「國家安全例外」條款解釋之演進以及可能影響

張育瑋 編譯

摘要

世界貿易組織於去（2022）年 12 月 9 日及 21 日分別公布「美國——鋼鋁製品關稅案」及「美國——原產地標示案」的爭端解決小組報告。美國作為這兩個案件中的被告，皆援引《關稅暨貿易總協定》第 21 條國家安全例外條款以正當化其系爭措施，並主張爭端解決小組對該些案件並無管轄權。爭端解決小組已於 2018 年「俄羅斯——過境轉運案」中針對國家安全例外條款作出解釋，即使世界貿易組織並無先例拘束原則，但原則上仍會保持裁決的一致性。然而，「美國——原產地標示案」的爭端解決小組卻針對國家安全例外條款的解釋做出一些變革，導致該條款的適用範圍更為限縮。本文試分析此變革所可能產生的影響及所代表的意義。

本中心曾於經貿法訊第 255 期指出爭端解決小組於「俄羅斯——過境轉運案（*Russia — Measures Concerning Traffic in Transit*）」針對《關稅暨貿易總協定（General Agreement on Tariffs and Trade, GATT）》第 21 條國家安全例外條款的解釋可能會影響到「美國——鋼鋁製品關稅案（*United States — Certain Measures on Steel and Aluminum Products*）」的小組報告 [1]。爭端解決小組於「俄羅斯——過境轉運案」中為援引國家安全例外條款設立高門檻，因此美國以國家安全為由，提高進口鋼鐵與鋁製品關稅的措施勢必會受到挑戰 [2]。此案件自 2018 年 11 月 21 日成立爭端解決小組後，因 COVID-19 疫情爆發而陷入停滯，終於在去（2022）年 12 月 9 日迎來爭端解決小組的裁決 [3]。

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[1] 劉瑋佳，美國以國家安全為由加徵鋼鋁產品關稅恐受到 WTO「俄羅斯——過境轉運案」爭端解決小組裁決之影響，經貿法訊，255 期，頁 1-5，2019 年 6 月 25 日，http://www.tradelaw.nccu.edu.tw/epaper/no255/1.pdf。

[2] 劉瑋佳（註 1），頁 5。

[3] 「美國——鋼鋁製品關稅案」起源於美國前總統川普（Donald Trump）以國家安全為由加徵鋼鋁製品的關稅，針對美國的系爭措施，歐盟、土耳其、瑞士、俄羅斯、挪威、墨西哥、加拿大、印度及中國分別提起諮商之請求，諮商未果後，爭端解決機構（Dispute Settlement Body）並未將此爭端合併成一案，而是就各案件自成立爭端解決小組。去年 12 月 9 日，WTO 率先公布中國、挪威、瑞士及土耳其的小組報告，報告內容基本上相同，故本文以下以中國的小組報告為例。*Dispute Settlement: DS544 United States — Certain Measures on Steel and Aluminium Products*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds544_e.htm (last visited Mar. 25, 2023); Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/R (circulated Dec. 9, 2022) [hereinafter Panel Report, *US — Steel and Aluminium*

之後不到半個月，另一同樣涉及國家安全條款的爭端——「美國——原產地標示案（*United States — Origin Marking Requirement*）」的爭端解決小組報告亦出爐，雖然其爭端解決小組於 2021 年初方成立[4]。於該案件中，美國以「國家安全」為由，擬正當化的是其要求出口至美國的香港產品均應標示原產地為「中國」的措施[5]。香港主張系爭措施違反 GATT 第 9.1 條原產地標示的最惠國待遇原則、《原產地規則協定（Agreement on Rules of Origin）》第 2(c)-(e)條、以及《技術性貿易障礙協定（Agreement on Technical Barriers to Trade）》第 2.1 條的不歧視原則[6]。

如眾所周知，上述兩案件之小組皆不同意美國之「國家安全」抗辯，且與「俄羅斯——過境轉運案」之小組看法相同，同樣認為爭端解決小組有權客觀審查 GATT 第 21 條（b）款所臚列的有關「國家安全」的情形在具體案件中是否存在[7]。不過在「美國——原產地標示案」中，爭端解決小組似乎較「俄羅斯——過境轉運案」的小組更進一步限縮國家安全例外條款的適用。以下比較上述案件中爭端解決小組對於國家安全例外條款的解釋，並說明論者對「美國——原產地標示案」小組報告的批評，最後作一結論。

Products (China)]; Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS552/R (circulated Dec. 9, 2022); Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS556/R (circulated Dec. 9, 2022); Panel Report, *United States — Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS564/R (circulated Dec. 9, 2022).

[4] Panel Report, *United States — Origin Marking Requirement*, WTO Doc. WT/DS597/R (circulated Dec. 21, 2022) [hereinafter Panel Report, *US — Origin Marking (Hong Kong, China)*].

[5] *Id*. paras. 2.1, 7.1 ("Hong Kong, China challenges the requirement applied by the United States as published by the United States Customs and Border Protection (USCBP) in the Federal Register Notice of 11 August 2020 (11 August Federal Register Notice)11 that imported "goods produced in Hong Kong, ... may no longer be marked to indicate 'Hong Kong' as their origin, but must be marked to indicate 'China'....In response, the United States invokes the security exception in Article XXI(b) of the GATT 1994.").

[6] *Id*. para. 3.1 ("Hong Kong, China requests that the Panel find that the origin marking requirement is inconsistent with the United States' obligations under Articles 2(c) and 2(d) of the ARO, Article 2.1 of the TBT Agreement, and Articles I:1 and IX:1 of the GATT 1994.").

[7] *Id*. para. 8.1 ("Article XXI(b) is not entirely self-judging insofar as the unilateral determination granted provision does not extend to the subparagraphs. Instead, the subparagraphs are subject to review by a panel...The United States has not demonstrated that the situation at issue constitutes an emergency in international relations, and therefore the origin marking requirement is not justified under Article XXI(b)(iii)"); Panel Report, *US — Steel and Aluminium Products (China)*, paras. 7.128, 8.1 ("The Panel does not consider that Article XXI(b) of the GATT 1994 is "self-judging" or "non-justiciable" in the sense argued by the United States, nor that the provision contains a "single relative clause" that wholly reserves the conditions and circumstances of the subparagraphs to the judgment of the invoking Member....Regarding Article XXI of the GATT 1994, the Panel does not find that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. The Panel therefore finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994.").

壹、相異之處

爭端解決小組於「俄羅斯——過境轉運案」中承認 GATT 第 21 條（b）款前言屬於會員主觀判斷的範圍，但就是否落入該款的 3 種情狀，則認為必須進行客觀的審查[8]。在判斷系爭情況是否符合 GATT 第 21 條（b）款 iii 目後半句之「國際緊急情況」前，小組先參考前半句之「戰爭時」規定，進而將「國際關係之緊急情況」解釋為泛指武裝衝突、潛在的武裝衝突、或高度緊張或危機情況，或環繞著國家的普遍性不穩定情況[9]。至於該國際關係之緊急情況的嚴重程度或規模，小組並未加以著墨。

在「美國——原產地標示案」中，爭端解決小組卻將「國際關係之緊急情況」作更為限縮的文義解釋，認為在程度上應達到「國家或國際關係之參與者間的關係發生極其嚴重的事態，該情形事實上代表關係呈決裂或瀕臨決裂的狀態」[10]。換言之，其嚴重的程度雖不需與戰爭相同[11]；但對國際關係所生之不利影響的嚴重程度與規模需與戰爭相當[12]。鑑於美國與香港間仍持續有貿易往來，「美國——原產地標示案」小組認定系爭狀況尚未達到該當「國際關係之緊急情況」要件所需的嚴重程度[13]。

另一方面，較早出爐的「美國——鋼鋁製品關稅案」小組報告則未對 GATT 第 21 條（b）款第 iii 目作出類似的限制性文義解釋，事實上，該小組認為美國所提出之全球合作設法解決鋼鐵產能過剩的事實，僅能反映全球對鋼鐵市場供過於求之關切，並無法證明該問題對國際關係的衝擊達到構成「國際關係之緊急情

[8] Panel Report, *Russia — Measures Concerning Traffic in Transit*, para. 7.82, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter Panel Report, *Russia — Traffic in Transit*] (“[I]s that the adjectival clause "which it considers" in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.”).

[9] *Id*. para. 7.76 (“An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.”).

[10] Panel Report, *US—Origin Marking (Hong Kong, China)*, para. 7.290 (“[A]n emergency in international relations refers to a state of affairs that occurs in relations between states or participants in international relations that is of the utmost gravity, in effect, a situation representing a breakdown or near-breakdown in those relations.”).

[11] *Id*. para. 7.297 (“The above does not suggest that for a situation to constitute an emergency in international relations it must amount to war.”).

[12] *Id*. (“[I]t should reflect a near-comparable gravity or magnitude as concerns its adverse impact on the relations between states or other participants in international relations.”).

[13] *Id*. para. 7.354 (“We further note that trade has carried on between the United States and Hong Kong, China, largely as before, with the exception of the origin marking requirement and some export controls. In our view, all of this militates against a conclusion of a breakdown or near-breakdown in international relations that we have found to be consonant with an emergency in such relations.”).

況」的嚴重程度[14]。

貳、「美國——原產地標示案」小組報告引發之批評

有論者認為「美國——原產地標示案」的小組報告過於著重 GATT 第 21 條（b）款第 iii 目條文的文義解釋，以致過於形式主義而有失平衡[15]。同時，其亦聲稱該小組報告凸顯國際裁決之武斷與不一致性，結果可能會減損 WTO 裁決機構對國家安全主張的客觀判斷[16]。該論者並主張，比較理想的方法應該是將 WTO 的司法審查限於檢視會員在追求國家安全利益保護時之裁量是否本於誠信原則（good faith），而不應導致會員受國際法保障的其他合法利益受到不合理的影響[17]。

事實上，早於 2019 年，即有學者主張針對國家安全例外條款宜效仿《防衛協定（Agreement on Safeguards）》，設置一立即「重新平衡（Rebalancing）」機制[18]。當一會員實施防衛措施時，其有義務提供出口會員補償；若雙方無法就補償事項達成協議，不需經過司法審理程序，出口會員得逕自實施貿易報復，立即使世界貿易組織（World Trade Organization）的貿易體系重新恢復到平衡的狀態[19]。

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[14] Panel Report, *US — Steel and Aluminium Products (China)*, paras. 7.148, 7.149 ("Having carefully reviewed the relevant evidence and arguments submitted in this dispute, and particularly those submitted by the United States in relation to global excess capacity, the Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an "emergency in international relations" during which a Member may act under Article XXI(b)(iii)....In conclusion, the Panel does not find, based on the evidence and arguments submitted in this dispute, that the measures at issue were "taken in time of war or other emergency in international relations" within the meaning of Article XXI(b)(iii) of the GATT 1994. Therefore, the Panel finds that the inconsistencies of the measures at issue with Articles I:1 and II:1 of the GATT 1994 are not justified under Article XXI(b)(iii) of the GATT 1994.").

[15] Hitoshi Nasu, *US – Origin Marking Requirement: Did the WTO Panel Get the Balance Right Between Trade Security and National Security?*, EJIL: TALK! (Jan. 25, 2023), https://www.ejiltalk.org/us-origin-marking-requirement-did-the-wto-panel-get-the-balance-right-between-trade-security-and-national-security/ ("[I]t is clear that the Panel's approach is overly formalistic and unbalanced.").

[16] *Id*. ("[T]his Panel decision serves as an illustration of arbitrariness and inconsistency in international adjudication that could undermine the judicial authority to make an objective determination against the claim of a security exception.").

[17] *Id*. ("[T]he better approach is to limit the judicial inquiry to whether discretion is exercised in good faith– in other words, genuinely in pursuit of the security interest protected and not in a way that is calculated to cause any unreasonable prejudice to other legitimate interests protected under international law.").

[18] Simon Lester & Huan Zhu, *A Proposal for "Rebalancing" to Deal with "National Security" Trade Restrictions*, 42(5) FORDHAM INT'L L. J. 1451, 1471 (2019) ("National security fits much more naturally into the safeguard category. Where national security is invoked, a violation is generally assumed and not contested. If the national security justification is upheld, there is no hope of inducing compliance with WTO obligations, and thus moving on to the rebalancing stage immediately is appropriate.").

[19] *Id.* at 1469-1470 ("[I]mmediate rebalancing has only been available for safeguards...."); Agreement on Safeguards arts. 8.1-8.2, Apr. 15, 1994, Marrakesh Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S 154, 157-158 ("To achieve this objective, the Members concerned may agree

該學者認為國家安全例外條款可以採用相同的機制，因為其提供一個將貿易報復性措施替換成補償性自由化（compensatory liberalization）之機會，同時亦能有效地抑制會員濫用國家安全例外條款的情形[20]。在目前各會員無法就國家安全例外條款的解釋達成共識之情況下，與其訴諸傳統訴訟，從程序上做調整或許是更有效的解決辦法。

參、結論

爭端解決小組針對「國際關係之緊急情況」作限制性的文義解釋固然可提高會員援引該條款的難度，有效避免該條款遭到濫用，進而維持多邊貿易體系的穩定性。然而，設立過於嚴苛的標準亦可能減損該條款保護會員國家安全利益的功能，而有違該條款宗旨。事實上，一旦會員自以為「國家安全利益」受到威脅，期待其優先考慮國際貿易，未免也不切實際。「美國——原產地標示案」中小組有關「國家緊急情況」的限縮解釋，究竟是會被繼續沿用？抑或效仿《防衛協定》的「重新平衡」機制會被會員大膽提出，進而成為談判草案？值得持續關注。

on any adequate means of trade compensation for the adverse effects of the measure on their trade... If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure....").

[20] Lester & Zhu, *supra* note 18, at 1471 ("Instituting rebalancing rules here would provide an opportunity to replace retaliatory tariffs with compensatory liberalization....[R]ebalancing would have an important benefit by limiting the abuse of the provisions.").