

疫情時代優先採購國產醫藥需修改

政府採購協定市場開放清單？

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摘要

去(2020)年底美國貿易代表署通知世界貿易組織政府採購委員會，表示將修正其附於政府採購協定附錄一之市場開放清單，因而引起其他協定締約國之不滿。諸締約國與美國諮商未果後，遂於今年三月訴諸政府採購協定第 19 條之仲裁程序。孰料數週後，美國又通知委員會表示其撤回原修訂清單之請求。其實政府採購協定第 3 條原本就設有國家安全和一般例外規定，惟美國受新冠肺炎疫情影响而有可能無法履行部分協定義務時，是否可援引上述例外條款，而毋庸大費周章地請求修改開放清單，頗值討論。儘管世界貿易組織有關一般例外的爭端案例不少，近年也陸續出現涉及國家安全例外者，但皆不涉及政府採購協定。不過鑑於相關例外規定之文字相仿，根據條約解釋原則，應可參考相關裁決論理，以討論美國是否得援引上述例外條款以達成其目的，而毋庸修改其開放清單。

《政府採購協定 (Government Procurement Agreement, GPA)》為《馬爾喀什設立世界貿易組織協定 (Marrakesh Agreement. Establishing the World Trade Organization)》(以下簡稱 WTO 協定)附件四之協定，乃多邊框架下之複邊協定，僅有締約之世界貿易組織 (World Trade Organization, WTO) 會員需負擔該協定之義務，也僅有締約之 WTO 會員得享有彼此授予之政府採購市場開放的利益¹。此協定之適用範圍，原則上以各締約會員提出於協定附錄一 (Appendix I) 之諸附件 (annexes) 所列之採購機關清單、採購產品 (包括貨品及服務) 清單、以及在一定門檻金額 (threshold value) 以上之採購為限²。不過如同 WTO 會員得在滿足

¹ Marrakesh Agreement Establishing the World Trade Organization art. II.3, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994).

² Protocol Amending the Agreement on Government Procurement, Annex: arts. II, Mar. 30, 2012 [hereinafter Revised GPA] (providing that "...; 2. For the purposes of this Agreement, covered procurement means procurement for governmental purposes: a) of goods, services, or any combination thereof: i. as specified in each Party's annexes to Appendix I... c) for which the value, ..., equals or exceeds the relevant threshold specified in a Party's annexes to Appendix I..., d) by a procuring entity; and ...; 4. Each Party shall specify the following information in its annexes to Appendix I: a) in Annex 1, the central government entities whose procurement is covered by this Agreement; b) in Annex 2, the sub-central government entities whose procurement is covered by this Agreement; c) in Annex 3, all other entities whose procurement is covered by this Agreement; d) in Annex 4, the goods covered by this Agreement; e) in Annex 5, the services, other than construction services, covered by this

一定條件下修改其關稅減讓表與特定服務承諾表一樣，GPA 締約國亦可以根據一定程序，修改上述諸附件，以改變其原始承諾³。

美國貿易代表署 (United States Trade Representative, USTR) 於去 (2020) 年 11 月即通知 GPA 委員會，表示欲修改其原列於協定附錄一之附件 1，將「其為因應來自化學、生物、放射和核子之威脅、以及公共衛生緊急情況 (包括如新冠肺炎之新興傳染病)，而認為有必要之所有貨品」排除於原承諾開放之聯邦政府機關採購範圍⁴。惟該修正內容引發其他締約國之異議⁵，與美協議未果後，諸異議國即於今年 3 月底將此事訴諸 GPA 之仲裁程序⁶。未料美國旋即又在 4 月 16 日向 GPA 委員會表示撤回其上述修正清單之提案⁷。

美國之所以撤回修正清單之提案，究竟是因為拜登政府決定採取與前川普政府不一樣的公衛危機因應策略？抑或其意識到 GPA 第 3 條之國家安全及一般例外條款，可正當化其為確保緊急時之醫藥供給而採取之採購手段？目前不得而知。不過探討美國是否可援引 GPA 第 3 條以正當化其在疫情時代優先採購美國所開發生產之醫藥產品，應有助於瞭解 GPA 締約國對於門檻金額以上之採購，是否仍有優先採購國貨之空間。

以下先簡介本次美國提案修正其政府採購開放清單之背景，以及其後又撤回之始末。接著分別根據過往案例之裁決論理，試析美國優先採購國產醫藥之措施，是否得以被 GPA 之國家安全及一般例外條款正當化。最後則作一結論。

壹、美國提案修改市場開放清單後又撤回之始末

前美國總統川普於去 (2020) 年 8 月 6 日發布第 13944 號行政命令，表示為確保「必要之藥品、醫療對策產品、以及關鍵性投入產品」在美國有足夠之供應，以降低對外國生產者之依賴，俾「保護公民、基礎設施、軍力及經濟，免受新興

Agreement; f) in Annex 6, the construction services covered by this Agreement; and g) in Annex 7, any General Notes.”) 由於本議定書之聯合國條約序號目前未定，條文請參考 WTO 官網：https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm。

³ Revised GPA art. XIX.1 (providing that “[a] Party shall notify the Committee of any proposed rectification, transfer of an entity from one annex to another, withdrawal of an entity or other modification of its annexes to Appendix I....”).

⁴ Hannah Monicken, *U.S. Seeks to Cut Essential Medicines from GPA-Covered Products at WTO*, INSIDE U.S. TRADE, Vol. 38, No. 49, Dec. 4, 2020.

⁵ Hannah Monicken, *EU, Switzerland Object to U.S. Push to Modify GPA Coverage*, INSIDE U.S. TRADE, Vol. 39, No. 2, Jan. 8, 2021.

⁶ Hannah Monicken, *WTO members refer objections to U.S. GPA modification to arbitration*, INSIDE U.S. TRADE, Vol. 39, No. 14, Apr. 2, 2021.

⁷ Jean Heilman Grier, *Biden Team Pulls Proposed GPA Modification to Remove Medicines*, PROSPECTIVE ON TRADE (Apr. 20, 2021), <https://trade.djaghe.com/?p=6962> (providing that “[i]n an April 16 filing with the WTO, the United States withdrew ‘effective immediately’ a proposed modification filed by the U.S. in November 2020 to remove more than 300 medicines and medical devices from U.S. commitments under the GPA.”).

流行病爆發及化學、生物、放射及核子之威脅」，要求相關政府部門採取一定措施，包括在採購上述產品時，盡可能優先採購在美國產製者⁸。

同行政命令亦要求 USTR 於美國食品藥物管理局 (Food and Drug Administration, FDA) 依據該行政命令列出上述產品清單後，修改美國在自由貿易協定及 GPA 下原承諾開放採購的產品範圍⁹。USTR 因此於去年 11 月通知 GPA 委員會，表示美國擬修改原承諾之開放清單，將上列產品排除¹⁰。

歐盟和瑞士等國原以美國上述通知未提供應有資訊為由，而聲明異議，蓋美國既未依 GPA 之規定，提供有關上述清單修改對其他締約成員可能影響之評估，亦未提出可能之補償調整資訊¹¹。後雖於今年 2 月，即拜登總統就任後，美國補充了相關資訊¹²，但異議國仍認為不夠充分，遂於今年 3 月將其異議訴諸 GPA 第 19 條之仲裁程序¹³。

孰料美國旋即於 4 月，即 USTR 新任代表戴琪宣誓就任後尚不滿一個月之際¹⁴，通知 GPA 委員會，表示撤回其修改開放清單之提案，不過也同時聲明保留未來修改開放清單之權利¹⁵。

⁸ Order Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States, 85 Fed. Reg. 49929 (Aug. 6, 2020) (providing that “Section 1 *Policy*. The United States must protect our citizens, critical infra-structure, military forces, and economy against outbreaks of emerging infectious diseases and chemical, biological, radiological, and nuclear (CBRN) threats. To achieve this, the United States must have ...resilient domestic supply chain...reduce our dependence on foreign manufacturers..... Section 2 *Maximizing Domestic Production in Procurement*(a) Agencies shall, as appropriate, to the maximum extent permitted by applicable law, and in consultation with the Commissioner of Food and Drugs (FDA Commissioner) with respect to Critical Inputs, use their respective authorities ... to conduct the procurement of Essential Medicines, Medical Countermeasures, and Critical Inputs by: (i) using procedures to limit competition to only those Essential Medicines, Medical Countermeasures, and Critical Inputs that are produced in the United States;....”).

⁹ *Id.* at 49930 (providing that “[n]o later than 30 days after the FDA Commissioner has identified, pursuant to section 3(c) of this order, the initial list of Essential Medicines, Medical Countermeasures, and Critical Inputs, the United States Trade Representative shall, to the extent permitted by law, take all appropriate action to modify United States Federal procurement product coverage under all relevant Free Trade Agreements and the World Trade Organization Agreement on Government Procurement to exclude coverage of Essential Medicines, Medical Countermeasures, and Critical Inputs. The United States Trade Representative shall further modify United States Federal procurement product coverage, as appropriate, to reflect updates by the FDA Commissioner.”).

¹⁰ Hannah Monicken, *supra* note 4.

¹¹ Hannah Monicken, *supra* note 5.

¹² Hannah Monicken, *U.S.: Proposed GPA-Exempted Medicines Total \$393 Million in Procurement*, INSIDE U.S. TRADE, Vol. 39, No.7, Feb. 11, 2021.

¹³ Hannah Monicken, *supra* note 6; Revised GPA art. XIX.7 (providing that “[w]here the Committee has adopted arbitration procedures to facilitate the resolution of objections pursuant to paragraph 8, a modifying or any objecting Party may invoke the arbitration procedures within 120 days of circulation of the notification of the proposed modification...”).

¹⁴ Dan Dupont, *Tai Sworn in as U.S. Trade Representative*, INSIDE U.S. TRADE, Vol. 39, No.12, Mar. 26, 2021.

¹⁵ Jean Heilman Grier, *supra* note 7.

貳、GPA 之國家安全及一般例外規定

GPA 雖是複邊協定，但與 WTO 協定附件一的三大多邊協定相同，皆訂有例外條款，用以正當化符合一定條件之違反協定行為¹⁶。前述要求美國聯邦相關行政機關優先採購在美產製之醫藥品的措施，目的是為了保護美國公民免於遭受如新冠肺炎等新興流行病爆發之威脅，縱使該措施與美國原先在 GPA 所承諾之義務相左，若其符合 GPA 之國家安全及一般例外規定，應無礙美國之採行。

一、國家安全例外規定

GPA 之國家安全與一般例外條款規定於同一條，分別為第 3 條之第 1 項與第 2 項，前者規定本協定不禁止任何締約方，為保護與「武器、彈藥或戰爭物資之採購」、或與「國家安全或國防目的不可或缺之採購」有關之「重大安全利益 (essential security interest)」，而採取任何「其認為必要」之行動¹⁷。相仿之規定亦可見於《關稅暨貿易總協定 (General Agreement on Tariffs and Trade, GATT)》第 21 條¹⁸、《服務貿易總協定 (General Agreement on Trade in Services, GATS)》第 14 條之 1¹⁹、以及《與貿易有關之智慧財產權協定 (Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS)》第 73 條²⁰，該等條文同樣允許 WTO 會員為保護其與該條文所臚列之特定事項有關之「重大安全利益」，而採取「其認為必要」之措施。不同的是前三大多邊協定所臚列之與「重大安全利益」有關之事項為：(一)「原子分裂性物質或其原料」、(二)「直接或間接為提供軍事設

¹⁶ 見後揭註 18~20。

¹⁷ Revised GPA art III.1 (providing that “[n]othing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.”).

¹⁸ General Agreement on Tariffs and Trade art. XXI, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT] (providing that “[n]othing in this Agreement shall be construed ... 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; ...”).

¹⁹ General Agreement on Trade in Services art. XIV *bis*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS] (providing that “1. Nothing in this Agreement shall be construed: ... or (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment; (ii) relating to fissionable and fusionable materials or the materials from which they are derived; (iii) taken in time of war or other emergency in international relations; ...”).

²⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights art 73, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (providing that “[n]othing in this Agreement shall be construed: ... or (b) to prevent a Member 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; ...”).

施之目的」運送武器、彈藥 (GATT、TRIPS) 或提供服務 (GATS)、以及 (三) 「在戰爭或其他國際關係緊急狀況 (in time of war or other emergency in international relations) 採取者」。換言之，三大多邊協定之國家安全例外條款除了與提供軍事設施之貨品及服務貿易有關之「重大安全利益」外，也包括在戰爭與國際關係緊張時期採取之措施。與 GPA 所臚列之戰爭物資採購、以及國安／國防目的採購，並不相同，亦即 GPA 並未於國家安全例外條款特別納入戰爭時期或國際關係緊急之情事。

關於與特定臚列事項有關之「重大安全利益」、以及會員「認為必要」之判斷基準，目前已有「俄羅斯—過境轉運案 (*Russia—Measures Concerning Traffic in Transit*)²¹」、以及「沙國—智財權案 (*Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights*)²²」的小組做出闡釋。儘管 WTO 爭端解決案例沒有先例效果，但基於 GPA 國家安全例外規定文字與上述三大協定相關規定頗為相近，解釋時參考上述小組之裁決論理，應有所助益。

二、一般例外規定

一般例外條款如上所述，乃是規定於 GPA 第 3 條第 2 項，該項臚列 4 款政策目標，而與本文討論有關者為第 2 款，即為維護人類或動植物之生命或健康之必要；為此政策目標而採行之措施，只要實施方式不構成專斷或不合理之歧視、或是國際貿易限制之偽裝²³，即得以被正當化。GATT 第 20 條²⁴與 GATS 第 14 條²⁵的一般例外規定，結構與文字亦與之相仿。

過往爭端解決案例涉及這些協定之一般例外規定者，不知凡幾。不但早就建立起所謂的三階段測試，即 (一) 先行檢視系爭措施之政策是否為保護人類或動植物之生命或健康；(二) 再檢視系爭措施對前述政策目標之達成是否具必要性；

²¹ Panel Report, *Russia—Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter Panel Report, *Russia—Traffic in Transit*].

²² Panel Report, *Saudi Arabia—Measures Concerning the Protection of International Property Rights*, WTO Doc. WT/DS567/R (circulated June 16, 2020) [hereinafter *Saudi Arabia—Protection of IPRs*].

²³ Revised GPA art. III.2 (providing that “[s]ubject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: ...b) necessary to protect human, animal or plant life or health; ...”).

²⁴ GATT art. XX (providing that “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...b) necessary to protect human, animal or plant life or health...”).

²⁵ GATS art. XIV (providing that “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: ...b) necessary to protect human, animal or plant life or health; ...”).

(三)最後檢視系爭措施之實施方式是否符合一般例外規定之小前言，即未構成專斷或不合理之歧視、或是貿易限制之偽裝。另一方面，相關案例也在所謂的「必要性」判斷上、以及小前言的適用上，發展出相關的標準。這些由裁決機構發展出來的解釋，對於 GPA 之一般例外條款的適用，同樣可提供重要參考。

參、美國優先採購國產醫藥符合國家安全例外？

如上所述，為保護與明文臚列之特定事項有關之「重大安全利益」，會員得採行其認為必要的措施。問題是 GPA 第 3 條第 1 項規定之「其認為」文字，應如何解釋？究竟會員得自行認定的範圍僅限於措施必要性之認定？抑或也包括「重大安全利益」之判斷？還是更廣泛地囊括條文所臚列的與「重大安全利益」有關的特定事項存在與否之判斷？這顯然是判定美國優先採購國產醫藥措施是否符合國家安全例外之關鍵。

「俄羅斯—過境轉運案」涉及的雖是 GATT 之條文，而非 GPA，但如上所述，兩協定之國家安全例外規定，除臚列之特定事項有所差異外，其他文字幾乎完全相同。而在該案中，小組認為國家安全例外條文中之「其認為…」一詞不應擴張到臚列事項之情狀是否存在之判斷上，理由是在運用了文義與上下文 (context) 解釋後，小組認為該案爭點—所謂的國際關係緊急狀況，應指涉及特定國防與軍事利益者，而這種狀況存在與否乃客觀事實，理應客觀判斷²⁶。小組並表示利用目的 (objective and purpose) 解釋，也會得到同樣的結論，因為 GATT 的一般目的之一就是在促進多邊貿易體系的安定性與可預測性，任由會員單邊主觀認定例外情事存在與否，將完全背離上述目的²⁷。小組最後還援引 GATT 第 21 條之談判歷史作為進一步之佐證，根據史料，當年談判時雖決定給予會員有關必要性措施與重大安全利益認定之彈性，但另一方面為求平衡，也限制了得以援引例外之具體情形，以避免國家安全例外條款的濫用²⁸。另外一件有關國家安全例

²⁶ Panel Report, *Russia—Traffic in Transit*, ¶¶ 7.76-7.77 (providing that “[a]n 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, ... giv[ing] rise to particular types of interests for the Member in question, i.e. defence or military interests, ... as the existence of an emergency in international relations is an objective state of affairs, the determination is that of an objective fact, subject to objective determination.”).

²⁷ *Id.* ¶ 7.79 (providing that “[p]revious panels and the Appellate Body have stated that a general object and purpose of the WTO Agreement, as well as of the GATT 1994, is to promote the security and predictability of the reciprocal and mutually advantageous arrangements It would be entirely contrary to the security and predictability of the multilateral trading system ... to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member.”).

²⁸ *Id.* ¶¶ 7.98, 7.100 (providing that “[t]he Panel considers that the foregoing negotiating history demonstrates that the drafters considered that... the ‘balance’ that was struck by the security exceptions was that Members would have ‘some latitude’ to determine what their essential security interests are, and the necessity of action to protect those interests, while potential abuse of the exceptions would be curtailed by limiting the circumstances in which the exceptions could be invoked to those specified in the subparagraphs of Article XXI(b); ... [t]he negotiating history therefore confirms the Panel's interpretation ... as requiring that the evaluation of whether the invoking Member has satisfied the

外的爭端，即「沙國—智財權案」，涉及的雖是 TRIPS 的安全例外條文，但該案小組亦沿用了上述小組在這方面之見解²⁹。

參考上述兩案小組之論理，美國優先採購美製醫藥之措施是否與 GPA 第 3 條第 1 項所臚列之採購事項有關，必須客觀判斷，而不能任由美國主觀認定。在 GPA 第 3 條第 1 項臚列之採購中，無論是武器彈藥、或是國防目的，皆明顯與醫藥無涉，換言之，醫藥採購只可能與「國家安全」有關。問題是「國家安全」之解釋若參考上述小組之「上下文」解釋方法，而認為應與其他臚列事項相仿，即限於武器、國防目的採購，將會使「國家安全」文字形同虛設，並不合宜，理解為一般所認知的維護國家、人民不受任何外來之非軍事威脅，可能較為妥適。

固然美國在上述行政命令中明言其政策是為「保護公民...，免受新興流行病爆發...之威脅」，但這畢竟僅是美國之主觀意向表述。參考上述小組之論理，防止流行疫病威脅是否屬於國家安全，必須客觀認定。而根據相關統計，截至目前為止，新冠肺炎疫情已造成美國 3.3 億人口中，逾 3200 萬人感染，約 57 萬人死亡³⁰，超過了二次世界大戰數年累積之死亡人口³¹。如此看來，此新興流行疫病之威脅，並不亞於戰爭之威脅，為了對抗此威脅而進行之採購，以避免更多人民死亡，應可視為是「國家安全不可或缺之採購」。

滿足上述要件後，接著必須檢視的是美國所為是否是在保護與上述採購有關之「重大安全利益」？「俄羅斯—過境轉運案」之小組表示「重大安全利益」一般理解為與國家最典型功能，亦即維護其領域、人民不受內部與外部威脅，以及維護國內之法律與公共秩序等功能相關之利益³²；不過這種與免受威脅直接相關之特定利益與系爭國家所在情況與認知息息相關，因此小組認為如同會員採取之措施是否具必要性，應由會員自行判斷一樣，何者構成該會員之重大安全利益，亦應由該會員自行認定³³；唯一的限制是會員在解讀與適用國家安全例外條款

requirements of the enumerated subparagraphs of Article XXI(b) be made objectively rather than by the invoking Member itself....”).

²⁹ Panel Report, *Saudi Arabia—Protection of IPRs*, ¶ 7.244 (providing that “[t]he panel in *Russia—Traffic in Transit* concluded that the circumstance in subparagraph (iii) is ‘an objective fact’ that is ‘amenable to objective determination’. In other words, the panel concluded that the adjectival clause ‘which it considers’ in the chapeau of Article XXI(b)(iii) of the GATT 1994 ‘does not qualify the determination of the circumstance’ in subparagraph (iii). In that panel’s view, the evaluation of whether the respondent has satisfied the circumstance in subparagraph (iii) must ‘be made objectively rather than by the invoking Member itself.’”).

³⁰ U.S. Ctr. for Disease Control and Prevention, *COVID Data Tracker*, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited May 9, 2021).

³¹ Jim Sergent & Ramon Padilla, *Americans Dying Faster of COVID-19 than Our Soldiers Did in WWII*, USA TODAY NEWS (Jan. 23, 2021), <https://www.usatoday.com/in-depth/news/2021/01/19/covid-19-deaths-americans-dying-faster-than-our-soldiers-did-wwii/6602717002/>.

³² Panel Report, *Russia—Traffic in Transit*, ¶ 7.130 (providing that “[e]ssential security interests’, which is evidently a narrower concept than ‘security interests’, may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally.”).

³³ *Id.* ¶ 7.131 (providing that “[t]he specific interests that are considered directly relevant to the

時，應遵循《維也納條約法公約 (The Vienna Convention on the Law of Treaties)》所明定之誠信原則³⁴。「沙國—智財權案」之小組亦採同樣見解³⁵。

如上所述，新冠肺炎疫情之肆虐使美國人民之生命飽受比二戰還嚴苛之威脅，在這種情況下，美國認為涉及重大安全利益，自然合理。只是為保護人民生命免受此世紀之疫的威脅是否就有必要優先採購國產品？此種判斷是否符合誠信原則？難道不是想要免除在 GPA 下之義務，而將扶植本國醫藥產業之貿易保護措施貼上國家安全之標籤³⁶？

關於這個問題，也就是會員認定其措施對國家安全具必要性之判斷是否符合誠信原則的問題，無論是「俄羅斯—過境轉運案」之小組或是「沙國—智財權案」之小組均認為只要系爭措施與重大安全利益間符合「最低合理性要求 (minimum requirement of plausibility)」，亦即系爭措施不至於與重大安全利益不相關到令人難以置信的程度，小組就不會認為該會員之判斷不符誠信原則³⁷。在這樣寬鬆的標準下，醫藥採購獨厚本地產品固然有貿易保護之嫌，但因為本地供應可確保供給之快速與充分，特別是在這次疫情中，無論是口罩、疫苗之供給都面臨普遍不足之困難，而由國外輸入，更要解決運輸工具確保不易、時程拖延等問題，美國因此採取以採購手段扶植本國關鍵醫藥生產，難謂與其重大安全利益毫無關聯。職是之故，在這樣的背景下，美國優先採購國產醫藥應得以符合 GPA

protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.”).

³⁴ *Id.* ¶ 7.132 (providing that “the discretion of a Member to designate particular concerns as ‘essential security interests’ is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith...”).

³⁵ Panel Report, *Saudi Arabia—Protection of IPRs*, ¶¶ 7.249-7.250 (providing that “the panel in *Russia—Traffic in Transit* concluded that a panel would be required to assess whether a respondent has sufficiently articulated its ‘essential security interests’..., the panel considered that ‘it is left, in general, to every Member to define what it considers to be its essential security interests’; [t]he panel noted, however, that a Member is not ‘free to elevate any concern to that of an “essential security interest”’; rather, ‘the discretion ... is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith’...”).

³⁶ 在過去案例中，小組曾表示所謂的誠信原則就是不應利用國家安全例外規避原應承擔之義務，而最明顯的濫用例子就是將貿易利益改貼上重大安全利益的標籤以規避義務。Panel Report, *Russia—Traffic in Transit*, ¶ 7.133 (providing that “[t]he obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example ... simply by re-labelling trade interests... as ‘essential security interests’...”).

³⁷ *Id.* ¶ 7.138 (providing that “[t]he obligation of good faith, ..., applies not only to the Member’s definition of the essential security interests..., but also, and most importantly, to their connection with the measures at issue..., this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests...”); Panel Report, *Saudi Arabia—Protection of IPRs*, ¶ 7.252 (providing that “the panel in *Russia—Traffic in Transit* considered the ‘obligation of good faith’ to apply not only to the respondent’s articulation of ‘its essential security interests’, but also to the connection between the measures at issue and those interests. This obligation, for the panel, is ‘crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests’.”).

之國家安全例外。

肆、美國優先採購國產醫藥符合保護人類生命健康之一般例外？

如前所述，有關一般例外條款之適用，爭端案例頗豐，而早在「美國—汽油案 (*United States—Standards for Reformulated and Conventional Gasoline*)」，小組即建立起所謂之「三階段測試」³⁸，儘管該案是適用 GATT 的一般例外規定，但如前所述，GPA 的一般例外規定架構與 GATT 並無二致，故應可將該三階段測試套用於此處，也就是要判斷美國優先採購國產醫藥得否被一般例外條款正當化，應先檢視美國採購國產醫藥措施之政策是否屬於 GPA 第 3 條 2 項所臚列之各款事由之一，然後判斷該措施對其政策目標達成是否有必要，最後再審視該措施之實施方式是否符合該項小前言之規定，即未構成專斷或不合理的歧視，也非貿易限制之偽裝。

美國優先採購國產醫藥之政策目的，依其行政命令之規定，既然是為保護公民免受新興流行病爆發及化學、生物、放射及核子之威脅，應可確定落入 GPA 第 3 條 2 項 b 款所規定之「為維護人類與動植物生命或健康之必要」。只是優先採購國產醫藥對保護人類生命或健康目標之達成是否具必要性，則須進一步分析。

在 GATT 時代的「泰國—香菸案 (*Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*)」，小組認為若沒有其他貿易限制較少之替代措施可達成公共健康之目標，則系爭措施之採行即具必要性³⁹。但到了 WTO 時代之「歐體—石棉案 (*European Communities—Measures Affecting Asbestos and Products Containing Asbestos*)」，上訴機構加入了權衡之判斷，亦即是否有合理存在的替代措施之判斷取決於該替代措施對目標實現之貢獻程度，另外，當系爭措施所保護之價值越高（如人類生命），該措施就越容易被認定具有必要性⁴⁰。

³⁸ Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.20, WTO Doc. WT/DS2/R (adopted May, 20, 1996) (providing that “[t]he Panel observed that the United States therefore had to establish the following elements: (1) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health; (2) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and (3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.”).

³⁹ Report of the Panel, *Thailand—Restrictions on Importation of and Intent Taxes on Cigarettes*, ¶ 75, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.), at 200, 220 (1991) (providing that “[t]he 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 be expected to employ to achieve its health policy objectives.”).

⁴⁰ Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Product*, ¶ 172, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001) (providing that “[w]e indicated in *Korea—Beef* that one aspect of the ‘weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure’ is reasonably available is the extent to which the alternative measure ‘contributes to the realization of the end

「巴西—輪胎案 (*Brazil — Measures Affecting Imports of Retreaded Tyres*)」之上訴機構則更進一步表示，其認為保護人類生命健康之必要所要求的是系爭措施對健康安全目標之達成有實質貢獻已足，並不一定要達到不可或缺的程度⁴¹。美國優先採購國內醫藥對保護其人民生命與健康目標之達成，應可認為有實質貢獻，因為國內供給可以更為及時，減少國際運送所需時間與可能風險。

縱使確定優先採購國產醫藥對目標達成具必要性，還必須通過最後一階段測試，即確認美國優先採購國產醫藥之措施在實施上未構成專斷或不合理之歧視，也非變相之貿易限制。目前尚不確知美國上述措施之具體實施情形，故以下假設兩種極端的情狀予以分析。

由於上訴機構曾表示一般例外條款的小前言其實就是「誠信原則」的另一種表述，也就是防止援引一般例外條款之會員有不合理或濫用其權利情形⁴²。因此，假如疫情繼續如此嚴峻，為增加迫切需要之醫藥供給，而以優先採購國產醫藥之方式，提高業者之產能，將很難被認為是不合理或有違誠信，畢竟要指責其是不想履行 GPA 之義務，而故意以疫情為藉口，未免太罔顧現實疫情之急迫性。

相反的，若在疫情過後之相當時間，美國仍堅持優先採購國產醫藥，即使是基於未雨綢繆的考量，也就是想逐步培植國內醫藥產製之實力，以因應不確知之未來可能爆發的嚴重疫情，恐怕就有可能被質疑是貿易限制的偽裝。就如同上訴機構在「美國—汽油案」及「歐盟—海豹產品案 (*European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*)」中所指出的，雖然美國、歐盟在各自的爭端中分別主張限制某些油品是為保護環境、禁止海豹商品是基於公共道德，但因為彼等實施的「方式」在本國業者與外國同類業者間存在差異，結果就會構成專斷或不合理的歧視，甚至是變相的貿易限制；譬如：美國給予其國內煉油業者調適新環保標準之時間，但卻未考量外國業者⁴³；同樣的，歐

pursued'. In addition, we observed, in that case, that '[t]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends...").

⁴¹ Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 150, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007) (providing that “[w]e also recall that, in *Korea—Various Measures on Beef*, the Appellate Body indicated that ‘the word “necessary” is not limited to that which is “indispensable”’. Having said that, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective.”).

⁴² Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 158, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) (providing that “[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith... One application of this general principle... prohibits the abusive exercise of a state’s rights...”).

⁴³ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, at 28, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) (providing that “[t]he United States wished to give domestic refiners time to restructure their operations and adjust to the requirements in the Gasoline Rule. This may very well have constituted sound domestic policy from the viewpoint of the EPA and U.S. refiners. At the same time, we are bound to note that, while the United States counted the

盟協助格陵蘭島之因紐特人利用法規中之「原住民例外」，但卻未對加拿大的因紐特人盡到類似的努力⁴⁴。

伍、結論

為因應新冠疫情所產生的醫藥不足問題，前美國總統川普曾發布行政命令要求優先採購國產關鍵醫藥，但拜登總統上任後已向 WTO 的 GPA 委員會撤回 USTR 根據前述行政命令所提出之修改開放清單的通知。儘管如此，相關事實仍成為吾人討論 GPA 第 3 條國家安全及一般例外規定之絕佳背景。美國未來若確定實施此優先採購國產醫藥措施，縱使在疫情過後，其援引一般例外條款抗辯的正當性有可能被質疑；但因國家安全例外援引的標準較為寬鬆，只要措施與目的間之關聯性不是不合理，即得以主張，則美國或許不需修改其開放清單，仍得透過援引國家安全例外以正當化其優先採購國產醫藥的措施。

costs for its domestic refiners of statutory baselines, there is nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners. In the light of the foregoing, our conclusion is that the baseline establishment rules in the Gasoline Rule, in their application, constitute ‘unjustifiable discrimination’ and a ‘disguised restriction on international trade.’”).

⁴⁴ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.338, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted Apr. 20, 2015) (providing that “[i]n sum, we have identified several features of the EU Seal Regime that indicate that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, ... we were not persuaded that the European Union has made ‘comparable efforts’ to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.”).