COLUMN:
SECURITY EXCEPTIONS –INTERPRETATION OF GATT ARTICLE XXI AND RECENT WTO PRECEDENTS

Security exceptions under the WTO Agreement (Article XXI of the GATT, etc.) have already been discussed in a column of the 2019 and 2020 Reports on Compliance by Major Trading Partners with Trade Agreements – WTO, EPA/FTA and IIA. In 2022, a series of the dispute settlement panel's decisions on security exceptions was published, and there is also a growing conflict of opinion among Members as to whether thier measures can be justified by security exceptions. This column reviews and introduces the current discussions within the WTO concerning the security exception.

1. ISSUES ON SECURITY EXCEPTIONS

Issues on interpretation of security exceptions can be broadly divided into two categories: (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 and what measures should be justified (the interpretation of the provision).

With respect to (I), recent decisions of the dispute settlement panels affirm the jurisdiction of the panel. Some Members, including the United States, have argued that the discretion of the Members should be respected regarding taking measures that they consider necessary for security purposes and that since Article XXI of the GATT (Security Exceptions) is a "self-judging" clause, the panel should only be able to find that Article XXI has been invoked by the Member that has imposed the measure ("Imposing Member") but is not authorized to review any further. However, there is no panel decision that conforms with such position.

With respect to (II) (the interpretation of the provision), it entails various issues, including the scope of the measures included in subparagraphs (ii) and (iii) of Article XXI(b) of the GATT, the nature of "essential security interests" under the chapeau of Article XXI(b) of the GATT, and the necessity and extent of the explanation of the term "necessary" for the measures in question. In the recent panel precedents introduced below, the relevance of "any action taken in time of war or other emergency in international relations" in Article XXI(b)(iii) of the GATT was an issue. With respect to the terms "essential interests" and "necessary," some panels required the Imposing Members to give certain explanations on the basis of the principle of good faith in the interpretation of treaties (Articles 26 and 31 of the Vienna Convention on the Law of Treaties), while respecting the discretion of the Imposing Member when Article XXI was invoked.

The applicable panel findings are explained in detail below.

2. PANEL PRECEDENTS RELATING TO SECURITY EXCEPTIONS

(1) RUSSIA – TRAFFIC IN TRANSIT (DS512)

This is the first panel decision on the interpretation of Article XXI of the GATT. Ukraine requested WTO consultations in September 2016 with respect to the import restriction measures taken by Russia (prohibiting and restricting traffic of goods from Ukraine to Central Asia through Russia), arguing that such measures were inconsistent with Article V of the GATT (Freedom of Transit), while Russia argued that such measures fell under the category of "any action taken in time of war or other emergency in international relations" (Article XXI(b)(iii) of the GATT) and that they were outside the scope of the panel's review. The panel report was circulated in April 2019.

The panel affirmed that (I) the panel is authorized to review Article XXI of the GATT. Russia argued that whether measures were considered necessary for the protection of its essential security interests should be self-judging on the grounds of the chapeau of Article XXI(b). However, 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 assessment on whether the subparagraph is met.

The panel stated that the phrase "emergency in international relations" under Article XXI(b)(iii) of the GATT refers to the instability (such as armed conflict) arising against the defense and military interests of Members. In light of the international situation between Russia and Ukraine, which was triggered by the Crimean crisis, the panel found that the measures at issue fell under subparagraph (iii) of Article XXI of the GATT. 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 could 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 are subject to good-faith obligations pursuant to the Vienna Convention on the Law of Treaties. The panel indicated that it could review whether the decision of a Member under Article XXI was made "in good faith."

Neither party appealed the case, and the panel report was adopted by the DSB.

(2) Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights (DS567)

Against the backdrop of the so-called Qatar crisis (an incident in which neighboring Arab countries objected to Qatar being conciliatory toward Hamas and Iran, leading to the severance of diplomatic relations in some countries), the intellectual property rights of a Qatar broadcasting company were openly infringed in Saudi Arabia (conducting pirate broadcasting) and access to judicial remedies in Saudi Arabia by the Qatari company was obstructed (rejection of civil suits, inapplicability of criminal penalties, etc.). In October 2018, Qatar requested WTO consultations on these issues, arguing that they were inconsistent with the TRIPS Agreement. Saudi Arabia claimed to invoke security exceptions under Article 73 (b)(iii) of the TRIPS Agreement. The panel report was circulated in July 2020.

The panel affirmed that (I) the panel was authorized to review the case. Saudi Arabia argued that the panel should refrain from reviewing the case because the case was "a political, geopolitical and essential security dispute" and there could not be "a satisfactory settlement of the matter" (Article 3.4 of the DSU). However, the panel stated that the issue to be resolved in this case was the issue put in its terms of reference and that it had not been asked to make any findings on any wider dispute between the parties, and therefore affirmed its jurisdiction.

With respect to (II) the relevance of security exceptions, the panel found, with respect to the relationship between "essential security interests" under the chapeau of Article 73(b) and the relevant actions, that it should make a finding by assessing whether it was implausible that the relevant actions were for the protection of the "essential security interests." The panel further found that while it was not implausible that the denial of the Qatari company's access to civil judicial procedures (such as the use of Saudi lawyers) was for protection purposes, the non-application of criminal procedures and penalties to pirate broadcasting was so remote from an "emergency in international relations" and could not be justified. There was no dispute between the parties that the relevance of Article 73 (b)(iii) of the TRIPS Agreement was at issue in this case and that the panel findings of DS512 described above regarding the interpretation of Article XXI(b)(iii) of the GATT should be followed in the consideration of the issue. On that basis, the panel found that the severance of diplomatic, consular and economic relations in the

Qatar crisis fell under the category of "time of war or other emergencies in international relations" under Article 73 (b)(iii) of the TRIPS Agreement and that protecting its national security from the dangers of terrorism and extremism as alleged by Saudi Arabia fell under the category of "essential security interests" under the chapeau of Article 73(b). However, the panel found, with respect to the term "necessary" for the relevant actions in relation to the "essential security interests," that although it was not implausible that the denial of the Qatari company's access to civil judicial procedures (such as the use of Saudi lawyers) was necessary, the non-application of criminal procedures and penalties to pirate broadcasting was so remote from an "emergency in international relations" and the necessity thereof could not be recognized.

Saudi Arabia appealed this decision (July 2020). However, following the suspension of the appeal proceedings, the dispute was terminated by the agreement of the parties and the panel report was not adopted.

(3) United States – Certain Measures on Steel and Aluminum Products (DS544, 552, 556 and 564)

Nine countries requested WTO consultations on duties and related measures imposed by the United States on steel and aluminum imports under Section 232 of the Trade Expansion Act (the imposition of additional tariffs was commenced in March 2018). The panel reports were circulated in December 2022 for four cases (complainants: China, Norway, Switzerland and Turkey). In all four cases, the panelists were the same, the panel schedules were similar, and the conclusions were almost the same. However, there were some differences in the subjects and the facts found.

With respect to (I) the jurisdiction of the panel, the United States argued that the panel was not authorized to review the case since the word "consider" in the chapeau of Article XXI(b) applied to the entirety of Article XXI(b), including subparagraphs (i), (ii), and (iii), and the requirements of Article XXI(b) were satisfied only by the Imposing Member "considering" to that effect. However, the panel analyzed the grammatical structure of the relevant clauses and held that the word "consider" expressed the discretion regarding the measures necessary to protect essential security interests and that each of the subparagraphs limited the circumstances in which such discretion might be exercised, and therefore, the relevance of each of the subparagraphs was subject to the panel's objective examination.

With respect to (II) the relevance of security exceptions, the United States initially did not explain the relevance of Article XXI(b) to the specific subparagraphs on the basis of its interpretation that Article XXI(b) has a self-judging nature (although subparagraph (b)(iii) was later invoked). The panel found that the measures taken by the United States pursuant to Section 232 relied on the "emergency in international relations" requirement under Article XXI(b)(iii) based on the evidence, such as the domestic documents at the time the measures pursuant to Section 232 were triggered. The panel then found that an "emergency in international relations" must be comparable to a war in terms of its gravity or severity, and that the global excess capacity in steel and aluminum and the adverse impact on the domestic industry recognized by the United States at the time the measures were triggered did not fall under this category and could not be justified under Article XXI(b)(iii).

The United States appealed all panel reports[1].

(4) United States – Origin Marking Requirement (DS597)

The United States allowed Hong Kong products to be marked to indicate that their origin was "Hong

[1] With respect to the measures pursuant to Section 232, there are other cases in which panel proceedings are ongoing (DS547 (Complainant: India), DS554 (Complainant: Russia)), and the date of circulation of the panel findings has not been determined.

Kong" even after Hong Kong's return to China. However, in July 2020, the US president issued an Executive Order and determined that Hong Kong was no longer "sufficiently autonomous to justify differential treatment in relation to China" and suspended the previous treatment, and required Hong Kong products to be marked to indicate that their origin was "China." In response to this, Hong Kong requested WTO consultations in October 2020, arguing that such measures were inconsistent with Article IX:1 of the GATT, etc. The panel report was circulated in December 2022.

With respect to (I) the jurisdiction of the panel, the United States argued that Article XXI(b) had a self-judging nature and the panel was not authorized to review the case on the basis of its interpretation that the word "consider" in the chapeau of Article XXI(b) applied to the entirety of Article XXI(b), including subparagraphs (i), (ii), and (iii). However, the panel found that although the Imposing Member had discretion based on the word "consider," the word "consider" did not cover the subparagraphs, and that the relevance of each of the subparagraphs was subject to the panel's objective examination.

With respect to (II) the interpretation of the relevant provision, the United States initially did not explain the relevance of Article XXI(b) to the specific subparagraphs. However, the United States argued during the panel process that the information it provided to the panel could be understood to relate most naturally to the circumstances described in Article XXI(b)(iii). Under these circumstances, the panel interpreted the term "emergency in international relations" to refer to "a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation representing a breakdown or near-breakdown" and found that an emergency did not necessarily involve defense and military interests and each situation needed to be considered on a case-by-case basis. With respect to the situation in Hong Kong which triggered the measures in this case, although the panel recognized some effects on international relations, such as export control and refugee applications, it found that the situation was not close to the collapse of international relations. Therefore, the panel ruled that Article XXI(b)(iii) did not apply in this case.

3. Future Developments and Considerations

As described above, there is an increasing number of conflicting views among Members as to whether their measures can be justified by security exceptions. It should also be noted that the scope of security is rapidly expanding to the economic and technological fields. Depending on the nature of the measures, the need to respect the discretion of the Imposing Member may be acceptable, while it is still important to prevent abuse of security exceptions. In this regard, it is necessary to pay close attention to future discussions among Members and panel findings in relevant dispute cases.