

GATT 第20条における必要性要件の考察  
— 解釈の理論的・制度的基盤に関する基礎的検討 —

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**【概要】**

2000年の韓国牛肉事件上級委員会報告以降、WTOのパネル及び上級委員会はGATT20条(b)号並びに(d)号に規定される「必要な (necessary to)」の文言（以下、必要性要件）の解釈に際し、問題とされる措置の①貢献度 (contribution)、②目的の重要性 (importance)、③貿易制限性 (impact) を検討した上で、より貿易制限性の低い代替措置の有無を検討する分析方法を採用している。2005年の米国賭博サービス事件以降は、問題とされる措置自体における措置の貢献度と貿易制限性との比較衡量を実施する傾向がみられるが、必要性要件に当該分析枠組みを用いることは定着しつつあると言える。

しかしながら、パネル及び上級委員会が提示しているかかる解釈は、「必要な」の文言を超えた解釈であり、文言を素直に理解するだけでは導かれる解釈とは言い難い。この点、同解釈の背景には、比例性原則が存在していると主張する論者は少なくない。しかし、一言で比例性原則といっても同原則は広範な意味を含み、また、WTO法が協定上の明文及び判例法のいずれにおいても比例性原則を明示していないことから、必要性要件における比例性原則の性質は不明確な状態にある。そこで本稿では、必要性要件に見られる比例性原則がどのような性質を有し、またどのような問題点を含んでいるかについて理論的、制度的な側面から検討を加える。

**1. GATT20条の概要**

- ・ GATT20条(b)号(d)号の必要性要件

**2. 必要性要件の解釈の変遷**

- a) 最小通商制限性テスト (least trade-restrictive alternative) **【資料2】**
  - ・ 米国関税 337 条事件 (1989 年)<sup>1</sup>、タイ・タバコ事件 (1990 年)<sup>2</sup>
  - ・ 代替措置の合理的可能性
- b) 均衡性プロセス (weighing and balancing process) **【資料3】**
  - ・ 韓国牛肉事件 (2000 年)<sup>3</sup>、EC アスベスト事件 (2001 年)<sup>4</sup>
  - ・ 代替措置の「合理的可能性」の判断基準としての三要素の提示：目的の重要性、貢献度、貿易制限性
- c) 均衡性テスト (weighing and balancing test) **【資料4】**
  - ・ 米国賭博サービス事件 (2005 年)<sup>5</sup>、ドミニカ・タバコ税事件 (2006 年)<sup>6</sup>、ブラジル再生タ

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<sup>1</sup> *United States – Section 337 of the Tariff Act of 1930*, BSID 36S/345 (Nov. 7, 1989)

<sup>2</sup> *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200 (Nov. 7, 1990).

<sup>3</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000).

<sup>4</sup> *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/R (Sep. 18, 2000), WT/DS135/AB/R (Mar. 12, 2001).

<sup>5</sup> *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004), WT/DS285/AB/R (Apr. 7, 2005).

イヤ事件（2007年）<sup>7</sup>

- ・争点とされる措置及び代替措置の判断基準として三基準の利用
- ・争点とされる措置の目的の重要性と貢献度の比較衡量

※均衡性プロセスから均衡性テストへ

### 3. 必要性要件の解釈の理論的基盤に関する検討

#### 3.1 WTO法における比例性原則の出現

- ・必要性要件の解釈が比例性原則（proportionality principle）の反映と捉える学説の出現（Hilf（2001）、Desmedt（2001）、Mitchell（2006））
- ・比例性原則は広範な意味で捉えられており、必要性要件の解釈がその一類型と捉えることは可能。
- ・ただし、WTO協定の条文には明記されていない  
→ 「包括的（overarching）」な原則ではなく、また、不文の原則（unwritten principle）。

#### 3.2 比例性原則

- ・定義
- ・比例性原則の類型：
  - ① 抵触しあう権利（right）、あるいは利益（interest）、価値（value）の均衡を図るための原則としての比例性原則
  - ② 不法行為に対する対抗手段の均衡を図るための比例性原則
  - ③ 権限の実施に対する制約としての比例性原則

#### 3.3 必要性要件に見られる比例性原則の理論的性質

- ・必要性要件＝利益の均衡を図るための原則としての比例性原則を基礎とした解釈（上記①）
- ・憲法的性質を有する比例性原則（「立憲化（constitutionalization）」<sup>8</sup>の文脈での原則）

#### 3.4 必要性要件における比例性原則の制度的基盤に関する検討

- ・相反する利益を「合理的に比較検討」することが可能か
- ・パネル、上級委員会が多様なWTO加盟国の価値を判断することの限界
- ・EUにおける司法制度（先決裁定制度、直接効果）との相違：制度的脆弱性

### 4. おわりに

- ・必要性要件における比例性原則の出現と「立憲化」の一類型としての原則
- ・必要性要件の理論的發展に制度的基盤が伴わない状態が存在（制度的基盤の伴わない比例性原則の適用）

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<sup>6</sup> *Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R (Nov. 26, 2004), WT/DS302/AB/R (Apr. 25, 2005).

<sup>7</sup> *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007), WT/DS332/AB/R (Dec. 3, 2007)

<sup>8</sup> Cottier (2000) の定義では、「等しく正統で民主的に定義づけられた異なる基本的価値や、自由や福利の促進に献身する政治組織の異なる政策目的を合理的に比較検討することの可能な枠組み」。

## 【資料1】関連条文

### GATT20条

この協定の規定は、締約国が次のいずれかの措置を採用すること又は実施することを妨げるものと解してはならない。ただし、それらの措置を、同様の条件の下にある諸国の間において任意の若しくは正当と認められない差別待遇 (arbitrary or unjustifiable discrimination) の手段となるような方法で、又は国際貿易の偽装された制限 (disguised restriction on international trade) となるような方法で、適用しないことを条件とする。

(b) 人、動物又は植物の生命又は健康の保護のために必要な措置

…

(d) この協定の規定に反しない法令（…特許権、商標権及び著作権の保護に関する法令並びに詐欺的慣行の防止に関する法令を含む。）の遵守を確保するために必要な措置

…

### GATS16条

この協定のいかなる規定も、加盟国が次のいずれかの措置を採用すること又は実施することを妨げるものと解してはならない。ただし、それらの措置を、同様の条件の下にある国の間において恣意的若しくは不当な差別の手段となるような態様で又はサービスの貿易に対する偽装した制限となるような態様で適用しないことを条件とする。

(a) 公衆の道徳の保護又は公の秩序（注）の維持のために必要な措置

注 公の秩序を理由とする例外は、社会のいずれかの基本的な利益に対し真正かつ重大な脅威がもたらされる場合に限り、適用する。

(b) 人、動物又は植物の生命又は健康の保護のために必要な措置

## 【資料2】

### (1) 米国関税法 337 条事件パネル報告

5.26 It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provision is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions. The Panel wished to make it clear that this does not mean that a contracting party could be asked to change its substantive patent law or its desired level of enforcement of that law, provided that such law and such level of enforcement are the same for imported and domestically-produced products. However, it does mean that, if a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so.

### (2) タイ・タバコ事件パネル報告

75. The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be “necessary” in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably expected to employ to achieve its health policy objectives.

### 【資料 3】

#### 韓国牛肉事件

164. In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

166. The standard described by the panel in *United States – Section 337* encapsulates the general considerations we have adverted to above. In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could "reasonably be expected to employ" is available, or whether a less WTO-inconsistent measure is "reasonably available".

### 【資料 4】

#### (1) 米国賭博サービス事件

310. Rather, it is for a responding party to make a *prima facie* case that its measure is "necessary" by putting forward evidence and arguments that enable a panel to assess the challenged measure in the light of the relevant factors to be "weighed and balanced" in a given case. The responding party may, in so doing, point out why alternative measures would not achieve the same objectives as the challenged measure, but it is under no obligation to do so in order to establish, in the first instance, that its measure is "necessary". If the panel concludes that the respondent has made a *prima facie* case that the challenged measure is "necessary"—that is, "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"—then a panel should find that challenged measure "necessary" within the terms of Article XIV(a) of the GATS.

311. If, however, the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains "necessary" in the light of that alternative or, in other words, why the proposed alternative is not, in fact, "reasonably available". If a responding party demonstrates that the alternative is not "reasonably available", in the light of the interests or values being pursued and the party's desired level of protection, it follows that the challenged measure must be "necessary" within the terms of Article XIV(a) of the GATS.

323. As we stated above, a responding party must make a *prima facie* case that its challenged measure is "necessary". A Panel determines whether this case is made through the identification, and weighing and balancing, of relevant factors, such as those in *Korea – Various Measures on Beef*, with respect to the measure challenged. In this regard, we note that the Panel: (i) found that the three federal statutes protect "very important societal interests"; (ii) observed that "strict controls may be needed to protect [such] interests"; and (iii) found that the three federal statutes contribute to the realization of the ends that they pursue. Although the Panel recognized the "significant restrictive trade impact" of the three federal statutes, it expressly

tempered this recognition with a detailed explanation of certain characteristics of, and concerns specific to, the remote supply of gambling and betting services... Thus, this analysis reveals that the Panel did not place much weight, in the circumstances of this case, on the restrictive trade impact of the three federal statutes. On the contrary, the Panel appears to have accepted virtually all of the elements upon which the United States based its assertion that the three federal statutes are "indispensable".

326. Turning to the Panel's analysis of alternative measures, we observe that the Panel dismissed, as irrelevant to its analysis, measures that did not take account of the specific concerns associated with *remote* gambling. We found above that the Panel erred in finding that consultations with Antigua constitutes a measure reasonably available to the United States. Antigua raised no other measure that, in the view of the Panel, could be considered an alternative to the prohibitions on remote gambling contained in the Wire Act, the Travel Act, and the IGBA. In our opinion, therefore, the record before us reveals no reasonably available alternative measure proposed by Antigua or examined by the Panel that would establish that the three federal statutes are not "necessary" within the meaning of Article XIV(a). Because the United States made its *prima facie* case of "necessity", and Antigua failed to identify a reasonably available alternative measure, we conclude that the United States demonstrated that its statutes are "necessary", and therefore justified, under paragraph (a) of Article XIV.

## (2) ブラジル再生タイヤ事件

178 ...[I]n order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness.

179 ...[I]n the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness.

210 Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.