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Security Exception Clauses under Free Trade Agreements

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Trade restrictive measures for the sake of a country's own national security are, as it appears, contrary to the spirit of free trade. Making exceptions to such measures requires a reason. Article XXI of GATT plays a central role in this regard. However, there is a strong critical view of this provision (and its interpretation), and there are moves to establish different rules. A typical example is the security exception clause in US FTAs. This paper discusses how the security exception clause is developed in the WTO and FTAs, and how its development in FTAs affects Article XXI of GATT.

Introduction

In modern international trade, which is regulated by the World Trade Organization (WTO), any restriction of trade on security grounds requires justification by Article XXI of the General Agreement on Tariffs and Trade (GATT). This article has been in "hibernation" for a long time since GATT was first applied in 1948. This is because the clause is extremely notional and the situations in which it is invoked involve multifaceted issues that go beyond trade issues, so countries have avoided its invocation with restraint.[1] However, since the Trump administration came into office in 2017, there have been increasing opportunities to rely on this provision (e.g., increased tariffs on steel and aluminum under Section 232 of the Trade Expansion Act of 1962[2]). The introduction of economic sanctions following the Russian invasion of Ukraine in 2022 and the emergence of the "economic security" concept could further spur this issue.

Against this backdrop, this paper will discuss security exceptions, but particularly it will focus on those in free trade agreements[3] (FTAs), since there are numerous articles on security exceptions in the WTO. In fact, while the security exceptions in the WTO agreements is increasingly receiving

[1] Kazeki (2016) p. 58, Bacchus (2022) p. 1.
[2] The measure became effective on March 23, 2018. The WTO Panel's decision on this measure (finding the inconsistency with Article XXI of GATT) was published on December 9, 2022.See, *infra* note 9.
[3] In this paper, free trade agreements refer to agreements on trade between two or more countries and are used in a broader sense than "customs union" or "free trade area" as defined in Article XXIV of GATT.

attention, security exceptions in FTAs are showing different developments from those in the WTO agreements. This paper will review the status of such provisions in FTAs, which have not received much attention, and examine their significance.[4]

2. Development of the security exceptions clause in the WTO agreements

Although it was noted that the security exceptions clause (Article XXI of GATT[5]) came to attention after the Trump administration came into office, it was *Russia – Traffic in Transit*, a dispute between Russia and Ukraine that was notified to the WTO in 2016, that triggered an earnest discussion on the clause.[6] The second case in which the security exceptions clause was applied to a dispute was *Saudi Arabia – IPRs*, a dispute between Saudi Arabia and Qatar.[7] Thus, it is by no means a clause that has been exclusively applied by the US.[8] It had been attracting increasing international attention. Since the two aforementioned cases, two Panel decisions have been issued both in December 2022: one on a measure taken under Section 232 of the US Trade Expansion Act, and another on a measure requiring products manufactured in Hong Kong to be marked as made in "China" (respectively, *US – Steel and Aluminum Products*[9] and *US – Origin Marking*[10]), bringing to four the number of cases in which the Panel issued a decision with respect to Article XXI of GATT.[11]

Before further discussing *Russia – Tariff in Transit*, which ushered in a series of discussions, let us elaborate on Article XXI of GATT. The article provides as follows:

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[4] See Abe (2022) for a preceding study that typifies security exception clauses in FTAs.

[5] Security exception clauses are also provided in the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which differ little from GATT in content, but Article XIV bis of GATS includes "fusionable materials" in addition to "fissionable materials."

[6] Panel Report, *Russia - Traffic in Transit,* WT/DS512/R, adopted 26 April 2019.

[7] Panel Report, *Saudi Arabia - IPRs*, WT/DS567/R, circulated 16 June 2020, not yet adopted. Note that although the case was appealed by Saudi Arabia to the dysfunctional Appellate Body (28 July 2020), the termination of the dispute was notified on 21 April 2022, and the Panel's decision was not adopted in the end.

[8] Japan was also in a situation where it was placed in the middle of the Article XXI of GATT fiasco, as a complaint to the WTO was filed by Korea against the review of export controls announced on July 1, 2019 (DS590). Currently, the WTO proceedings are in a state of no progress (no Panelists have been selected), and there is no immediate progress in the discussions and developments regarding Article XXI of GATT.

[9] Four reports have been published on the case, filed by China, Norway, Switzerland, and Türkiye, but this paper focuses mainly on the report filed by China (Panel Report, *US - Steel and Aluminum Products (China)*, WT/DS544/R, circulated 9 December 2022, not yet adopted).

[10] Panel Report, *US - Origin Marking (Hong Kong, China)*, WT/DS597/R, circulated 21 December 2022, not yet adopted.

[11] Although there have been several disputes in which Article XXI of GATT was raised as an issue throughout the GATT and WTO periods, *Russia-Tariff in Transit* can be said to be the first case in which a decision was clearly expressed by the Panel. See, for example, Kazeki (2016), p. 45ff, for discussions prior to that case.

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.

What is important in this article is that the chapeau of Article XXI(b), which stipulates that the introduction of measures that "*a contracting party* considers necessary for the protection of its essential security interests" is allowed (emphasis added by the author). In other words, since the subject of the sentence is a contracting party (WTO Member), it can be understood that it is the contracting party initiating the measure that can determine the significance and necessity of the measure in question. Even if a dispute arises, other WTO Members or WTO bodies for dispute settlement (i.e., the Panel or Appellate Body) cannot review the appropriateness of the measure (argument of justiciability[12]).

In *Russia – Tariff in Transit*, the issue was whether Russia's measures restricting the transit of goods from Ukraine through its territory in response to the annexation of Crimea and other international tensions that arose in 2014 constituted measures "taken in time of war or other emergency in international relations" under Article XXI(b)(iii). The Panel held that the scope of subjective decisions by Members is limited to the chapeau of Article XXI(b)[13] and that the applicability of "in time of war or other emergency of international relations" referred to in subparagraph (iii) is to be determined objectively by the Panel.[14] On that premise, the Panel in this

[12] For example, Horimi (2019), p. 340ff.
[13] Panel Report, *Russia - Traffic in Transit, supra* note6, paras. 7.131 and 146.
[14] *Ibid.*, paras. 7.71, 77, 82, and 101.

case found that the international developments involving Russia and Ukraine since 2014 constituted a "time of … emergency in international relations"[15] and that Russia's measures could be said to be "necessary for the protection of its essential security interests."[16]

The Panel's decision, in essence, limited the scope of judgment that WTO Members could make on their own. Although the judgment of the Member on whether the measure in question is necessary for the protection of its essential security interests is to be respected, the question of whether the measure is taken in time of war or other emergency in international relations is to be determined objectively by the Panel. This was an unacceptable decision for the US (although it was not a party to this case), which had insisted that the judgment of the country invoking Article XXI of GATT should be thoroughly upheld.[17]

In the three subsequent cases, the Panel adopted the same interpretive approach that self-judgment by the country introducing the measure is allowed only with respect to the chapeau of Article XXI(b), and that determination under the provisions of subparagraphs (i) through (iii) is made objectively.[18] In *Saudi Arabia – IPRs*, the Panel affirmed the applicability of the "emergency of international relations" in the Qatar crisis, in which neighboring countries, including Saudi Arabia, severed diplomatic relations with Qatar.[19] Conversely, in *US – Steel and Aluminum Products*, the Panel concluded that the following claims made by the US did not establish a severe situation anticipated as a case of "emergency in international relations": (1) the displacement of domestic steel and aluminum production by excessive imports, (2) the consequent adverse impact on the economic welfare of the domestic steel and aluminum industry, and (3) the emergence of global excess capacity in steel and aluminum.[20] Similarly, in *US – Origin Marking*, the Panel deemed that

[15] *Ibid.*, paras. 7.122-123.
[16] *Ibid.* paras. 7.145 and 148.
[17] In fact, at the Dispute Settlement Body meeting for the adoption of this Panel report, the US strongly criticized the report, describing it as containing "seriously flawed." WTO Dispute Settlement Body (2019), para. 8.11.
[18] Panel Report, *Saudi Arabia – IPRs*, *supra* note 7, paras. 7.244-246; Panel Report, *US – Steel and Aluminium Products (China)*, *supra* note 9 , paras. 7.128 and 145; Panel Report, *US – Origin Marking (Hong Kong, China)*, *supra* note 10 , para. 7.185.
[19] Panel Report, *Saudi Arabia - IPRs*, *supra* note 7 , para. 7.268. However, it rejected the justification under that provision for the failure to apply criminal proceedings or criminal penalties to piracy of Qatari company's copyrighted materials by a Saudi entity, on the grounds that the conduct had nothing to do with the protection of "essential security interests." *Ibid.*, para. 7.293.
[20] E.g., Panel Report, *US – Steel and Aluminium Products (China)*, *supra* note 9, paras. 7.142, 146-148. More precisely, of the three elements listed by the United States, it states that (1) and (2) are elements concerning the domestic situation, relating more to "action which it considers necessary for the protection of its essential security interests." It identified point (3) as an element that, while of international concern, does not lead to an "emergency in international relations."

the situation surrounding Hong Kong from 2019 to 2021, while causing tension and concern at the international level, did not reach such a level of severity as to constitute an "emergency in international relations."[21]

3. Security exception clauses in FTAs

Unlike the Panel decisions described above, the US[22] has almost consistently adopted provisions in FTAs that it has concluded, in which the security exception clauses respect the judgment of the country invoking the measure. A specific example is Article 29.2 of the Trans-Pacific Partnership (TPP) Agreement (which the US eventually did not join).[23] The agreement provides as follows:

> Nothing in this Agreement shall be construed to:
>
> (a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
>
> (b) 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.

As can be seen by comparing the wording of this article with the equivalent article of GATT, (1) provisions corresponding to subparagraphs (i) through (iii) of Article XXI(b) of GATT were not included; (2) the wording in which the phrase "[a Party] considers necessary" encompasses the entire provision of paragraph (b) has been adopted; and (3) measures for the purpose of international peace etc. are now allowed to be adopted as "fulfillment of [the Party's] obligations" even if they are not necessarily based on the Charter of the United Nations. As for (1), since subparagraphs are considered an exhaustive enumeration in Article XXI of GATT[24], their deletion means that the adoption of measures can be permitted for a wide range of reasons.[25] And as for (2), since the words "[a Party] considers necessary" takes up almost the entire article, the subjective decision of the Party introducing the measure can be readily upheld even when it introduces a

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[21] Panel Report, *US – Origin Marking (Hong Kong, China)*, *supra* note 10, para. 7.353. It is noteworthy that in this case, the EU also submitted an opinion stating that the case falls under the category of "emergency in international relations." *Ibid.*, para. 7.321.

[22] The US has been highly critical of the WTO Panel's interpretation to date, E.g., USTR (2022).

[23] Since the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP) incorporates the TPP Agreement (Article 1), "TPP Agreement" is used in this paper as an expression to mean the TPP Agreement as incorporated into the CPTPP.

[24] E.g., Panel Report, *US - Steel and Aluminium Products (China)*, *supra* note 9, para. 7.113. It is noted here that the US itself agrees to an exhaustive nature of the enumeration.

[25] Japan Tariff Association (2019), p. 953.

measure on the basis of the elements enumerated in (i) through (iii) in Article XXI(b) of GATT.[26] Taking into account the overall situation, including the absence of reference to the UN Charter, it can be said that the US FTAs have expanded the scope of the security exception clause and the discretion of the country introducing the measure.[27]

US FTAs that adopt similar provisions to the TPP Agreement are listed in the Box 1 below. The exceptions are limited to those that have been concluded some time ago, such as the US-Israel FTA and the US-Jordan FTA.[28] The FTAs signed after these predecessors have consistently adopted provisions respecting the judgment of the parties. Furthermore, for some of the FTAs concluded by the US (the underlined agreements in Box 1), there is a footnote stating that "the tribunal or panel hearing the matter shall find that the exception applies" if security concern is invoked in the dispute settlement procedure of the FTA. This is understood to mean that when the security exception clause is applied, the arbitral tribunal or Panel will affirm the application of the provision of the article without an examination based on the provision of the article.[29] If this is the case, self-judgmentality could be particularly respected in those agreements.[30]

Box 1: US FTAs with Security Exception Clauses Respecting Parties' Judgements

US-Chile FTA (Article 23.2), US-Singapore FTA (Article 21.2), US-Australia FTA (Article 22.2), US-Morocco FTA (Article 21.2), CAFTA-DR (Article 21.2), US-Bahrain FTA (Article 20.2), US-Oman FTA (Article 21.2), US-Peru (Article 22.2), US-Korea FTA (Article 23.2), US-Colombia FTA (Article 22.2), US-Panama FTA (Article 21.2), Article 4(b) of the US-Japan Trade Agreement, United States-Mexico-Canada Agreement (Article 32.2):

13 FTAs in total

[26] For a similar assessment of the security exception clause in the USMCA, see Gantz (2020) p. 214; Ouellet (2022) p. 229.

[27] On the other hand, there is room for a narrower interpretation of the article. On this point, see Kawase (2022), p. 66. Note that Article 28.12(3) of the TPP Agreement, which calls for consideration of the relevant interpretation of provisions in the WTO agreements, may also—although the provision only refers to provisions of the WTO agreements incorporated into the TPP Agreement—provide a basis for requiring an interpretation consistent with Article XXI of GATT.

[28] Article 21.1 of the US-Morocco FTA lists similar measures listed in Article XXI(b)(ii) of GATT as an illustrative enumeration.

[29] Yoo and Ahn (2016) p. 439. In contrast, the absence of the insertion of such a note in the TPP Agreement and the USMCA can be understood as a diminution of the self-judgmental nature (in other words, allowing for judgments based on the principle of good faith).

[30] Abe (2022) p. 101.

Similar provisions to those in the U.S. FTAs are found in some of the FTAs that Singapore has concluded. Specifically, Article 17.2 of the Singapore-Australia FTA and Article 18.3 of the Singapore-Costa Rica FTA are examples.[31]

On the other hand, Table 1 highlights major security exception clauses in FTAs concluded by countries other than the US, excluding the agreements referred in previous paragraph.

Table 1: Security Exception Status in FTAs Involving Countries Other Than the U.S.

Agreement	Security Exception Clause
EU-Korea FTA, Article 15.9	Reproduction of Article XXI GATT *1
CETA (EU and Canada), Article 28.6	Reproduction of Article XXI GATT*1
Japan-EU EPA, Article 1.5	Reproduction of Article XXI GATT*2
RCEP agreement, Article 17.13	Reproduction of Article XXI GATT*3
ASEAN-Australia-NZ FTA, Chapter 15, Article 2	Reproduction of Article XXI GATT*3
Canada-Korea FTA, Article 22.2	Reproduction of Article XXI GATT*4
Chile-Mexico FTA, Article 19-03	Reproduction of Article XXI GATT*4
China-Australia FTA, Article 16.3	Incorporation of Article XXI GATT
Korea-India FTA, Article 2.9	Incorporation of Article XXI GATT
China-NZ FTA, Article 201	Reproduction of Article XXI GATT*2

*1. There are differences with Article XXI GATT, such as the fact that the reference is to an international obligation rather than a UN Charter obligation.
*2. The enumerated items contain fusion materials.
*3. Enumerated items include protection of critical public infrastructure.
*4. Instead of measures concerning fissionable materials, implementation of domestic policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices is listed.

Table 1 shows that FTAs in which the US does not participate generally have provisions similar to Article XXI of GATT.[32] In agreements that replicate the provision of Article XXI of GATT, there is room for the FTA to develop its own interpretation, while agreements that incorporate (mutatis mutandis) Article XXI of GATT, such as the China-Australia FTA, are more likely to adopt the same interpretation as that adopted in the WTO.[33] Therefore, in FTAs, the security exception clause is divided between FTAs in which the US participates (and some FTAs such as those of Singapore)

[31] Some FTAs that Peru has concluded also have similar provisions (for example, Article 28.2 of the Peru-Australia FTA).
[32] As noted in the notes to Table 1, differences from Article XXI of GATT are also found in EU FTAs and other FTAs. See Chianale (2019) for a discussion of the differences between EU FTAs and WTO provisions.
[33] However, security clauses that allow the self-determination of the country invoking the provision may be inserted outside of trade in goods (such as provisions on electronic commerce), as in Article 12.14(3)(b) of the Regional Comprehensive Economic Partnership (RCEP) Agreement.

and those in which it does not.[34] What is the impact of the insertion of provisions different from Article XXI of GATT in US FTAs?

4. The implications of the FTA's security exception clause

The inclusion of a security exception clause which expands self-judging nature in the US FTAs means that for the party introducing the measure at issue, the scope of policies that could be justified under the clause has expanded. However, as an FTA, its scope is still limited.

At the beginning, since FTAs only regulate trade relations with their parties, the security exception clause is valid only to that extent. As Box 1 above shows, the U.S. has concluded only 13 FTAs or trade agreements (with 20 countries). The security exception clause in these FTAs cannot be applied to countries such as the EU,[35] China,[36] India, Brazil, and Russia. As has been the case, only Article XXI of GATT is applicable in relation to countries that have not concluded such FTAs (case A in Table 2).

Table 2: Situations in Which Security Exception Clauses in FTAs Apply

Relationships between countries	Details of violation →		Article providing justification
Relationships between countries that have not concluded FTAs: (A)	Violation of GATT obligations		Article XXI GATT
Relationships between countries with FTAs: (B)	Violation of FTA-specific obligations: (B-a)		Security exception clause in FTAs
	Measures that violate both FTA and GATT obligations: (B-b)	Alleged violation of FTA obligations: (B-b-1)	Security exception clause in FTAs
		Alleged violation of GATT obligations: (B-b-2)	Article XXI GATT

What, then, are the relationships between countries that have concluded FTAs? We would like to take and discuss the relationship between the US and South Korea. (Japan has also concluded a Japan-US trade agreement, but we will look into the US' relationship with South Korea, where a

[34] Even among the FTAs concluded by Singapore and Peru, which have a track record of adopting provisions similar to those of US FTAs, has a provision that replicate Article XXI of GATT, e.g., Article 20 of the EFTA-Singapore FTA.

[35] The EU's draft article published during the TTIP negotiation did not include a security exception clause.

[36] The US-China Economic and Trade Agreement (Phase One) has been concluded with China, yet no security exception clause was included in that agreement.

more typical FTA has been concluded, as an example). In the first place, since the US and South Korea have a security exception clause in their FTA that gives more respect to the self-judgment of the parties(Article 23.2), it makes it easier to restrict trade between the two countries for security reasons.

The question then arises as to the scope in which the FTA's security exception clause applies. There would be no objection to claiming justification under the security exception clause of an FTA for a breach of an FTA-specific obligation (pattern B-a in Table 2). Specifically, this is the case where a liberalization commitment realized under an FTA is abrogated on security grounds. A difficult case is when obligations overlap between an FTA and a WTO agreement (pattern B-b in Table 2). For example, suppose that the US bans the export of certain US-origin products for reasons of security. This would be a violation of the prohibition on quantitative restrictions on exports, i.e., Article XI of GATT, but if a similar provision exists in the FTA, it will also constitute a violation of the Article 2.8 of the US-Korea FTA. The violation of the latter provision must be justified by Article 23.2 of the US-Korea FTA (B-b-1 in Table 2), while the former must be justified by Article XXI of GATT (B-b-2). Here, if the interpretation of security exceptions in the FTA and the WTO agreement diverge, a situation will arise where different legal conclusions are reached for the same measure (the likely situation is that a violation is justified in the US-Korea FTA and is deemed to be a violation of the GATT/WTO agreement).[37] Theoretically, since the FTA and the WTO agreements are different agreements, it may be understood as a natural consequence that different conclusions are drawn under different agreements. However, in practice, multiple different assessments of a single measure can be a source of confusion. The question arises as to how this should be addressed.

A possible solution is to adjust the priority relationship between each procedure of the FTA and the WTO agreement. Since there are detailed preceding studies on this point,[38] a more realistic response is discussed here. In the first place, if the security exception clause in the FTA concluded with the US is expected to be interpreted in favor of the country invoking the clause, it is unwise for the aggrieved country of the measure (South Korea in this case) to make the dispute under the

[37] The US-Korea FTA provides that once a Panel is requested or a "matter" is referred under the dispute settlement procedures in the WTO or the US-Korea FTA, the use of other procedures is precluded (Article 22.6(2)). Thus, it appears that double litigation will not occur. Nevertheless, it is not difficult to avoid the identification of disputes in each dispute resolution procedure, and therefore, it is difficult to completely prevent a situation in which multiple judgments are rendered on the same measure.

[38] Kawase (2007), Stoll (2019), etc.

FTA.[39] The complaining country can simply allege a violation of its obligations under the WTO agreement (in other words, it can refer the matter to the WTO dispute settlement procedure).[40] In this way, the WTO agreement would be the sole forum for discussion, and the security exception clause in the FTA would have no place in the discussion.[41]

However, this raises the question of whether the FTA's security exception clause can be used as a mean to justify a violation of the WTO's prohibition on quantitative restrictions (i.e., whether an FTA's security exception clause is relevant in the situation shown in B-b-2 in Table 2). In other words, the question arises whether the creation of a security exception clause in an FTA can be equated with an agreement to replace Article XXI of GATT with the content of the security exception clause in the FTA. In this regard, in light of the decision of the Appellate Body in *Peru – Agricultural Products*,[42] the following solution can be drawn:[43] First, while it is permissible to view FTA provisions as "a solution mutually acceptable to the parties to a dispute"[44] and to give priority to the content of the WTO agreement,[45] the security exceptions in the US FTA cannot

[39] If, as in *Russia-Tariff in Transit*, the security exception clause is regarded as a provision that excludes the application of the obligations of the agreement (as opposed to "exception"), there is no need to discuss the infringement of particular FTA provisions that are the premise of the case (such as the provision prohibiting quantitative restrictions). However, in practice, the discussion of violation of FTA provisions is inevitable, since a dispute settlement procedure cannot be initiated without an allegation of violation of the agreement by the complaining party. In the *Saudi Arabia-IPRs*, backed by the intention of the disputing parties, the Panel both examined a violation of the TRIPS Agreement as well as the applicability of security exception clause of the Agreement. A similar approach was adopted in *US - Steel and Aluminium Products*, but the Panel provided scant explanation regarding such decision, stating that the Panel has discretion as to the structure of its consideration (Panel Report, *US - Steel and Aluminium Products (China)*, *supra* note 9, para. 7.7). On the other hand, in *US - Origin Marking*, the Panel considered the case in following order: (1) examination of the justiciability of Article XXI of GATT, (2) finding of violation of obligations under GATT, and (3) determination of whether the US measures can be justified under Article XXI of GATT. The Panel adopted this structure because the US argued that Article XXI of GATT is a provision based entirely on self-judgment, and that if the provision were applied, the Panel would not be able to consider the measure in dispute settlement procedure (Panel Report, *US - Origin Marking (Hong Kong, China)*, *supra* note 10, para. 7.20. See also para. 7.189 for the explanation regarding the order between (2) and (3)). This order of review is linked to the question of how to characterize the security exception clause. On this point, see Lee-Iwamoto (2021), p. 278ff.

[40] In US FTAs, the complaining country is basically free to choose the forum to which the dispute is referred (e.g., Article 22.6(1) of the US-Korea FTA).

[41] However, the FTA dispute settlement procedure remain as an important option, given that it would be ineffective to initiate WTO dispute settlement proceedings against the US under the current circumstances in which the WTO's Appellate Body has ceased to function.

[42] Appellate Body Report, *Peru – Agricultural* Products, WT/DS457/AB/R, adopted 31 July 2015.

[43] See also Hirami (2019) for a discussion of this point.

[44] Article 3.7 of the Understanding on Rules and Procedures Pertaining to Dispute Settlement (DSU).

[45] Appellate Body Report, *Peru - Agricultural Products*, *supra* note 42 , para. 5.26. This argument in *Peru - Agricultural Products* was developed in the discussion of whether the FTA provisions can extinguish the right to use the WTO dispute settlement procedures. However, it is also helpful in considering the general issue of whether an FTA can be regarded as an agreed settlement

constantly be recognized as a mutually acceptable solution consistent with the WTO agreements, since the security exceptions in the US FTA cannot be said to be fully consistent with the WTO Agreement.[46] Next, as to whether FTA provisions mean that the WTO agreement has been amended for the FTA parties, the Appellate Body identified that there are specific provisions in the WTO agreement that deal with amendments to the WTO agreement.[47] Therefore, the amendments based on these provisions usually prevail.[48] Finally, although the Appellate Body acknowledged the possibility that deviations from the WTO agreement through FTAs could be allowed in line with Article XXIV of GATT (and interpretations thereof),[49] in practice there is little room for such recognition. In more detail, in *Turkey – Textiles*, the Appellate Body stated that a measure in violation of a GATT provision is justified only if it can be demonstrated that a customs union (or FTA) cannot be formed without the introduction of the measure in dispute.[50] In accordance with this, if the establishment of an expanded security exception clause were to become essential for the formation of a customs union or FTA, the introduction of such an exception clause and measures based on it would be allowed on the basis of Article XXIV of GATT. In reality, however, it is difficult to imagine a situation in which such an essentiality is proved. So far, it seems that the general view is to support the current style of the security exception clause materialized in GATT. Thus, as long as we follow the decision of the Appellate Body in *Peru – Agricultural Products*, there is little chance that Article XXI of GATT will be modified by the FTA's security exception clause.[51]

4. Conclusion

As described above, the US has demanded that Article XXI of GATT be interpreted and applied in a manner that respects the judgment of the country invoking the provision and has established

between the parties.

[46] For example, it could be a case where a measure is justified on grounds other than those listed in subparagraphs (i) through (iii) of Article XXI(b) of GATT.

[47] The Appellate Body refers to Articles X and IX of the Agreement Establishing the WTO, Article XXIV of GATT as specific examples. Appellate Body Report, *Peru – Agricultural Products, supra* note 42, fn 300.

[48] *Ibid.*, para. 5.112. More strictly, it held that the claim that the FTA amended the WTO Agreement under Article 41 of the Vienna Convention on the Law of Treaties could not be allowed to prevail over the amendment provisions of the WTO Agreement. However, the Appellate Body's decision on this point can be viewed as *orbiter dictum*.

[49] *Ibid.*, paras. 5.113.

[50] Appellate Body Report, *Turkey – Textiles*, WT/ DS34/AB/R, adopted 22 October 1999, para. 58. This is the second of the two conditions indicated by the Appellate Body, the first condition being that the FTA fully satisfies the relevant requirements of Article XXIV of GATT. See also, Appellate Body Report, *Peru – Agricultural* Products, *supra* note42 , para. 5.115.

[51] It could be possible, if the parties to the dispute agree, to invoke provisions of the FTA in the WTO dispute when they are included as a part of (special) terms of reference (e.g., Article 6.2 of the DSU). On this possibility, see Flett (2015).

provisions to make this clearer in the FTAs it has concluded (some countries have adopted a similar approach). This can be seen as attempts to gradual modify the security exception clause.

At present, however, the US has concluded only 13 FTAs with about 10% of the WTO Members. Even if non-US FTAs with provisions similar to those in the US FTAs are combined, they cannot be said to have become mainstreamed. In addition, as discussed in this paper, as long as parties to a dispute develop arguments based on violations of the WTO Agreement, security exception clauses in FTAs will not be the main point of contention. Taking these factors into consideration, it can be said that the situations in which security exception clauses in US FTAs are substituted for Article XXI of GATT are limited.

Nonetheless, if the number of FTAs concluded by the US increases and the practice of security exception clauses becomes more prevalent in the future, the situation where FTA provisions effectively replace Article XXI of GATT for the US will expand. In particular, if new rules going beyond the WTO agreements are promoted in FTAs, FTA-specific obligations will become a point of contention more often, and opportunities for the invocation of the FTA security exception clause may increase (increase in the number of situations in A in Table 2).[52] Moreover, more countries, such as Singapore, may adopt a similar approach. Given the existence of views calling for the renewal of security exception clauses, the possibility of an expansion of clauses similar to those found in US FTAs cannot be ruled out.

What about Japan? In part, it is aligning with the US direction. The US-Japan Trade Agreement clearly contains provisions of the same form as the security exception clauses found in other US FTAs, and the same can be said of the TPP.[53] However, viewing Japan's stance comprehensively, including the EU-Japan EPA and other agreements,[54] Japan's basic stance for the security exception clause is not fully aligned with the US FTAs. If the Indo-Pacific Economic Framework for Prosperity (IPEF) is realized, how the security exception clause will be deployed in it may be a touchstone. Continued attention should be paid to the development of the security exception clause.

[52] Recently, countries began to use FTA dispute settlement procedures.

[53] However, since the US-Japan Trade Agreement does not provide for dispute settlement procedures other than consultation (Article 6), there is essentially no opportunity for a third party to interpret the security exception clause in the event of a dispute.

[54] Basically, with the exception of the TPP and the US-Japan Trade Agreement, Article XXI of GATT is incorporated (e.g., Article 1.10 of the Japan-Mongolia EPA) or replicated (e.g., Article 1.10 of the Japan-Australia EPA) in the FTAs Japan has concluded.

[References]

Bacchus, J. (2022) “The Black Hole of National Security: Striking the Right Balance for the National Security Exception in International Trade”, CATO Policy Analysis, 9 November 2022, at https://www.cato.org/sites/cato.org/files/2022-11/policy-analysis-936.pdf

Chianale, G. F. (2019) “The General and Security Exceptions in the European Union's Free Trade Agreements” in. Prévost D. et al., *Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossche* (Hart), pp. 235-251.

Flett, J. (2015) “Referring PTA Disputes to the WTO Dispute Settlement System” in Dür, A. and Elsig, M., eds. *Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge University Press), pp. 555-579.

Gantz, D. A. (2020) *An Introduction to the United States-Mexico-Canada Agreement: Understanding the New NAFTA* (Elgar).

Ouellet, R. (2022) “Exceptions, General Provisions, the Review and Term Extension Clause”, in Gilbert Gagné and Mechèle Rioux, eds., *NAFTA 2.0: From the First NAFTA to the United States-Mexico-Canada Agreement* (Palgrave Macmillan), pp. 227-242.

Stoll, P-T. (2019) “The WTO Dispute Settlement System and Regional Trade Tribunals: the Potential for Conflict and Solutions,” in A. do Amaral Júnior et al. eds., *The WTO Dispute Settlement Mechanism: A Developing Country Perspective* (Springer), pp. 229-244.

USTR (2022) Statement from USTR Spokesperson Adam Hodge, 21 December 2022, https://ustr.gov/about-us/policy-offices/press-office/press- releases/2022/december/statement-ustr-spokesperson-adam-hodge-0

WTO Dispute Settlement Body (2019) “Minutes of Meeting Held in the Centre William Rappard on 26 April 2019”, WT/DSB/M/428 (25 June 2019).

Yoo, J. Y. and Ahn, D. (2016) “Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?”, *Journal of International Economic Law* 19(2), pp. 417-444.

(Written in Japanese)

Abe, Y. (2022), “The Future of International Trade Law and Order in the Post-COVID world,” *Tokyo Review of International Law*, No. 10, pp. 95-114.

Hirami, K. (2019) “The place of FTAs in WTO dispute settlement,” *Financial Review* No. 140, pp. 165-181.

Horimi, H. (2019) “Security Exception Clause and Limitations of Dispute Resolution: From the Viewpoint of Judicial Decision Conformity,” in Abe Y. and Sekine T. (eds.), *Legal Issues in International Trade Dispute Resolution,* Shinzansha, pp. 335-360.

Japan Tariff Association (2019) *TPP Commentary*, Japan Tariff Association.

Kawase, T. (2007) “Competition and Coordination in Dispute Settlement Procedures between WTO and Regional Economic Communities: Comparative Review of Forum-choice Clauses,” RIETI Discussion Paper Series 07-J-050.

Kawase, T. (2022) “Trade and Security: Proximity, Friction and the Transformation of Relationships,” *Economic and Security Linkage Study Group Interim Report*, Japan Institute of International Affairs, pp. 61-74.

Kazeki, J. (2016) “Trade and Security: The Rule of Law from a Practitioner's Perspective,” *Tokyo Review of International Law*, No. 4, pp. 39-62.

Lee-Iwamoto, Y. (2021), “The ICJ Ruling on Security Clauses: Preliminary Objections or a Defense on the Merits?,” *Okayama Law Journal*, Vol. 70, No. 3 & 4, pp. 277-297.