

PREFACE

This volume is the twenty-fourth annual report prepared by the Subcommittee on Unfair Trade Policies and Measures, a division of the Trade Committee of the Industrial Structure Council. The Industrial Structure Council is an official advisory body to the Minister of Economy, Trade and Industry of Japan.

1) OBJECTIVES AND STRUCTURE OF THIS REPORT

(1) Securing of Compliance with the WTO Agreements, EPA and Other International Rules

The primary approach of this report is to base our analytical standards on the rules set forth in the international agreements that rule trade policies of each country and to use those policies to achieve our main objective of creating a framework for dispassionate and constructive solutions to trade disputes. As described later, this approach has won praise both inside and outside of Japan in the past 23 annual reports.

At the same time, this report seeks to identify and analyze problems concerning the trade policies and measures of Japan's major trading partners (which are referred to as "economies" or "countries"), and to urge them to remove or otherwise remedy the problematic policies and measures. While, as described above, the original objective in presenting our basic approach has achieved to a considerable degree, the aim of monitoring compliance with international rules has become increasingly important for the following reasons: a change of business activities of Japanese industry in accordance with the expansion of trade and investment, growth of the relative importance of new players in the international economic order, and rapid increase of bilateral and regional agreement such as EPAs in addition to WTO agreements.

This report is the only report being published in Japan that monitors the wide-ranging trade policies and measures of major trading partners in light of compliance with international rules; WTO agreements, Economic Partnership Agreements (EPAs) and International Investment Agreements (IIAs), in a comprehensive manner.

(2) Promotion of Further Understanding of the WTO Agreement, EPA, and Other International Rules

This report serves as a practical guide to the WTO agreements, came into effect in 1995 and other international rules. Unfortunately, few members of the business community and even fewer members of the general public fully understand WTO agreements and their role in the world economy. Therefore, Part II of this report provides a detailed explanation of the current rules and the basic principles under the WTO as they affect global trade in the context of actual cases and disputes. In addition, the Part II also points out potential problems in the current rules, focuses on areas of possible improvements, and tries to offer suggestions, albeit partially, for future direction. We hope that these descriptions, coupled with the analyses in Part I of the trade policies and measures of different countries under particular examples, will promote further understanding of the significance and potential of the WTO Agreements and other international rules.

The number of Economic Partnership Agreements (EPAs) and other agreements has increased substantially in recent years across the world including Japan, in which rules, rights and obligations

related to trade and investment policy in countries function as new international rules to supplement the WTO agreements. This report introduces these rules in Part III. In this volume, there are measures reported in Part I with respect to the consistency of the EPAs Japan has concluded, such as export restrictions on mineral resources and local content issue in Indonesia as well as the issues concerning fulfillment of the Japan-Indonesia EPA (introduction of a partial design protection system, well-known trademarks of foreign parties system, and general assignment system).

(3) Presentation of Basic Approach

In the early 1990s, when our first annual report was published, unilateral and results-oriented criteria were often used in evaluating trade partners' policies and measures, adding to the difficulty of resolving international economic issues that were constantly becoming more varied and more complex. However, since the mid-1990s, when the WTO was established, cases involving unilateral criteria have dramatically decreased, while the number of cases involving compliance with the WTO Agreements, EPA and other international rules has increased. Such a change may be viewed as evidence that the objectives, concepts and methodologies of our report have become widely accepted.

Furthermore, this report suggests the importance of utilizing the dispute settlement procedures under the WTO to address unfair trade policies and measures. Significant results have been observed with regard to this matter. Many countries, including the world's major trading countries, utilize dispute settlement procedures led by Appellate Body. Owing to this, the awareness has become widespread that fair and objective determinations in accordance with these procedures should be obtained when it comes to the pros and cons of measures which are dubious in light of WTO agreements. Furthermore, case examples which attempt to resolve infringements of obligations based on economic partnership agreements and the like through the use of the arbitration proceedings stipulated by the agreements have risen dramatically in countries all around the world since the latter half of the 1990s, and international arbitration bodies have continued to amass precedents of decisions. This is indicative of the fact that countries around the world share the recognition that WTO agreements, economic partnership agreements, and similar devices are models which are highly reliable. It also reflects the fact that the importance and efficiency of international rules have increased with respect to trade and investment policies since the groundbreaking dispute resolution systems which these agreements have set in place are proactively utilized by governments, companies, and others to resolve specific dispute cases.

However, that is not to say that the reasoning behind the "result-based criteria" described in 2. (2) has vanished, nor does it mean that moves attempting to resolve problems by unilateral measures without recourse to dispute resolution procedures have disappeared. Generally, whether international rules function effectively or not is largely dependent on the compliance consciousness of each country and the effectiveness of arbitration mechanisms. This differs from domestic law, through which enforcement is made possible consequent upon detailed discipline and coercive power. There is always the risk of backsliding depending on the trends in the international economy in the future. In fact, countries have been introducing measures such as stricter regulations and tariff increases that constitute new barriers to trade in the midst of severe global economic conditions stemming from the 2008 financial crisis. Taking such risks into consideration, continuing to point out the basic ideas heretofore adhered to in both Japan and overseas through this report is considered essential in order to create a more stable international trading structure under WTO agreements, economic partnership agreements, and similar arrangements.

2) BASIC VIEWPOINT OF THE REPORT

Our basic perspective described below, which we have maintained since the publication of our first report, may now be generally accepted as a foregone conclusion. However, considering the risk of returning to past unilateral methods, it remains necessary to re-emphasize the substance of our perspective in this report.

(1) What Are “Fair” Trade Policies and Measures?

From the very beginning, our report has consistently advocated the idea of analyzing trade policies and measures according to “rule-based criteria” as a means of determining their fairness.

What Are “Rule-Based” Criteria?

The “rule-based criteria” used in this report are based on existing international agreements. Following the rules is an essential part of handling matters fairly. Indeed, the first definition that the Oxford English Dictionary provides for “fair” is “in accordance with the rules”. This report sets out the applicable present international rules based on our evaluation. It also takes a stand that, when there is no appropriate international discipline, the establishment of new rule should be pursued first, and fairness or unfairness should not be discussed without international rules.

The first and most important set of rules used in this report is found in the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), which provides the most comprehensive international framework for international trade. It goes beyond the scope of its predecessor (GATT, which covered only trade in goods) by providing rules for new areas such as trade in services and protection of intellectual property rights.

The second set of rules we employ is found in international treaties other than the WTO Agreements, basic principles of international law, and customary international law. These disciplines, international agreements concluded in the areas covered or not covered by the WTO Agreements and other standards supporting the international law system, are considered as supplements to the WTO Agreements.

Examples of these other rules and principles of international law include:

- Economic Partnership/Free Trade Agreement;
- Investment Treaty;
- Bilateral agreements governing bilateral economic and trade issues;
- Multilateral agreements other than the WTO Agreements; and,
- International customs in the form of unwritten law and other international customary law. The general principles of international law may not be codified in treaties, but they nevertheless constitute rules which Japan and all other countries are supposed to observe.

In particular, as previously noted, though the role of EPAs/FTAs has been expanding relatively, we should basically contribute to the enlargement and deepening of fundamental international trade rules under the WTO system. Moreover, it is important to commit strongly to the establishment of area/bilateral orders through EPAs/FTAs. In addition, it is also important to ensure EPAs/FTAs’ consistency with WTO Agreements.

Significance of “Rule-Based Criteria”

Three points must be kept in mind when considering the significance of the criteria applied. First,

issues of fairness in market competition should not be focused on the results of competition, but on the rules under which competition takes place. As long as fair competition takes place under agreed-upon rules, challenging the fairness of results is not only misguided, it is also a destruction of the base of agreed-upon rules. When complaints about results arise, the rational response is to ensure fairness by reexamining whether the rules have been enforced appropriately to achieve the basic objective to develop international trade. It is important that we must not depart from rules by dealing with individual cases based on a misguided “results-based” approach.

Second, when countries reach agreement in international negotiations and commit to the fulfillment of mutual obligations, they should cite and seek remedies for the breach of those obligations. Such an approach is both justified and necessary to secure the effectiveness of agreements. Requests for fair treatment in this regard are certain to be backed with broad international approval.

Third, an effective means of avoiding needless misunderstandings and emotionalism over trade concerns, as well as of preventing trade friction from becoming a political issue, is to judge objectively whether criticism and complaints about a country’s trade policies and practices in fact have any basis under internationally agreed-upon rules. The WTO dispute settlement system was designed for this very purpose. If, for example, the United States invokes retaliatory measures under Section 301 of its Trade Act unilaterally by condemning a foreign country’s measure as a violation of the WTO Agreement without going through the WTO dispute settlement procedures, it would itself be in violation of the WTO Agreement; and so such an action cannot be accepted. As economic relations between Japan and other Asian countries have intensified, more problems have been occurring with regard to individual trade with these countries. In order to construct mature economic relations with these countries without it becoming a political issue, it is important to solve these problems in a calm and constructive manner according to rules, based on confidence in the economic order based on the WTO Agreements and EPA.

Also, many of Japan’s economic partnership agreements (EPA) stipulate the establishment of forums for discussing improvements to the business environment, enabling the parties to discuss the partner countries’ systems for trade and investment and the implementation of these systems. These forums for discussion are created with rules that allow these topics to be discussed calmly and constructively without being turned into political issues. Moreover, many EPA rules procedures for mediation are based on international law, in the case of problems arising between investors and states as a result of investors’ submitting to arbitration against the host country, which function as a useful tool to secure the implementation of rules. One of the purposes of this report, which seeks to examine trade policies and practices in terms of rule-based criteria of fairness, is to provide a means under which something productive can evolve when trade friction occurs. Governments need to determine the issues at hand, select effective tools in keeping with the type, nature, etc., of the issues, and undertake efforts towards resolving them.

The very first report cited “sharing awareness as “All are sinners” and promoting mutual efforts for solving problems” as one of the purposes of this report. The significance of the above-mentioned attitude should again be emphasized here.

(2) Problems with “Result-Based Criteria”

Since the first annual report was published, this report has pointed out the problems of “result-based criteria” as opposed to the idea of “rule-based criteria”. Result-based criteria allow a country to brand as “unfair” or “unreasonable” the trade policies or measures of another country instantly. A country that takes this approach may regard the trade policies and measures of trading partners as “unfair” if there is a large trade imbalance or if exports to that trading partner fall short

of expectations. There are many problems associated with this approach.

Lack of Objectivity

The first problem with result-based criteria is its inherent lack of objectivity. The criteria by which the policies of trading partners are reviewed are adopted unilaterally and are not based on internationally agreed-upon rules. Therefore, criticisms that are based on these unilaterally set criteria and that are used to brand a trading partner as “unfair” lack objectivity. Behind the unilateral measures is the belief that a country is justified in making unilateral judgments when applicable international principles either do not exist or are ineffectively administered. However, as a framework for the dispassionate and constructive handling of trade friction, this approach offers little stability and, therefore, this report does not support it.

Result-Based Criteria (Lack of Causal Relationship)

Second, result-based criteria are an integral part of a “result-oriented” approach toward trade. This approach contains a basic flaw. A country might perceive a specific policy or measure of its trading partner as having brought about that result and, therefore, judge it as “unfair” when trade has produced an undesirable result, even when no causal relationship has been established between the policy and the result. To a large extent, this result-oriented approach comes from a tendency to see a direct link between current account or trade imbalances and inadequate market access. However, it has been theoretically established that no direct relationship exists between macro trade imbalances and micro issues in trade policies and measures.

Danger of “Managed Trade” (Anti-Competitive Effect)

Finally, it is important to point out that a result-oriented approach can easily evolve into “managed trade”. There are cases in which countries dissatisfied with the results of trade adopt policies that instruct their trading partners to achieve specific results in terms of market share or import value for certain foreign products (numerical targets). Such arguments have been developed into a “balance of benefits” theory, a term that was noted in the chairman’s summary attached to the 1986 Punta Del Este Declaration that launched the Uruguay Round of multilateral trade negotiations.

Frequently, the measures taken by trading partners are labeled as not only “unfair,” but also “anti-competitive”. Thus, what they ultimately seek is “equivalency of results” rather than “equal opportunities”. This approach has the danger of hindering many excellent functions of genuine competition, the engine of a market economy. It represents an abandonment of the market economy and an abrogation of the basic principles of the WTO Agreements and the WTO’s efforts to develop the world economy according to market disciplines.

(3) Economic Perspectives that Supplement “Rule-Based Criteria”

The basic position of this report favors “rule-based criteria”, which implies that legal analysis necessarily becomes dominant. As a supplement to this approach, we have, since the first volume of the report, included a brief analysis on the “economic implications” of the rules and measures discussed. There are three basic reasons for doing this.

The first reason is that trade policies and measures that depart from international trade rules and dispute settlement mechanisms that have been agreed upon in negotiations not only are infractions of the rules, but also generally have negative economic implications. They reduce the predictability and transparency of international trade and distort the international flow of goods and services,

thereby exerting a substantially detrimental influence on the economic welfare of member countries. Keeping these economic effects in sight should assist the better understanding of the importance of international trading rules and dispute settlement mechanisms.

Second, international trading rules and dispute settlement mechanisms serve as institutional frameworks for the economic activities of national governments, producers, and consumers, and have a significant effect on the economic welfare that is achieved. In other words, it should be possible to basically regard trade measures and policies which do not depart from dispute settlement mechanisms or existing international trading rules as having been adopted based on said rules and mechanisms. Understanding the economic implications of the rules and mechanisms is of fundamental importance to understanding the meaning and significance of the current system.

Third, international trade rules and dispute settlement mechanisms are not set in stone. They are merely institutional frameworks that can be changed at any time if there is an international consensus to do so. Where there are no international disciplines, our position is that international rules should be established. In searching for new international disciplines, we must have an accurate understanding of the implications that possible rules and mechanisms will have on countries' economic welfare, and we must make a social choice regarding the systems that we prefer.

3) THE 2016 REPORT

As previously mentioned, this report is divided into three parts. Part I discusses Japan's major trade partners' policies and measures that are problematic under the WTO Agreements and other international rules. Part II contains an overview of the WTO Agreements and other rules and discusses major cases involving these rules which form the basis of Japan's views. Part III provides analysis and explanations concerning the provisions and rules of EPAs/FTAs, etc., sector by sector. Also, there are several columns which discuss special topics every year.

In general terms, in order to seek to improve another country's policy/measure based on international rules, it is necessary for the industrial world, the general public including experts, and governments to work effectively together. Moreover, from this point of view, we provided information to assure broader understanding of the WTO Agreements and international trade rules such as EPAs/FTAs.

In Part I, we have described a three-step framework wherever possible: i) Outline of the measure, ii) Problems under international rules, and iii) Recent developments. These descriptions indicate how a country's measures could be problems under the WTO Agreements, and will lead to a better understanding the WTO Agreements for readers. Moreover, we have tried to describe the reactions of the Japanese Government and hope that our initial policy information feedback will lead to a better understanding of trade policies in general and help promote public-private cooperation. Before preparing this report, the Secretariat announced a list of topics for inclusion in the report and invited public comments on these and any other topics.

In Part II, we describe the dispute settlement procedures in detail, to enhance the public's understanding.

Part III explains, in a systematic manner, economic partnership agreements and investment treaties. Part III explains the provisions and rules of not only the agreements that involve Japan but also those of some agreements concluded between other countries as necessary for reader's help to assure wide view point. In the 2016 report, we mentioned the latest trends inside and outside Japan regarding Trans-Pacific Partnership (TPP), Free Trade Agreement among China, Japan and Korea, Regional Comprehensive Economic Partnership (RCEP), and the Japan-EU Economic Partnership

Agreement.

Criteria for Selecting Trading Partners

We have made it a rule to cover in the report a dozen or so economies important to Japan, based on the total value of bilateral trade (total exports and imports).

In the 2016 report, we covered the economies of China, ASEAN countries¹, the United States, EU, Republic of Korea, Chinese Taipei, Australia, Hong Kong, Russian Federation, Canada, India, and Brazil.

Figure P-1 Amount of Trade with Japan

(Total value of exports and imports in 2015, in 1 trillion yen)

China	32.7
ASEAN	23.3
The United States	23.3
European Union	16.6
Republic of Korea	8.6
Chinese Taipei	7.3
Australia	5.8
Hong Kong	4.5
Russian Federation	2.5
Canada	2.0
India	1.6
Brazil	1.4
World Total	154.0

Source: Ministry of Finance “2015 Customs Statistics (final report)”

Policies and Measures Discussed

In Part I, the trade and investment policies and measures of the covered economies are discussed. Business practices and such that have nothing to do with the policies and measures taken by a particular government are not discussed here. However, Part I is not intended as an exhaustive study of these policies and measures; rather, examinations are conducted focusing on those that are considered to be important to Japan’s economic and trade activities and only those are listed that may be problematic in terms of conformability with the WTO Agreements and other international rules.

There also are some trade and investment policies and measures that do not expressly violate the

¹ Although ASEAN as a regional economic association is not member to the WTO as an independent customs territory, it is collectively dealt with in one chapter because there are problems addressed that are common to ASEAN countries.

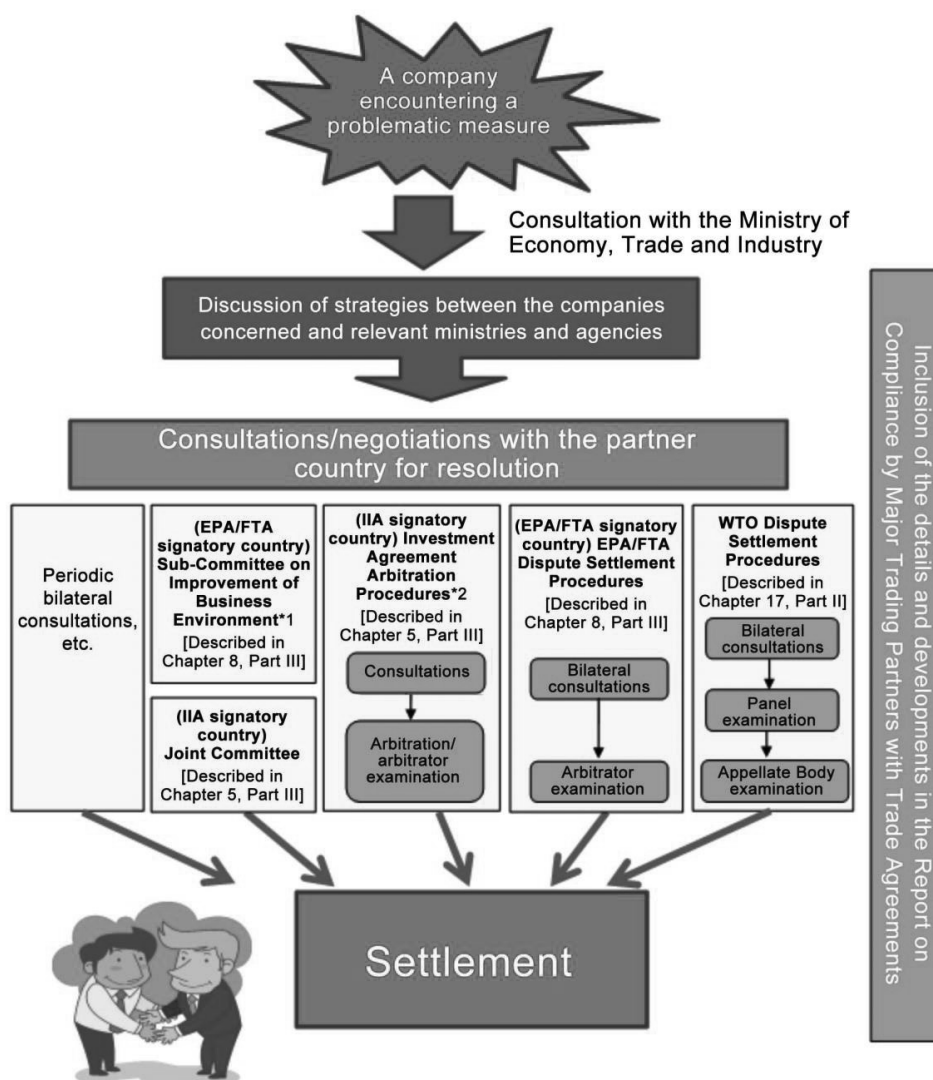
WTO Agreements or other international rules, but that contravene the spirit of the WTO and should be liberated or controlled under new rules. These areas generally include high tariffs, non-concession, services, and government procurement, etc. They are partly included after it being clarified that they are not violations of the international rules with the statement “this particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules” at the beginning of each case.

Other Matters

Unless otherwise stated, this report indicates the state of affairs as of the end of February 2016. The report is available on the METI website.

<http://www.meti.go.jp/english/report/index.html>

Figure P-2 Procedures for Correcting Unfair Measures



*1 Industries (local Chamber of Commerce and Industry, etc.) can also participate in the Sub-Committee on Improvement of Business Environment

*2 Investment Agreement Arbitration Procedures are carried out by the investors (companies) and the government of the host country.

*3 The above procedures show the procedural flow of typical cases

Figure P-3 Relationship between WTO and EPA/FTA

- WTO aims to reduce/eliminate trade barriers (tariffs, etc.) equally through round negotiations.
- Conclusion of EPA/FTA enables further trade liberalization between signatory countries.

