money laundering, and found the relationship between the measures and the regulatory objective, but denied the necessity of the measures (whether the measures are necessary to achieve the objective). The Appellate Body then upheld the conclusion of the panel.

(For the compliance procedures in which GATT Article XI:1 was a major issue, see Part II Chapter 3 "Volume Restrictions" 2.Major Cases (5).)

(14) Brazil –Measures Concerning Discriminatory Taxation and Charges for Automobiles, etc. (Domestic-Product Preferential Subsidies) (DS472 & DS497)

Refer to Part I, Chapter 11 for the case and the main content of the notice.

In the panel procedures in this case, Brazil claimed (1) justification based on GATT Article XX (a) (public morals), arguing that the tax reduction measures on the condition of using domestic products for digital TV wireless frequency signal transmitters (PATVD Program) were necessary for the objective of correcting the digital divide (the difference between those who can and can't use information communication devices), and also that (2) the reduced tax measures on using domestic products related to automobiles (the INOVAR-AUTO Program) were necessary measures for the objective of improving automobile safety, reducing carbon dioxide output and securing oil resources and therefore, to be justified by Article 20 (b) (health protection) or (g) (securing natural resources).

While the panel admitted that, for the claims of subparagraphs (a) and (b), the alleged objectives were covered by objectives under these subparagraphs, and that the measures are related to the objectives, the panel rejected the justification as it did not find the necessity of the measures due to the fact that level of contribution of the measures had not been demonstrated, the level of trade restrictiveness was substantial, and the alternative measures (for example, tax reduction measures for products without discrimination between domestic or foreign manufacturing) may be available. Furthermore, the panel found that, for the claims of subparagraph (g), while the alleged objective may be covered by the objective under subparagraph (g), as there is no close and genuine relationship between the discriminatory nature of the measures and the objective of securing oil resources, the relationship requirement is not satisfied, and that the equivalence with domestic measures is not demonstrated either. Thus the panel rejected the justification under subparagraph (g) as well.

While this case was appealed, GATT Article XX was not at issue in the Appellate Body procedure.

(15) Indonesia - Import Restrictions on Horticultural Crops (DS477, 484) and Indonesia - Import Restrictions on Chicken Meat (DS480)

The panel in DS477/478 made findings on GATT Article XX (a), (b) and (d) (which were not appealed). The Appellate Body in the same case declared that the panel's findings regarding the application of the chapeau without finding regarding the application of each subparagraph are moot. Furthermore, the panel in DS480 made findings about GATT Article XX (b) and (d). (See Part II, Chapter 3 "Quantitative Restrictions" 2.Major Cases (7))

(16) EU - Measures related to Energy Industry (DS476)

The panel report made public in August 2018 made a finding regarding GATS Article XIV (a) (measures required to maintain public order) and GATT Article XX (j) (essential measures to acquire or distribute products with supply shortage). (For details, see Part II, Chapter 12, 7.Major Cases (7): (6)(b) the third-country certification measure by three countries, and (7) the TEN-E measure under the Gas Directive)

COLUMN:

SECURITY EXCEPTIONS: ARGUING POINTS IN INTERPRETATION OF GATT ARTICLE XXI

GATT Article XXI stipulates security exceptions. GATS Article XIV-2 and TRIPS Agreement Article 73 also stipulate security exceptions, based on GATT Article XXI. Furthermore, outside of the WTO Agreements, there are EPA/FTA and Investment Agreements that provide for security exceptions based on GATT and GATTS security exceptions (for example, TPP and the China - Japan - Korea, Republic of Trilateral Investment Agreement).

In the context of "Trade and Security," the focus of discussion used to be mainly on issues covered by the Foreign Exchange and Foreign Trade Control Laws, such as security export control and other export control measures. other However, recently the security exceptions were raised in several WTO dispute settlement cases. While there were judgments related to security in the international public law field, , in the WTO dispute settlement cases, no judgments had been made regarding the interpretation of ecurity exceptions, so future developments should be interesting. Based on the current situation, this column summarizes and introduces discussions in the WTO regarding the security exceptions.

1. Interpretation and Arguments in Security Exceptions

There should be no objections among Members that national security is essential for sovereign nations. Having said that, the historical background should be taken into consideration that the GATT framework was established after the WWII, in an attempt to maintain peace by encouraging economical interdependency. The Members considered that the free trade and non-discriminatory rules based on GATT and other WTO rules are essential to promote economically interdependent relationships between countries using trade, and thus built a framework based on such relationships that consequently contributes security. To put it another way, this scheme creates security by not imposing trade restrictions and from that perspective, the scope of trade restrictions recognized as security exceptions would have certain restraints.

There are two main discussion points around the security exception caluse. First there is the issue of whether or not the panel has the authority to review the alleged security exception claim and the second is how the security exception clauses should be interpreted.

Regarding the first issue, some Members, such as the U.S., takes the position that it is for the Member's to determine measures necessary to protect essential security interests at its own discretion and that the panel does not have the authority to review GATT Article XXI. From this perspective, when GATT Article XXI (Security Exceptions) is invoked to justify its measures, the panel can only find that the security exception was invoked, but cannot step in and determine whether or not the measures in question can be justified or not.

On the other hand, other Members such as the EU takes the position in a DS case currently in dispute that while GATT Article XXI provides a broad discretion of the invoking Member, the panel has the authority to review.[98] On the other hand, the U.S., for example, argued at the DSB meeting to establish panels regarding the U.S. measures on imported steel and aluminum under Section 232 of the Trade Expansion Act, that its measures can be justified pursuant to the security exception clause (GATT Article XXI) and that the WTO panel does not have the authority to review. [99]

With respect to the interpretation of the article (1) the scope of the terms "its essential security interests" and (2) the scope of subparagraphs (ii) and (iii) of Article XXI(b) for example are some relevant issues.[100]

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[98] See Ds 512, Oral statement submitted by EU para. 6 etc. （http://trade.ec.europa.eu/wtodispute/show.cfm?id=663&code=3）

[99] See the page 15 and below, U.S. statement in the DSB meeting in November 2018 （https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_.Stmt_.as-deliv.fin_.public.pdf）.

[100] See the page 210 and below, for overview about the GATT Article XXI.

For example, it could be useful to compare Articles XX (general exceptions) and XXI (security exceptions) of the GATT. Measures that are otherwise GATT-inconsistent cold be justified if either GATT Article XX or GATT Article XXI applies. Looking at the structure of the text, GATT Article XX justifies measures that are "necessary" for protection of public moral (Subparagraph (a)), ensuring compliance with law (Subparagraph (d))a legitimate policy objectives.[101] On the other hand, GATT Article XXI justifies measures that are "considered necessary" for the protection of essential security interests by the invoking Member. These differences in the terms used and the structures of the text could affect the interpretation of GATT Article XXI. Furthermore, although negotiation histories are merely considered to be supplementary to the Article interpretation under the Vienna Convention, it should be noted that GATT Article XXI was separated from the general exceptions, after formerly being part of the single Article text, in the process of drafting the Havana Charter, and that have been concerns about abuse of the security exceptions.

Looking at FTAs and EPAs, while there are security exception clauses similar in structure to GATT Article XXI, Subparagraph (b), there are security exceptions that only stipulate the chapeau portion of GATT Article XXI, Subparagraph (b). For example, the security exception of CPTPP (Article 29.2 (b)) that stipulates, "[Nothing in this Agreement shall be construed to:] preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." Only the chapeau portion of GATT Article XXI, Subparagraph (b) is similar, and Article XXI, Subparagraph (b) items (i) to (iii) are not stipulated therein. In this regard, it may be necessary to consider the meaning of the fact that Article XXI (b) provides subparagraph items (i) through (iii) e.

National security is important for sovereign countries, and thus decision regarding security interests should be respected and accordingly, certain discretion of the Members in this regard should be recognized. However, there is the risk of abuse if excessive security exceptions are allowed. If the security exception clauses such as GATT Article XXI are allowed, there is concern that it will cause world trade to contract, and there are apprehensions that it will hollow out the versatile trade system of which the WTO is the core.

2. DS Related to Security Exceptions

There are a few DS cases where the security exceptions became one of the issues after the transition to the WTO system. This is thought to be because apprehensions regarding abuse of security exceptions were shared between member countries, and it can be seen that each countries refrained from using the exceptions.

The first WTO DS case in which security exceptions were disputed was regarding the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. Concern was raised by the EC to this law due to the influence it had on EC products and services and the EC made a request to establish a panel (DS38). At the DSB meeting, the U.S. stated that the measure were taken for essential security purpose. It was expected that the security exception clause would become one of the issues, but the panel proceeding was suspended upon receipt of the request from EC in April 1997, and the panel lapsed the following year. Therefore, no panel hearing regarding security exceptions were held. Since then, there were no cases regarding security exceptions, until recently where there are several cases regarding security exceptions.

In this regard, the case brought to the panel by the Ukraine, which it made a request for consultation in September 2016 regarding certain measures regarding traffic in transit by Russia,

[101] See the page 191 and below, for interpretation regarding the necessity of measures based on GATT Article XX.

allegedly inconsist with GATT, etc. (DS512), is gaining attention due to the fact that Russia is invoking GATT Article XXI(b) (iii).[102] A panel was established in March 2017 regarding this case. Several third-party participants have made public its third-party submissions. From these submissions, it can be seen that the aforementioned arguments, that is whether or not GATT Article XXI is self-judging, and how Article XXI (b) (iii) should be interpreted are among the discussion points. Accordig to the WTO website, the Panel report for this case is expected to be sent out during the first quarter in 2019. The Panel report is to be made public after it is translated into the WTO official languages (English, French and Spanish). It is likely that this will be the first report on security exceptions and that determination will be worth watching.

In July 2017, Qatar requested consultation regarding the WTO-consistency (notably relating to GATT, GATS, TRIPS, etc.) of certain measures against Qatar by the UAE, Bahrain and Saudi Arabia (DS526, 527, 528). It is expected that security exception clauses will be one of the issues. Qatar has only requested a panel establishment in the case against the UAE, for which a panel was established in November 2017 and panel proceedings are held. (Contrary, Qatar has not requested the establishments of panels regarding the cases against Bahrain and Saudi Arabia.)

In 2018, China, the EU, Norway, Canada, Mexico, Turkey, Russia, India and Switzerland each made a request for consultation regarding the Section 232 measures on imported steel and aluminum, and panels were established in October 2018 (November for India and Switzerland). At the DSB meeting, the U.S. repeated its position stating, that it is not the role nor within the authority of the WTO to make a judgment regarding essential security interests for sovereign nations.

In light of the above, at a Wall Street Journal event in December 2018, the WTO Director-General Azevêdo noted concerns in entrusting judgments regarding security interests to the panel consisted of three trade experts, and commented that it was too risky to bring Section 232 measures regarding steel and aluminum imports to the WTO dispute settlement proceedings, which the U.S. are claiming security exceptions,.

As stated above, the panel report on security exceptions in the Russia – Ukraine case is to becirculated in due course. Due attention should be paid to the Panel report and its implication to the Section 232 measures.

[102] See the following documents: Summary of USTR (https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Exec.Summ.fin.%28public%29.pdf）; EU Opinion (http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156603.pdf）; Australian Opinion (https://dfat.gov.au/trade/organisations/wto/wto-disputes/Documents/ds512-australias-third-party-oral-statement-240118.pdf) etc.