

COLUMN: SECURITY EXCEPTIONS –INTERPRETATION OF GATT ARTICLE XXI

As mentioned in the 2019 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, EPA/FTA and IIA – (hereinafter the “2019 Report”), in recent years, the cases pertaining to security exceptions are under review in the WTO dispute settlement procedures. In April 2019, the WTO panel found that measures which were alleged to be inconsistent with the GATT 1994 are justifiable under Article XXI of the GATT 1994⁹⁰. This ruling has recently attracted considerable attention as the first case interpreting Article XXI of the GATT 1994 (Security Exceptions), since the WTO was established. This column discusses and introduces the current discussions in the WTO concerning the security exception, particularly focusing on the developments over the past year.

1. SECURITY EXCEPTIONS – INTERPRETATION AND ISSUES

As mentioned in the 2019 Report, the discussions on national security can be broadly divided into two issues: (i) whether a panel is authorized to review the provision on security exceptions in WTO dispute settlement procedures (the jurisdiction of the panel), and (ii) how the provision on security exceptions should be interpreted (the interpretation of the provision).

With respect to (i), some Members, including the United States, have argued that the Members have discretion to take measures that they consider necessary for security purposes, which should be respected and that the panel does not have jurisdiction to review Article XXI of the GATT. The United States actually made clear that position in a DS case, which was filed by several countries regarding its measures under Section 232 of the Trade Expansion Act on imports of steel and aluminum: the United States argued that Article XXI of the GATT (Security Exceptions) is a “self-judging” clause and that the panel should only be able to find that Article XXI was invoked by the imposing Member but is not authorized to review any further⁹¹. Russia (which was the respondent in that case) also presented similar arguments with regard to the measures concerning traffic in transit by Russia (DS512, “*Russia – Traffic in Transit*”) discussed in 2. below⁹².

On the other hand, some Members, including the EU, have taken the position in pending DS cases that Article XXI of the GATT 1994 grants Members a broad degree of discretion in the application of

⁹⁰ Measures concerning traffic in transit by Russia (WT/DS512/R, issued on April 5, 2019). Neither Ukraine (the complainant) nor Russia (the respondent) appealed the determinations of the panel, and thus it was adopted in a DSB meeting held on April 26, 2019.

⁹¹ Please refer to USTR opinions in DS cases relating to the measures of Article 232 on steel and aluminum imports: <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products> (petitioned by China), <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products-1> (petitioned by EU), <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products-0> (petitioned by India), <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products-2> (petitioned by Norway), <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products-3> (petitioned by Russia), <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products-4> (petitioned by Switzerland), and <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes/certain-measures-steel-and-aluminum-products-5> (petitioned by Turkey).

⁹² Please refer to page 15 onwards of the statement of the United States in the DSB meeting held on November 2018 (https://geneva.usmission.gov/wp-content/uploads/sites/290/Nov21.DSB_Stmt_as-deliv.fin_public.pdf).

the said Article, but that the panel has jurisdiction over the review⁹³. As detailed below, the panel in *Russia – Traffic in Transit* (DS512) took the same position, stating that the panel was authorized to review whether the measures in question could be justified under Article XXI of the GATT 1994, and rejected Russia's arguments.

With respect to (ii) (the interpretation of the provision), it entails issues of how to interpret the text of the provision in respect of (x) the scope of “essential security interests”, and (y) the scope of subparagraphs (ii) and (iii) of Article XXI(b) of the GATT⁹⁴. The panel's finding on these issues in *Russia – Traffic in Transit* (DS512) is explained in detail in 2. below.

2. STATUS OF DS CASES RELATING TO SECURITY EXCEPTIONS

Since the transition to the WTO, there have been several cases in the dispute settlement procedures where the issue of security exceptions was raised⁹⁵. However, the Members shared the concern that the security exception clause could be abused, and thus used it in a restrictive manner. The panel in *Russia – Traffic in Transit* presented its interpretation on Article XXI of the GATT for the first time in the WTO.

In that case, Ukraine had requested consultations in September 2016 with respect to the measures taken by Russia for prohibiting and restricting traffic of goods from Ukraine to Central Asia through Russia. Ukraine argued that such measures were inconsistent with Article V of the GATT 1994 (Freedom of Transit), while Russia argued that such measures were justified under the GATT 1994 because they were “measures taken in time of war or other emergency in international relations” (Article XXI(b)(iii) of the GATT 1994)⁹⁶.

The panel was established in March 2017, and a total of 17 countries, including Japan, United States and the EU, participated as third parties. The panel was comprised of three members: Mr. Georges Abi-Saab (being the chairperson of the panel, who is a former member of the Appellate Body and is familiar with public international law), Mr. Ichiro Araki and Mr. Mohammad Saeed.

In the panel report circulated in April 2019, the panel determined that (i) the panel was authorized to determine whether the measures disputed in the case could be justified under Article XXI of the GATT 1994 (Security Exceptions), and (ii) Article XXI(b)(iii) of the GATT 1994 is not totally self-judging, but rather is subject to objective assessment by the panel. Given that, in light of the international situation between Russia and Ukraine, which was triggered by the Crimean crisis, the Panel find that the measures at issue fall under subparagraph (iii) of Article XXI of the GATT 1994.

As discussed above, Russia argued that measures considered necessary for the protection of its essential security interests should be self-judging on the grounds of the Article XXI(b). However, this was expressly rejected by the panel, which stated that the Panel has jurisdiction over Article XXI of the GATT 1994. Focusing on the “self-judging” term “consider” used in the chapeau of Article XXI (b), the panel stated that Members are given the discretion to take security measures, but those measures must fall under either of the subparagraphs of Article XXI(b), and given that at least Article XXI(b)(iii) provides for an objective situation, the panel should be able to make an objective

⁹³ Please refer to paragraph 6 of the Oral Statement submitted by the EU in DS512.

(<http://trade.ec.europa.eu/wtodispute/show.cfm?id=663&code=3>).

⁹⁴ Please refer to page 225 onwards for the overview of Article XXI of the GATT.

⁹⁵ The details of this case are discussed in an article in the 2019 Report.

⁹⁶ Please refer to the summary of the USTR opinion (<https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Exec.Summ.fin.%28public%29.pdf>), the opinion of the EU (http://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156603.pdf) and the opinion of Australia (<https://dfat.gov.au/trade/organisations/wto/wto-disputes/Documents/ds512-australias-third-party-oral-statement-240118.pdf>).

assessment on whether the subparagraph is met. As described above, the panel in *Russia – Traffic in Transit* found that the relationship between Russia and Ukraine in 2014 constituted an emergency in international relations and therefore confirmed that subparagraph (iii) of Article XXI(b)(iii) is met.

The panel stated that the “‘essential’ security interests” provided in the chapeau of Article XXI(b) is a narrower concept than “security interests” and that its interpretation can vary depending on the specific circumstances or the circumstances surrounding the Members. While the panel stated the meaning of the term “essential security interests” and suggested that the term “consider” qualifies the term “necessary”, the panel also found that the Members is subject to good-faith obligations pursuant to the Vienna Convention on the Law of Treaties. The panel indicated that it can review whether the decision of a Member under Article XXI was made “in good faith”.

Apart from the above case, security exceptions are expected to be a central issue in the cases where Qatar has requested for consultation alleging that the economic sanctions implemented on Qatar by the United Arab Emirates (UAE), Bahrain and Saudi Arabia are inconsistent with the GATT 1994, GATS, TRIPS and other agreements (DS526, 527 and 528). At present, the panel is proceeding only with the case relating to the measures taken by UAE, and according to the WTO’s website, the panel report is expected to be issued to the parties to dispute by mid-2020, and would be circulated after it is translated into WTO’s official languages⁹⁷. (As for the cases relating to the measures taken by Bahrain and Saudi Arabia, no request for the establishment of a panel has been made yet.)

The security exception will also be a central issue in the cases concerning the measures taken by the United States pursuant to Section 232 of the Trade Expansion Act for imports of steel and aluminum, raised by China, the EU, Norway, Turkey, Russia, India and Switzerland. The panel was established in October 2018 (and in November 2018 for the cases of India and Switzerland) and the proceedings are ongoing. According to WTO’s website, the panel report is expected to be issued to the parties to dispute by autumn of 2020, and would be circulated after it is translated into WTO’s official languages⁹⁸. As mentioned in the 2019 Report, at a Wall Street Journal event held in December 2018, Mr. Azevedo, Director-General of WTO (at the time), expressed his concerns that it had been left to three panelists, who are trade experts, to decide what constitutes the “security interests” of Members, and that it would be risky to challenge, in WTO’s dispute settlement system, the Section 232 measures for imports of steel and aluminum that the United States alleges falls under the security exception. We will keep our eyes on the decisions in each of these cases.

⁹⁷ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm

⁹⁸ Canada and Mexico also made similar requests for consultation and for the establishment of a panel, but have since informed the panel that they reached a satisfactory settlement with the United States in May 2019, and the dispute settlement proceedings were completed. On the back of this settlement, each of Canada and Mexico reached an agreement with the United States to exempt them from the Section 232 measures, to withdraw their rebalancing measures against the United States and to discontinue the pending WTO dispute settlement procedures in relation to the Section 232 measures. Please also refer to USTR’s press release on bilateral agreements (<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/may/united-states-announces-deal-canada-and>), the agreement between the United States and Canada (https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Canada.pdf) and the agreement between the United States and Mexico (https://ustr.gov/sites/default/files/Joint_Statement_by_the_United_States_and_Mexico.pdf).