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Security Exceptions and WTO Reform*

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Abstract

This paper discusses the status of security exceptions in the WTO, their actual implementation and interpretation, and desired responses for the international trade system.

In order to maintain the balance between security exceptions and free trade, it is essential to restore the WTO's legislative function, strengthen its monitoring and surveillance function, and quickly restore its dispute settlement function.

The expansion of security exception measures is largely due to the sluggish legislative function of the WTO, and it is important to realize the results in such areas as the JSI（Joint statement initiative）, as well as to specify negotiation issues such as trade remedy measures.

Moreover, the dialogue on matters of specific trade concern (STC) at WTO committees based on the TBT Agreement and other agreements has been effective and has also been helpful in resolving disputes, and is expected to be utilized for security exceptions. The establishment of new National Security Committee is also an issue for consideration.

With regard to the restoration of the dispute resolution function, in order to prevent the abuse of the security exception and the acceleration of its black-boxing, it is essential to take into account its political nature and the U.S. position on the issue of justiciability, and it may be necessary to consider introducing a compensation mechanism on the grounds of non-violation. In disputes related to security exceptions, there is currently a strong possibility that the losing party will file an appeal into the void, which will further hollow out the dispute settlement function of the WTO. It is necessary to consider the option of introducing a binding, one stage dispute settlement system into the WTO dispute settlement to avoid this.

Keywords: Security Exceptions, WTO, dispute settlement function, appeal in the void
JEL classification: F13

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I Background

Japan's trade policy has developed based on the GATT/WTO and the multilateral trade regime, but since the beginning of the 21st century, FTAs have gained importance as complementary pillars to the GATT/WTO and have come to be positioned as the two wheels of the cart in trade policy.

Since the late 2010s, the rapid narrowing of the economic and technological gap between the U.S. and China has triggered a constant confrontation between the two countries, and various measures have been introduced from a security perspective, positioning the security trade perspective as the third pillar.

This trend was accelerated by the Russian-Ukraine conflict of 2022 and the introduction of countermeasures in various countries. While it is indisputable that the security perspective is extremely important as the basis of a country's existence, it is also important to properly harmonize it with the trade policy that has been the foundation of Japan's prosperity and development, as well as the global economy. Contrarily, we must not forget to protect and nurture the free trade and global value chain (GVC) that has supported the Japanese economy and the global economy overall.

Security is one of the most important challenges for the WTO, the principle of which is stipulated in the security exception of GATT Article 21 (similar provisions have been introduced in GATS Article 14-2 and TRIPS Article 73). However, owing to its sensitive nature, this issue has not been fully discussed in the past and has been operated in an extremely restrained manner.

Recent changes in the situation require a discussion on the issue of security exceptions.

Japan also introduced the Economic Security Promotion Law in 2021, and the perspective of trade restrictions from a security perspective is emerging.

Under these changing circumstances, we should seriously consider how to harmonize security and free trade without abusing the security concept; how to consider the necessity, limitations, and risks of the security concept; and what should be done to protect free trade.

Another reason is the paralysis of the WTO's rule-making and judicial functions. The long period of stagnation in the formation of rules necessary to regulate international trade (paralysis of the legislative function) and the malfunctioning of dispute settlements to interpret existing rules (paralysis of the judicial function) have led to the abuse of measures based on security exceptions, such as the US

Trade Act Section 232.
Of course, the need for protectionist measures is increasing because of international tensions, but if the legislative and judicial functions of the WTO were functioning smoothly, the abuse of security measures would have been less severe.
Resolving this situation is an urgent task for the WTO.

1 Transformation of Trade Policy with Free Trade and Global Value Chains as Pillars

(1) From WTO (GATT)-centricism to the WTO+FTA two-pillar system (2000–) - WTO stagnation
Since the Uruguay Round negotiations essentially ended in 1993 and the WTO was established in 1995, support for the WTO by member countries was firm, and rule in the WTO proceeded smoothly until the conclusion of the ITA and the Telecommunication and Financial Services Agreements in 1997. However, in the 21st century, rule-making slowed down, partly due to the difficulty of the consensus-based WTO decision-making process. 2001 saw the accession of China to the WTO, and the Doha Round began amid the multi-polarization of the world economy, but the Doha Round drifted along and was never settled. In contrast, from around 2000, FTAs came to be positioned as one of the two wheels of the international economic order.
During this period, the WTO's dispute settlement functioned smoothly, but against the background of sluggish WTO rule-making, the U.S. in particular began to show strong dissatisfaction with the functioning of the Appellate Body in the 2010s; in 2019, it ceased functioning due to a situation in which it was unable to secure the necessary members.

(2) The establishment of the concept of security trade due to constant confrontation between the U.S. and China (from the late 2010s)
As the Chinese economy grew rapidly following China's accession to the WTO in 2001, the conflict over US-China economic hegemony became more serious in the 2010s. In particular, when Trump became President of the U.S. in 2017, he introduced comprehensive restrictive measures against China in terms of trade, investment, and technology, including higher tariffs.
Even under the Biden administration, the U.S. hardline stance toward China

continued, and in the 2020s, the idea of developing a trade policy based on security was gaining further ground. Protectionism is becoming increasingly acute and includes measures that cannot be easily justified under the WTO rules. Measures are not necessarily limited to China.
For example, the United States introduced measures to increase tariffs on steel and aluminum from other countries under Section 232 of the Trade Expansion Act, based on the security exception in GATT Article 21.

(3) Russia-Ukraine conflict and countermeasures (2022)
With the outbreak of the Russian-Ukraine conflict in 2022 and with the U.S., Europe, Japan, and other like-minded countries taking extensive sanctions against Russia, the status of security exception clauses, such as GATT Article 21, has come under close scrutiny.
In other words, the scope of the application of the security exception (Article 21) has expanded significantly, and a situation is emerging in which the rules of contingency are eroding and replacing those of peacetime.
The active use of the Article 21 exception by the U.S. is particularly noteworthy.
It is necessary to first accurately grasp the current situation in which the security exception, which is an "exception" in the first place and was never intended for active use, is rapidly expanding its meaning and being used more and more frequently[1].

2 Need for a "Balance" between Free Trade and Security Trade - Basic Direction in the WTO

There is tension between free trade and security regulations. Although Article 21 allows for exceptions as needed for security, this does not mean that any security measure is acceptable.
As the Keidanren Report (2022.9.13) and the White Paper on International Economy and Trade by the METI (2023) correctly point out, the security perspective and the perspective of maintaining free trade must be discussed in a balanced manner. This perspective has been recognized since the drafting of the GATT[2]. However, it is important to achieve balance. However, a simple solution

[1] See Jake Sullivan (2023).

[2] See Bacchus (2022) p3-p4

does not exist. As trade measures for security reasons expand, it is necessary to comprehensively discuss the position of security from each aspect of the WTO's legislative, judicial, monitoring, and surveillance functions to find a balance.

The White Paper on Trade also presents various options from the three perspectives of rebuilding a rule-based international trade order, establishing reliable supply chains, and strengthening relations with the Global South; however, its content remains abstract. We hope that concrete efforts toward effective solutions and the restoration of a desirable balance will continue in the future.

How to achieve a balance between peacetime legislation and contingency legislation?

Transparency and predictability are necessary to maintain and strengthen global value chains and businesses.

In response to changes and tensions in the international environment, I strongly hope that further consideration will be given to how to respond to unbalanced, unreasonable, and protectionist measures while maintaining reasonable security measures. Further consideration is required in future studies.

In the WTO framework, I believe that transparency, dialogue, and international cooperation should be the basis for everything and that the following should be the basic direction, as detailed in this paper.

(i) Legislative Functions

Thus, the WTO’s rule-making capacity must be revived and strengthened. The WTO should not be abandoned in the absence of any other effective and universal rule-making framework. In particular, we should focus on coming up with a solution that does not use the Article 21 exception and on strengthening the rules for peacetime rather than contingency rules. The revision of Article 21, which is not functioning adequately and is unclear, should be considered, and discussions should be started as soon as possible; however, in light of the difficulties involved, it would be realistic to leave its realization as a future issue.

(2) Monitoring and Surveillance

The monitoring and surveillance functions of the WTO should be utilized, including the use of a TBT-like framework and the establishment of a new National Security Committee (WTO).

(3) Dispute Settlement Function

It is necessary to accumulate and organize panel precedents, and understand and discuss these issues. In particular, the discussion of the scope of the panel's

decision-making authority (justiciability) is critically important: it is necessary to seek a universal solution to the issue of the Article 21 exception in the context of an early restoration of the WTO's dispute settlement function as a whole.

3 Establishment of an International Framework for Security related Trade

From a security perspective, the international framework for trade regulation is undergoing fluctuation and restructuring.
For example, at present, no international consensus has yet emerged, even for EMERGING TECHNOLOGY and KEY TECHNOLOGY concepts, which the U.S. has attempted to define as a subject of regulation under ECLA and others from the beginning as a measure against China. Moreover, it appears that the United States does not have a unified view.
Looking at the progress of discussions to date, it appears that the United States unilaterally introduces these concepts and agreements are reached later, rather than being decided through consultations among the countries involved in the security framework[3].
We hope that a framework for security-related rule making will be established among like-minded countries in a transparent, objective, and fair manner. In this context, it is necessary to ensure transparency and predictability for businesses.

Although it is still difficult to foresee the entire framework for the formation of rules for trade in security-related matters and we need to follow future developments closely, there are three important points to be considered in developing a trade framework for international security.
First, clarification of the rule-making mechanism and framework among multiple countries is an ongoing challenge[4].
Second, it is critical that such a decision-making framework have adequate powers with multilateral oversight. With the consensus of the participating countries, it is necessary to prevent a situation in which unilateral decisions by specific countries such as the United States become de facto international rules. For this purpose, cooperation among intermediate and like-minded countries is important, and the formation of a common axis by like-minded countries is

[3] See the examples of definition of rules of origin in IRA and semiconductors in Chips Act

[4] See Hoekman, Mavroidis & Nelson (2022) p21-p23

necessary [5] .To realize this, the involvement of industry and international cooperation must also be strengthened.
Third, the need for a framework of countermeasures (as in the case of the EU) to restrain the unilateral introduction of measures by specific countries, such as the U.S. should also be considered.
The EU is preparing to counter other countries' violations of its rules through the MPIA and its countermeasure framework. Although many countries have already developed such a countermeasure framework, the necessity and effectiveness of such a framework and its grounds under the WTO need to be closely examined.
Under these circumstances, Japan may need to consider a framework to deal with the black hole in security exceptions and the use of protectionism[6].

In light of the changes in the environment described above,
in particular, this study focuses on the following points in the direction of the efforts of the WTO.

(1) Rule-making in the WTO
From the beginning, Article 21 of GATT is supposed to have been used in an extremely exceptional and modest manner. The U.S. was very concerned about the abuse of exceptional measures at the time of drafting the agreement[7]. Because this article is based on the inseparable requirements of national security, its interpretation and handling must be performed with great care[8].
The Article 21 exception is, so to speak, a family heirloom, and it is important to reduce the number of situations in which it must be used as much as possible.
Although the Article 21 exception has been used in an extremely modest manner as a Panel decision, the Russia-Ukraine case in 2019 opened the door to an

[5] On the importance of a plurilateral agreement, see Hoekman, Mavroidis & Nelson(2022).They also emphasize the significance of improving transparency and presenting conditions to non-member countries.

[6] Japan's participation in the MPIA is a significant development, but there is also a need to discuss the necessity of measures to encourage the other countries to change their mind in response to rule violations, while referring to the examples of other countries.

[7] See Maruyama & Wolff, Bacchus

[8] See Maruyama & Wolff, Bacchus

explicit decision on Article 21[9]. In addition, there has been a significant recent change in the situation regarding trade measures, as seen in President Trump's use of Article 232 and the citation of Article 21, and there is a concern that an increasing number of Article 21 exceptions will be cited. In this context, the debate on the security exception of Article 21 is gaining importance.

Originally, it would have been desirable to clarify the content of the security exception in Article 21.

Unfortunately, in addition to the economically and politically sensitive nature of the security exception, it is generally extremely difficult to revise Article 21, a sensitive article on security in the WTO, where decision-making procedures are based on consensus.

Even reaching an agreement will take an enormous amount of time. While it is essential to start discussions as soon as possible, it is important to first clarify the disciplines in the WTO on necessary trade measures, with an eye to the causes of the utilization of measures for security reasons.

In the future, it would be desirable to clarify the exceptions provided in Article 21 itself; however, before or in parallel with that, it would be important to clarify the contents of the permissible and prohibited measures in other WTO articles and disciplines[10]. The goal should be to develop and modernize WTO disciplines so that they do not need to cite the exception of Article 21.

(2) Transparency and STC approaches

What needs to be done to clarify the interpretation of Article 21 and address the specific issues? In addition to the aforementioned rule-making efforts and referring security-related measures to dispute settlement procedures in the Article 21 exceptions, activating the use of existing WTO committees and other frameworks (although rarely discussed) is an option that should not be forgotten.

First, transparency and information sharing on trade issues and security measures are the basis for problem-solving.

The experience of the WTO's TBT/SPS Committee and other committees in

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[9] See Bacchus

[10] Especially in light of the current situation where various subsidies and domestic support measures are the sources of active use of the Article 21 exception, consolidation and rule development regarding trade remedy measures is an issue that cannot wait.

handling Specific Trade Concerns (STC) is instructive[11].

The TBT/SPS Committee and other committees have a track record of discussing a large number of reported cases and bringing individual and crosscutting cases to resolution. Rather than deferring to the WTO's formal dispute settlement procedures alone on matters of specific trade interests, it is a useful and proven approach to utilize dialogue procedures based on transparency, fact-sharing, and the promotion of mutual understanding in the committees.

Considering that, in many cases, the WTO dispute settlement does not lead to the final adoption of the security exception due to its political nature, settlement through discussions at the committee level should be utilized as a powerful problem-solving tool.

It would be beneficial to utilize existing committees and other bodies to confirm facts about security measures that are overwhelmingly lacking, exchange and discuss opinions, and clarify best practices regarding the issues and measures that should be taken.

From a similar perspective, Lester et al.'s proposal to establish a National Security Committee in the WTO deserves attention[12].

(3) Dispute Settlement

The handling of Article 21 's exception is closely related to the current status and limits of dispute settlement in the WTO.

First, it is necessary to overview and analyze recent panel developments in the Article 21 exception, including the Russia--Traffic in Transit Case (2019).

Second, it is necessary to consider how the dispute settlement mechanism for issues related to the security exception should be considered under the current circumstances, in which the Appellate Body has ceased to function and the WTO's dispute settlement procedures are dysfunctional.

Third, as clearly stated in the US memorandum on the future of the dispute settlement system[13], the handling of security exceptions is an issue directly linked to the direction of the revival of the dispute settlement function and thus requires an inextricably linked analysis when discussing the revival and future direction of the WTO's dispute settlement function.

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[11] Hoekman, Mavroidis and Nelson (2023) p63-p68

[12] Lester and Manuk (2020)

[13] U.S. objectives for a reformed dispute settlement system, JOB/DSB/4, WTO, 5 July 2023

(4) Security Exception in FTAs

The treatment of security exceptions in FTAs, which are positioned as complements to the WTO, also needs to be analyzed as there are various developments.

This paper will focus on the above four perspectives.

II Possible Direction of WTO Efforts

Since the Steel 232 case, security exception clauses have been transformed from "swords of the family" on the altar, so to speak, to "swords of war" for practical use. Security measures have expanded beyond what is necessary and are used in a protectionist manner and as weapons for this purpose.
Under these circumstances, WTO rules may be virtually cut into bones (black holes[14] in security exceptions). A system in which anything that can be called "security" can be passed is not worthy of the name "system."
To prevent this, it is necessary to comprehensively accelerate efforts within the trade framework, including (1) clarifying trade rules (restoring the legislative function), (2) improving transparency and utilizing the STC approach, and (3) restoring the dispute settlement function (restoring universal and binding dispute settlement)[15].

1 Restoring the Rule-Making Function

To maintain the balance between security and free trade, it is necessary to consider the premise that balance is a relative concept subject to change.
It is necessary to discuss the issue not only from the perspective of the importance of security (from the perspective of contingency rules) but also from the perspective of the stability and transparency of trade rules during peacetime. In doing so, particular attention should be paid to discussing and clarifying the widely permissible and prohibited measures in the WTO as a whole, including Article 20 (general exceptions) and trade remedy measures (above all subsidies and AD disciplines), rather than merely discussing Article 21 exceptions[16].
The expansion of the security concept affects rules in these broad areas. Conversely, the failure of broad trade rules to develop in response to the needs of the times has led to the expansion and abuse of security exceptions.
While it is true that rules have failed to evolve amid conflicts of interest among

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[14] Bacchus (2022)

[15] Furthermore, although outside the WTO, progress in regulatory harmonization including IFA and international standards is expected.

[16] It is important to narrow down the items to be discussed in future work programs in MC 13.

countries, the reluctance of member countries is largely blamed. If the WTO fails to make efforts to develop rules, the expansion of security exceptions and the creation of black holes will continue.

Stagnant rule-making will only lead to further expansion of security exceptions and the spread of protectionism, and it is essential that discussions and efforts be made both within and outside the WTO to deepen the rules in peacetime, no matter how difficult it is.

The "Magna Carta" that does not match the economic reality cannot cope with today's complex economic environment, and as predicted, the WTO's dispute settlement system has become dysfunctional amid the stagnation of rule-making[17].

The time for exchanging abstract discussions has passed and it is necessary to accumulate as many results as possible in the near future.

First, the results of the JOINT STATEMENT INITIATIVE (JSI), which are discussed in the plurilateral framework, are important. It is important to further deepen the plurilateral framework, which is considered important as an abstract theory but has not been fully utilized. In this regard, the recent agreement on the domestic regulation of services is commendable. In addition, concluding e-commerce[18] negotiations are anticipated.

The WTO rules are narrow in scope and outdated, and the tools used to implement them were created in 1993, so they are out of touch with present times. Although much remains to be done, it would be more realistic to narrow down the issues to be addressed and aim for results.

In particular, it is important to discuss and define WTO rules that address the rapid development of technology, such as digitalization, and the pursuit of non-trade objectives (NTOs), such as environmental, labor, and human rights, and to clarify the limits of permissible activities so that we can avoid the risk of treating and discussing comprehensive regulations, such as Article 232, under the security exception in Article 21. Thus, it is necessary to identify the topics to be addressed based on these pressing issues.

Specifically, improving and clarifying available key WTO tools such as trade remedy measures (e.g., subsidy rules, countervailing duties, AD rules, and

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[17] See Baldwin & Nakatomi (2015)

[18] See Joint Convenors' Report on December 20, 2023. Unfortunately the conclusion deferred agreement on difficult issues such as free flow of data to future negotiation. 100598742.pdf (mofa.go.jp)

safeguard rules) in response to the needs of the times would be effective in deterring broad protectionist measures under the security exception. This issue is inextricably linked to the need for World Trade Organization (WTO) reform.
Although great difficulties are expected in accelerating rule making, which has remained stagnant until now, it is strongly expected that major countries will narrow the issues to be addressed and accelerate their work by specifying their future plans. For example, further development of the discussion on the harmonization of subsidy rules among Japan, the U.S., and the EU may be considered.
In addition to the multilateral framework, it is also necessary to utilize plurilateral, FTA, and other frameworks in parallel, which is considered easier to achieve results.

2 Expansion of TBT, SPS-type dialogue and transparency - Response to STC and monitoring

Along with the legislative and judicial functions of the WTO, monitoring the implementation of WTO rules plays an important role.
In particular, in areas such as security exceptions, where the details of the rules are not clear, it is important for the relevant committees to discuss the actual situation, background, and necessity of the measures and to monitor them to ensure that excessive or protectionist measures do not prevail.
Each WTO committee plays an important role in monitoring the actual implementation of the rules. In particular, the roles played by the TBT and SPS committees often attract attention, but other committees and meeting bodies, such as the Trade Facilitation Committee, also function effectively. Member countries should consult each other to determine the most efficient committee or meeting body.
The actual monitoring by the TBT Committee and its approach to STC are detailed in HOLTZER (2018), which has been functioning effectively for a long period of time and is considered to have many reference points for monitoring security exception cases.
As for the TBT, the legal basis for the procedures is set forth in TBT Agreement 13.1, but the procedures are fairly well established based on the history of implementation from the Standard Code during the GATT era.
The basic idea is for member countries to submit questions regarding STCs and

for the Committee to respond to them, which are shared with the committee simultaneously. Informal consultations are held among the countries concerned with the reported STCs, and if no resolution is reached, the matter is placed on the agenda of the TBT Committee for discussion.

The concerns expressed range from further clarification of measures, unnecessary barriers to trade, transparency, the legitimacy of measures, international standards, discriminatory treatment, and timeframes for implementation. The basis for STC statements is the fulfillment of notification obligations under the agreement, and it is critical that countries fulfill their notification obligations.

The participation of national authorities, and the private sector, is crucial for the development of STC consultations.

In terms of actual results, between 1995 and 2017, 548 STCs were raised by countries in the TBT Committee.

STC consultations are expected to have the following effects: clarification of technical standards, improvement of technical standards, sharing of experiences and best practices, resolution of issues that pertain to other agreements, and an inexpensive resolution of trade frictions.

According to Holtzer, there are many cases in which formal WTO dispute procedures have been avoided because of the STC process[19].

Only 15 of these STC cases have been brought to a formal WTO dispute resolution.

The established procedures for STC processing by the TBT Committee and other committees will be helpful in the processing of security cases.

However, the basis is the transparency and reporting of measures by member countries. It is essential that the TBT Committee and other relevant committees are accurately informed of the details of the measures taken. Countries must first recognize that appropriate information disclosure and reporting are the basis for the STC response of the relevant committees.

In particular, for security exceptions where the details of the rules are not clear, the exchange of views in the relevant committees would contribute significantly to understanding and resolving the issues. In addition, it is considered politically difficult in many cases to withdraw security-related measures once they have

[19] The EU REACH case is a typical example.

been taken because of their nature, and it would be necessary to discuss compensatory measures (e.g., suspension of concessions) to achieve a balance between countries taking the measures and countries affected by them[20].
The idea of a committee (National Security Committee) concentrating on security-related measures (e.g., Lester) is an interesting and worthwhile proposal.
Lester suggested that the Committee be charged with continuing to review trade-impacting measures taken for security reasons, providing guidelines, reviewing technical cooperation on security measures, providing an off-the-record framework for informal discussions, providing guidance on the rebalancing process, and providing secretariat support for the Committee's monitoring function. The report also provides examples of the preparation of an annual report on the trade impact of security measures to support the secretariat's committee's monitoring function. In addition, it is indisputable that the scope of security-related measures to be reported, the scope of discussion, and other matters to be referred to the Committee must be closely coordinated.
The establishment of such a committee is expected to contribute to the clarification of security exceptions based on transparency, understanding of facts, reconciliation of the interests of the parties to security-related measures, the establishment of best practices, and rebalancing among the parties.
In addition to these committee discussions, it is recommended that non-trade objectives (NTOs), including security measures, utilize a plurilateral framework and clubs within and outside the WTO, based on transparency and active exchange of views[21].

3 Strengthening and Restoring the WTO's Dispute Settlement Function

Along with the restoration of the rule-making function and monitoring of rule implementation, I would like to discuss the restoration of the dispute-settlement function.
The WTO's dispute settlement mechanism is currently not functioning adequately as the Appellate Body has ceased to function. Resolving this is one of the biggest challenges to the WTO reform.
There is a movement for an MPIA by like-minded countries, but the number of

[20] Bacchus p11

[21] Hoekman, Mavroidis & Nelson (2022, 2023)

participating countries is 52 (as of April 2021, according to the Ministry of Economy, Trade, and Industry). The United States is not a member of the MPIA and is unlikely to participate.
There have been several dispute panels on security exceptions in recent years. In the course of their work, precedents have converged in a certain direction regarding the handling of security exceptions.
Trade measures on security grounds are at great risk of escalation because of the uncertainty in the requirements of Article 21 and the lack of sufficient precedents for Panels.
In particular, a serious risk is created if the position that security exceptions are self-judgment by the country concerned becomes widespread with regard to the panel's right to make a decision (justiciability).
This paper analyzes this risk and discusses the possible way out.

(1) Panel Accumulation and decision-making
This section provides an overview of the disciplines of security exceptions in the WTO and an analysis of disputed cases.
GATT Article 21 provides for security exceptions as follows

Article XXI Security Exceptions
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 re 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.

Due, in part, to the legislative history and restrained operation of Article 21, there

have not been many specific dispute resolution cases in the GATT/WTO. There has been little panel accumulation; however, since the Russia-Transit Carriage case (DS512) in 2019, significant panel decisions have been made.
The following are the cases in which panel decisions have been issued.
(1) Russia: Traffic in Transit Carriage Case (DS512)
(2) U.S. - Steel and Aluminum Products Case (DS514)
(3) Saudi Arabia: Intellectual property rights Case (DS567)
(4) U.S. -origin marking case (DS597)
The three main issues are as follows.
(1) Jurisdiction over security measures (justiciability)
(2) Interpretation of time of war or other emergency in international relations
(3) Interpretation of measures for the protection of its essential security interests.
The interpretation of these individual panels has already been analyzed by various experts and should be referred to for further discussion.

DS512 (Russia– Traffic in Transit Carriage Case) held that, with respect to the interpretation of (2) emergency, this situation falls under the category of an unstable situation that arises against the defense and military interests of a member state. With respect to the interpretation of (3) measures to protect essential security interests, it recognized the discretion of the taking state and held that the discretion of the taking state is subject to the duty of good faith under the Vienna Convention. Contrarily, regarding the interpretation of measure (3), the Panel concluded that the discretion of the measure-taking country is subject to the duty of good faith, based on the Vienna Convention on the Law of Treaties. The panel also held the position that it had the right to make decisions on the security measure in (1).
Subsequent panels (DS514, 567, and 597) have also taken a position consistent with DS512 with regard to (1). With regard to (2) and (3), individual decisions have been made according to the characteristics of each case, but the panel has generally been flexible with regard to emergency decisions (note: DS597, however, states that (2) does not apply to the particular case.).
The Panel’s judgments have generally taken a certain direction, centering on the issue of the right to make judgments regarding security exceptions (the direction of the panel's judgment is generally appropriate[22].)

[22] See Bacchus p10. Maruyama and Wolff, contrarily, object to the logical structure that permits

However, the issue of who has the authority to make decisions regarding the security exception in (1) is likely to become more acute in response to these panels. Only DS512 was adopted in these four cases.
While it is an important development that the accumulation of cases gives a certain direction to the panel's decision, it is not desirable that the number of cases in which the U.S. loses (and then files appeals into the void) increases while the U.S. is greatly dissatisfied with the justiciability issue.

(2) Justiciability of Security Exceptions
Regarding the right to judge security exceptions, a series of panels, such as the Russian transit case, have held that the WTO dispute settlement body (panel) has the right to judge. In contrast,
the U.S. assumes that the definition of the security concept is such that the parties to the dispute are responsible for determining exceptions, and that the Panel does not have the right to make such determinations. On the contrary, the U.S. also holds that only parties have the right to judge the legitimacy of security exceptions, while affirming the need for rebalancing with countries affected by the measures. (See DS 558)
First, attention should be paid to the implications and dangers of self-judgment theory.
If self-judgment theory becomes generalized, it is tantamount to saying that the Panel will not function with regard to security exceptions. A change in the U.S. position is expected, but self-judgment theory has been a consistent view of the US government, both Democrats and Republicans, under the last four presidents[23].
The position of a number of countries, especially the U.S., is now limited, but if it were to expand, it would have an even greater impact[24].
However, given the importance of the case and its political impact, there are certain grounds for the position that it is difficult or inappropriate for the Panel to discuss the legality of security issues.
In addition, it is difficult to imagine that a country that loses a case under the

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Russia's invasion of Ukraine on the one hand and does not permit denial of origin to HK on the other.

[23] Bacchus p5

[24] The Black Hole of Security Exceptions (Bacchus); Bacchus states that the Chinese position in particular needs to be watched closely.

security exception will implement the panel's conclusions as is (recall that the U.S. has filed appeals in the void with respect to the Article 232 panel and the Hong Kong origin panel.)

Considering that addressing security issues is explicitly stated as a requirement to realize the restoration of the WTO's dispute settlement function (see the U.S. Position Paper[25]), it seems that some response to the issue of who has the authority to determine the security exception will be essential when discussing the restoration of the dispute settlement function.

The U.S. itself recognizes the need for rebalancing between the parties to the measure and the affected countries (see DS558.) Maruyama and Wolff, for example, while taking into account the position of the U.S., argue that to avoid the adverse effects of expanding security exceptions, the parties have the right to determine the security exception, but to respond to the nullification and impairment of WTO interests caused by the exception, the exception should be structured as a non-violation[26] and recovery of damages by the country whose interests were nullified or impaired should be allowed[27].

It proposes that the countries concerned should abandon the question of violation under the Article 21 exception and treat it as a matter of non-violation (not a violation, but still remediable), and the need to conclude a provisional agreement on the Article 21 exception. (Note: Instead of amending the DSU, which is difficult to do, they suggest that the procedure could be tentatively agreed upon in the form of a National Security MPIA (NSMPIA), as in MPIA.)

(3) Politics of Security Issues and Dealing with Appeals in Voids

Does the dispute settlement mechanism function during serious bilateral conflicts concerning security related trade?

Although the Panel is maintained and functions as the last resort of the WTO's dispute settlement mechanism, there is a problem with appeals in the void due to the dysfunction of the Appellate Body (there have been 18 appeals in the void (as of December 2022.)

In particular, the possibility of appeals in the void of security issues is considered

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[25] U.S. objectives for a reformed dispute settlement system, JOB/DSB/4

[26] Non violation nullification and impairment (NVNI)

[27] The history of the negotiations to establish the ITO indicates that the negotiators were considering relief through a non-violation structure on security exception.

high because of their political nature, including the issue of the decision maker, and there is a large possibility that the country concerned will avoid adopting conclusions of the Panel that are unfavorable to it.

If the WTO dispute settlement body takes the position (supported by the majority of WTO members) that it has the right to make a decision on the security exception, the panel's result will be confirmed by negative consensus unless an appeal to the void is filed regarding the panel's outcome under the current circumstances where the Appellate Body is not functioning. If an appeal is filed, it will not be final, but the possibility of a politically motivated appeal to the void will be lower.

However, if the WTO dispute settlement body takes the position that it does not have the right to decide security exceptions (the country concerned has the right to decide),which is a position supported by the U.S. and others, the probability of a political appeal in the void of a panel decision that adversely affects the country concerned will increase. As a result, the possibility that the WTO's dispute settlement procedures for security exceptions will not function will increase.

In fact, with regard to the Article 232 case and the Hong Kong origin case, in which the U.S. lost at the panel, the U.S. filed an appeal in the void, and the panel's conclusion was not finalized.

To prevent appeals in the void with regard to security exception cases, it is necessary for the Panel’s decision to be reasonable and appropriate, and the outcome must be shared by many countries. This is expected to create a foundation within the country that makes it politically difficult to file an appeal in the void.

At present, the direction of the Panel is considered to have a certain universality and validity, but it is necessary to further examine the panel's decisions in the future. The consistency and validity of a Panel’s decisions are fundamental conditions for domestic acceptance.

However, even if these conditions are met[28], a system that allows appeals in the void regardless of the Panel's conclusions is extremely unstable, and the reform of dispute settlement procedures to completely eliminate the possibility of appeals in the void should be considered.

Without this consideration, appeals in the void in security exception cases will

[28] It is also unlikely that the U.S. position will change in the short term.

continue to occur, which will spread to other countries[29], erode confidence in the WTO's dispute settlement system, and aggravate the crisis of paralysis of the WTO's judicial function, making its recovery even more difficult.

(4) Harmonization of Security Exceptions with the Dispute Settlement Function of the WTO: Basic Solution Direction

The security exception has existed as a discipline in Article 21 in the past but has a history of being treated with extreme caution. Therefore, it is essential to return to these traditions.

To that end:

First, as previously discussed, it is necessary to restore the WTO's rule-making capacity. I hope that efforts in this direction will begin with MC13.

Without such comprehensive legislative efforts, there will be no solution if we discuss only the dispute resolution issue under Article 21 ’s exception.

Second, to prevent appeals in the void under security exceptions, it is necessary to simultaneously restore the entire WTO dispute settlement function. While the dispute settlement framework for the exception of Article 21 is an essential element for achieving the overall solution, it is only a partial solution within that framework.

As a precondition for restoring the overall dispute settlement function, it is necessary to clarify where the goal of restoring the WTO's dispute settlement function should be set. At present, when confusion in the WTO's dispute settlement function has become serious, it is necessary to return to the starting point and review goal setting.

In doing so, possible options are,

a) Pre-WTO situation[30]

b) One-trial system (+ adoption by negative consensus)

c) Restoration of the two-trial system (i.e., Appellate Body + adoption by negative consensus).

The following are possible options.

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[29] Bacchus p10

[30] The panel is not a mandatory adoption. The current situation, where appeals into the void are possible, is in this sense similar to the situation before the WTO.

Of these, it is considered that there is no major objection that a), the GATT-era panel (without mandatory adoption), is not a landing point that should be aimed for from the perspective of a WTO-centered multilateral trade regime[31]. The WTO's dispute settlement procedures, built with the goal of resolving the U.S. abuse of unilateral measures under Section 301 of the Trade Act and European protectionism in the agricultural sector in mind, have achieved a breakthrough by introducing a framework for mandatory adoption by negative consensus, versus the GATT-era (pre-WTO) dispute settlement mechanism. The automatic adoption of panel conclusions by negative consensus in the WTO is a major innovation and is probably the bottom line of the goal being pursued. Most countries agree with this point[32].

Next, should we aim to restore a two-trial or one-trial system (negative consensus)?

Is the restoration of the Appellate Body an absolute requirement?

Should we aim for a negative consensus on a one- or two-trial system?

The following is an analysis of the basic considerations.

a) Avoidance of a stalemate regarding the Appellate Body (e.g., overreach, trade remedy)

The major issues in the dispute over the Appellate Body are the scope of its decision-making authority (overreach) and whether the Appellate Body made incorrect decisions regarding trade remedy measures. Resolving these and other difficult issues is the biggest challenge to restoring the WTO's dispute settlement function.

Of course, the DSU must be revised, but it would be easier to avoid a stalemate and serious confrontation triggered by the Appellate Body issue if a single-trial system based on a negative consensus, rather than a two-trial system, is considered.

b) Universality and acceptability for the U.S.

It is desirable for the WTO dispute settlement framework to be universal, with the

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[31] Hoekman & Mavroidis (2020)

[32] The WTO's dispute settlement system offers significant advantages to the U.S. aside from the views of politicians (Bucchus p10), and it is necessary to persuade the U.S. not to take position a).

participation of all member countries. However, at present, the Appellate Body has ceased to function. The United States has no intention of participating in the MPIA. Nor does the MPIA offer a direct solution to U.S. concerns about the Appellate Body issue. Although U.S. participation is indispensable for the full-fledged restoration of the dispute settlement function, even looking ahead to the medium term, it must be said that the possibility of a two-trial system based on the WTO Panel + MPIA being established with universality among participating countries is slim[33].

With regard to a one-trial dispute settlement framework, the possibility of U.S. acceptance is considered higher than pursuing the restoration of a two-trial system by avoiding the problem of the function and authority of the Appellate Body, which the U.S. considers problematic.

Of course, there is no guarantee that U.S. concerns will be immediately resolved by abolishing the Appellate Body and returning to the one-trial system. It should be recognized that U.S. dissatisfaction with the Appellate Body's overreach problems and trade remedy decisions may continue even under a one-trial system.

c) Can it be handled in the short term?

Regarding the Appellate Body, the situation has reached a point where there is no solution acceptable to all countries and it has completely stopped functioning. However, with disputes occurring more frequently in the rapidly changing international environment, the situation is critical for the World Trade Organization (WTO), where dispute settlement is unable to provide a binding solution. It is essential to proceed with discussions to reach a settlement at an early stage. If the dispute is settled through a single-trial system, it may be easier to deal with the difficult issues of the Appellate Body, as exemplified in (a), and I believe that a short-term settlement may be possible.

d) Dealing with security exceptions

The issue of how to deal with security exceptions and who has the authority to make a decision cannot be avoided regardless of whether a one- or two-trial system is used, and is an important issue that needs to be addressed when the

[33] Hoekman & Mavroidis (2020) states that for a long-term solution, MPIA requires the participation of the United States and more than 100 WTO member countries.

dispute settlement mechanism is restored.
Even in a single trial system, it will be necessary to seek some acceptable solution, such as a non-violation mechanism, for the treatment of the security exception (especially the issue of justiciability.) (Note: The key issue is the structure of the NSMPIA.)

e) Burden related to dispute resolution
The procedural problems of the Appellate Body (e.g., failure to move according to schedule, heavy burden, etc.) have been pointed out in criticism; however, considering the burden on the parties, a one-trial system is a simpler procedure and may contribute to reducing the burden of dispute resolution.

f) Possibility of appeals in the void
The possibility of appeals in the void cannot be eliminated unless the Appellate Body is fully reinstated in accordance with the DSU rules. Appeals in the void have significantly reduced the effectiveness of the WTO's dispute settlement function, and the WTO's current dispute settlement at the WTO has returned to the status quo of the GATT era (pre-WTO). However, in a one-trial system (negative consensus), the problem of appeals in the void itself does not arise.

From this analysis,
I would like to advocate that in order to revive the dispute settlement function of the WTO, we have not only the option of fully restoring the Appellate Body but also the option of returning to a binding one-trial system panel by negative consensus.
In this context, a solution focusing on the issue of Article 21 's security exception should also be conceivable.
Restoring the Appellate Body (i.e., restoring the two-trial system) and resolving the security exception issue simultaneously would resolve a new difficult issue, the security exception issue, in addition to the Appellate Body issue, which has already reached an impasse and is now in the midst of deadlock. Even if possible, this is an extremely difficult process requiring a lengthy resolution period.
This is not the only option for rescuing a multilateral trade regime during a crisis[34].

[34] It would also give the U.S. an excuse to turn its back on the WTO's dispute settlement mechanism because of the problems with the Appelate Body.

It would be a realistic and constructive basis for WTO reform of dispute settlement procedures to avoid as much as possible the difficulties that are at the root of Appellate Body issues (in particular, the overreach problem and the difficulties related to Appellate Body decisions on trade remedies) on the basis of a one-trial system (one trial system subject to a panel decision by negative consensus), and then focus efforts on reaching an agreement (or tentative agreement) on the security exception. This would be the basis for realistic and constructive reform of the WTO's dispute settlement procedures.
Hoekman and Mavroidis (2020) showed that an enforceable one-trial system could be a landing place, provided that the functioning of the one-trial system is improved.

On the contrary, it should not be forgotten that there is strong support, beginning with the EU and Canada, for maintaining the WTO's two-trial system structure, and that the introduction of the Appellate Body was aimed at stabilizing dispute settlement decisions by the WTO.
When returning to the one-trial system, it is necessary to discuss how to consider this as well.
Hoekman and Mavroidis (2020) suggest (1) the introduction of a full-time panelist system (12-15 permanent panelists with appropriate qualification requirements and selection processes); (2) revision of impossible mandatory processing deadlines; (3) more stable legal analysis by the panel (support from legal and economic experts is essential); and (4) the use of the STC process (e.g., TFA is helpful.)
By considering these measures together, it may be possible to realize the benefits of stabilizing dispute resolution in a two-trial system.
These negotiations are extremely complex, and the positions of major countries, including the U.S., are unclear.
The position of the U.S. in blocking the resolution of Appellate Body issues is not always clear or consistent, and the above hypothesis is only one toward a resolution. It is possible that the issues that the U.S. is advocating as Appellate Body issues could be rehashed at the panel stage.
This proposal is a search for a solution to the current situation in which the dispute

settlement procedures of the WTO have been hollowed out and there are fears that the situation may deteriorate further. It goes without saying that it is necessary to start discussions while carefully judging the responses of WTO members (especially the US.)

5) Addressing the issue of the right to decide on security exceptions - Reconsideration

As seen above, a dispute resolution mechanism with a one-trial system and mandatory adoption could be a more acceptable solution because the U.S. could skip the various issues involved with the Appellate Body. This also solves the problem of appeals in the void.

However, even if the one-trial system were to be restored, the issue of who has the authority to determine the security exception (the U.S. position is that this is a matter for the parties concerned to determine and is not subject to the dispute resolution mechanism) will not be resolved.

Maruyama and Wolff (p. 1) state that it is unlikely that the U.S. will return to a fully effective WTO dispute settlement procedure without a resolution (compromise measure) on the issue of the right to judge security exceptions.

Finally, the U.S. will stick to its independent judgment, and there is a high possibility that the resolution of this issue will be a condition for the restoration of the dispute settlement function. First, we would like to see if the U.S. has changed its position, but under the current circumstances, we must assume that this will be extremely difficult.

In addition, it will be politically difficult, in many cases, for the losing party to dispute the security exception to implement the Panel’s conclusions.

In particular, the United States filed appeals in the void in both the Article 232 case and the Hong Kong origin case, and it is natural to expect that it will continue to assume that its conclusions are unacceptable in the losing case.

It is imperative that we negotiate to reach a resolution on this issue.

Again, as one option (in what is sure to be a tough negotiation and in which all possible solutions will be explored.),

one realistic solution that should be considered is not to question whether there is a violation of Article 21 regarding security exception measures but to open the way for compensation measures based on non-violation.

It is necessary to discuss and consider the contents of a specific Tentative Agreement on National Security (NSMPIA) with various options in mind, including

such a proposal.
Considering the above, we hope that discussions at the WTO will progress rapidly. We also hope that Japan will play an active role in these discussions.

(6) FTAs and security exceptions
FTAs are complementary tools to the WTO, and unfortunately, they are being developed with various economic and political motivations and backgrounds under the circumstances that liberalization and trade rule making in the WTO, which covers the entire world, have been stagnant in the 21st century.
Economic security is another factor that directly and indirectly influences FTAs and defines their content; however, a specific analysis of this issue is still in its infancy.
Looking at the discipline of security exceptions, major FTAs follow the WTO's security exception framework, but more lax (allowing exceptions) disciplinary writing is said to be particularly evident in FTAs involving the U.S. (including the CPTPP). Based on discussions at the WTO and dispute settlement panels, it can be seen that the influence of the U.S. position in bipartisan FTAs has already started to appear in FTAs.
The importance of FTA frameworks and dispute-settlement procedures may increase in the future.
However, unlike NAFTA, the dispute settlement framework for FTAs involving Japan has not yet been utilized.
Depending on future developments in the WTO, if discussions on the Article 21 exception do not progress, it is possible that measures and dispute settlement based on FTA dispute settlement procedures and security exception clauses will be utilized, and the follow-up and analysis of progress in FTAs will be an important issue. In such cases, it is necessary to address issues such as how to interpret the differences in provisions between the WTO and individual FTAs.
The basic idea is to establish a universal approach in the WTO, and it is necessary to proceed with a strong will and policy so that the results of various efforts in FTAs will be embodied in WTO rules in the future.

III Conclusion

Japan's trade policy was developed based on the multilateral trade regime centered on the GATT and WTO, but as negotiations in the WTO have become

difficult in the 21st century, FTAs have supported liberalization and rule making as the two wheels of the trade policy cart.
Since the latter half of 2010, with the intensification of friction between the U.S. and China, the introduction of trade measures on the grounds of security has accelerated and has come to occupy the position of the third pillar of trade policy, so to speak, and achieving a balance between free trade and security is an urgent issue facing not only Japan but the world.
From the perspective of security, Article 21 of the GATT stipulates the principle of security exceptions,
Traditionally, the security exception clause has been administered in a restrained manner and WTO disputes have been rare. In recent years, the introduction of measures based on security exceptions has become more frequent, and WTO disputes have accelerated in the wake of the Russia-Ukraine panel.
This paper reviews the position of the security exception clause and actual cases of dispute settlement. It is necessary to continue to monitor the operation of Article 21 and dispute settlement decisions.
The U.S. position is that only the parties concerned have the authority to make decisions (WTO panels do not have the authority to make decisions), and it is necessary to consider handling security exceptions with this in mind.
While an increasing number of measures are being introduced based on security exceptions, this paper presents the direction of WTO discussions, focusing mainly on four points. The following is a summary of the discussion:

1. Restoration of the rule-making function
Since the high incidence (and abuse) of security exceptions is based on sluggish rule making in the WTO, it is necessary to realize the results of JSI negotiations (e.g., e-commerce) as soon as possible and determine future negotiation targets focused on trade remedy measures and other issues.

2. Expansion of dialogue at the TBT/SPS Committee and establishment of a National Security Committee
The TBT/SPS Committee and other committees have a long history of responding to the STC on the basis of notification and expanded transparency, and have contributed to dialogue, presentation of guidelines and best practices, and resolution of specific conflict cases.
Following this precedent, one idea is to expand dialogue in existing committees

and even to establish a National Security Committee in the WTO, based on reporting and dialogue, to open the way for handling issues other than formal dispute settlement, which rarely leads to adoption because of the political nature of the security exception.

3. Strengthening and Restoring Dispute Settlement Functions

In an environment where the introduction of security exceptions is expected to accelerate in the future, it will be essential to take action while recognizing the positions of major countries, especially the U.S., on the issue of who has the authority to make decisions on security exceptions to prevent the abuse of security exceptions and the acceleration of black boxing.

Specifically, it is necessary to consider the introduction of compensation measures on the grounds of non violation, as advocated by Maruyama and Wolff. In addition, because of the political nature of the security exception, it is unlikely that a party will settle a dispute over a case it has lost; therefore, it is expected that security cases will frequently be subject to appeals in the void. This further hollows out the WTO’s dispute settlement function. The frequent occurrence of appeals in the void is not limited to the security exception, but is a problem of the WTO's dispute settlement as a whole and needs to be resolved urgently. Introducing a single-trial system with a negative consensus should be considered as a way to block appeals in the void..

Binding to a one-trial system can also be the basis for restoring the WTO’s dispute settlement system.

4. FTAs and Security Exception

Although many FTAs incorporate rules for security exceptions, their provisions are not necessarily the same as those of the WTO. It is necessary to closely monitor the development and utilization of FTA disciplines for security exceptions where the dispute settlement procedures of FTAs may be utilized.

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