CHAPTER 3

UNITED STATES

Table of Contents

A. NATIONAL TREATMENT

1. HARBOR MAINTENANCE TAX "HMT"

<Outline of the Measure>

Since 1987, in accordance with the Water Resources Development Act of 1986 (Public Law 99-662), as amended, the United States has operated a system that is designed to impose ad valorem taxes of 0.125 percent (0.04 percent prior to 1990) on freight (imports and exports and certain domestic freight) belonging to entities that use harbors within the territory of the United States. The system is commonly known as the Harbor Maintenance Tax (HMT). Under this system, imported products are almost invariably subject to the tax because it is collected at the point of importation, where relevant duties are charged. The tax burden on exports and national freight is comparatively low because ship-owners or exporters voluntarily pay the tax in these circumstances on a quarterly basis. With regard to national freight, there are three exceptions: (a) payments under US$10,000 per quarter; (b) traffic in Alaska, Hawaii and dependent territories; and (c) the landing of fish from ships and some freight shipments of Alaskan crude oil. Yet, similar exceptions are not allowed for imported products.

<Problems under International Rules>

The US system may violate GATT 1994 in three respects:

1. GATT Article II (Schedules of Concessions): The system imposes a tax that exceeds that prescribed in the schedules of concessions;
2. GATT Article III (National Treatment): Compared to domestic products, imported products are accorded less favorable treatment in terms of capture ratio and lack of exceptions, as explained above; and,
3. GATT Article VIII (Fees and Formalities Connected with Importation and Exportation): The system is designed to (and does, in fact) levy charges that exceed fees for harbor maintenance.

February 1998, the European Union requested WTO consultations with the United States regarding this system under GATT Article XXII. Japan participated in the consultations as a third party. Consultations were held in March and June 1998, but no further developments have occurred.

In March 1998, the Supreme Court of the United States held that the application of the HMT to exported products was unconstitutional with respect to exports. In accordance with this decision, the US government stopped collecting the tax from exporters beginning in April 1998. However, the HMT is imposed on importers and the problems described above have not been resolved.

<Recent Developments>

Regarding the Water Resources Development Act, a draft amendment was approved in June 2014, but with regard to the HMT, there has been no change in the explanation for taxation underlying the imposition of the HMT since 1986.

There are cases where products are discharged at ports in Canada and then imported into the US by land to avoid the collection of the HMT, resulting in significant disadvantages for the US ports near the border with Canada in particular. The American Association of Port Authorities (AAPA) currently asserts that the tax should be abolished for this reason, etc.

2. *MERCHANT SHIPPING ACT OF 1920 (JONES ACT)*

<Outline of the Measure>

The Jones Act specifies that only ships owned by US citizens, built in US shipyards and run by US crews are permitted to engage in domestic passenger and cargo transport within the United States and its territories. This restricts exports of foreign-made ships to the United States.

In 2010, the Open America's Water Act (S.3525) was proposed by a Republican Senator from Arizona and a Republican Senator from Idaho to repeal the Jones Act, but it did not pass the U.S. Congress.

<Problems under International Rules>

The measure is considered a violation of GATT Article III (National Treatment) and Article XI (General prohibition of quantitative restrictions). The United States, however, claimed that the measure is permitted under the special rule on the provisional application of GATT of 1947. During the Uruguay Round negotiation, Member countries other than the United States asserted that the special rule should not carry over to GATT 1994, but the United States maintained that the measure should continue, mostly to uphold the Jones Act. In the end, Member countries agreed to put the special provision in Paragraph 3 of GATT 1994. This Paragraph maintained under such unusual proceedings, causes considerable problems in light of basic principles of WTO.

Therefore, Paragraph 3 of GATT 1994 provides that review shall take place within five years from the date of the Agreement's entry into force and every two years afterward throughout the duration of the Agreement, on whether the US measure still needs to be maintained.

<Recent Developments>

The Jones Act has been discussed in the WTO General Council since July 1999, but the United States has insisted the exception should be continued since there has been no change in domestic laws and regulations. In addition, the United States have asserted that the measure has been implemented for the purpose of maintaining national security, making US shipyard capacity available to build and repair ships with potential military applications so as to keep US military readiness.

On the other hand, most Members including Japan take the position that extension of the measure should be restrained and serious consideration needs to be given to this after review, considering that the exception under the Paragraph 3 of GATT 1994 is gross deviation from basic principles of GATT. At the General Council sessions and informal consultations held during the period between 2003 and 2015, Japan has requested the United States orally and in writing to provide information on revising the Jones Act. However, no sufficient explanation was given as to the measure being a gross deviation from basic principles of GATT. (For additional information on maritime services, see "Trade in Services".)

At the WTO General Council meeting in November to December 2015, Japan pointed out that the measure deviated significantly from basic principles of GATT. Other countries also pointed out the necessity for a substantial review process of the US and expressed their concerns that the status of national treatment in the US may continue to deteriorate. Japan also expressed concern about the fact that a law that gives preferential treatment to US-registered liquefied natural gas (LNG) carrying vessels when exporting US-produced LNG was enacted in the United States in December 2014, indicating that such action runs counter to improvement of the situation.

B. QUANTITATIVE RESTRICTIONS

1. *EXPORT MANAGEMENT SYSTEM*

*** 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.**

<Outline of the Measure>

Export management has hitherto been carried out based on the “Export Administration Act” in the United States. At present, however, the “International Emergency Economic Powers Act” of the United States gives the government the ability to invoke unilateral export restrictions on agricultural goods for reasons of foreign policy or domestic shortages. The Export Administration Act was used in 1973 to ban exports of soybeans and soybean products and, again in 1974, 1975, and 1980, to restrict exports of wheat to the Soviet Union and Poland. Such restrictions significantly impact the targeted countries.

<Concerns>

Regarding the import of agricultural products, the Uruguay Round Agreement requires the replacement of non-tariff border measures with tariffs, in principle, and reduction of tariff rates. Japan believes that the regulation on export bans and export regulations under Article 12 of the Agriculture Agreement is not strong enough and lacks transparency, predictability and stability. Although the US system does not directly infringe on international rules, it does have trade distorting effects and obstructs stable food imports by importing countries. Therefore, it may present problems in terms of food security.

<Recent Developments>

In the WTO agriculture negotiations, Japan expressed the need for regulation reinforcement by substituting export tariffs for bans on exports and other restriction measures in order to restore the balance of rights and obligations between exporting and importing countries and to maintain food security. In December 2008, in the chairperson's text of modalities of agriculture, the reinforcement of regulations concerning export bans and restrictions in WTO Agriculture Agreement Article 12 Clause 1 was noted. Japan has continued to urge reinforcement of regulations against export bans and restrictions at WTO agriculture negotiations and various occasions for bilateral discussions.

2. *EXPORT RESTRICTIONS ON LOGS*

<Outline of the Measure>

The United States enacted logging restrictions in order to protect spotted owls and other animals. These restrictions reduced the domestic supply of logs, which led to the “Forest Resource Conservation and Shortage Relief Act of 1990,” a law which restricts log exports. The United States currently bans the exportation of logs taken from federal and state-owned forests west of the 100 west longitude line except Alaska and Hawaii. However, a specific quantity of logs may be exported where they are recognized by the government as surplus materials that are not used by domestic log processors.

<Problems under International Rules>

The United States argues that this measure is for the conservation of exhaustible natural resources (GATT Article XX(g)) and therefore is allowed as an exception to Article XI, which prohibits quantitative restrictions. However, this is a restriction on the export of logs only; there are no restrictions on trade in logs within United States. The measure therefore cannot be justified under GATT Article XX(g) as a necessary and appropriate means of protecting forest resources. For this reason, it may be in violation of the GATT Article XI.

<Recent Developments>

Japan will encourage improvements in these measures through multilateral/bilateral consultations.

C. TARIFFS

1. HIGH TARIFF PRODUCTS

*** 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.**

<Outline of the Measure>

The current simple average bound tariff rate for non-agricultural products is 3.3%. Items with high tariffs include footwear (maximum 48%), glassware (maximum 38%), porcelain and ceramics (maximum 28%), woolen goods (maximum 25%), trucks (25%), leather products, etc. (20%), and titanium (maximum 15%). The tariff rate on trucks is very high, placing imported trucks under a severe competitive disadvantage; Japan has strong interests in seeing this tariff rate reduced. Furthermore, the binding coverage on non-agricultural products of the United States is 100% and the average applied tariff rate in 2015 was 3.3 %.

<Concerns>

High tariff rates themselves do not, per se, conflict with WTO Agreements unless they exceed the bound rates. However, in light of the spirit of the WTO Agreements of promoting free trade and enhancing economic welfare, it is desirable to reduce tariffs to their lowest possible rate, and eliminate the tariff peaks (see “Tariff Rates” in 1. of Chapter 5, Part II) described above.

<Recent Developments>

Negotiations regarding market access for non-agricultural products are ongoing in the Doha Round negotiations; they include negotiations on reducing and eliminating tariff rates. In addition, with the aim of increasing the number of items subject to elimination of tariffs on IT products, ITA expansion negotiations launched in May 2012 outside the Doha Round negotiations and an agreement was reached in December 2015. Elimination of tariffs on 201 subject items is planned to start in July 2016 (see 2. (2) “Information Technology Agreement (ITA) Expansion Negotiation” in 5. of Chapter 5, Part II for details).

2. METHOD OF CALCULATING TARIFFS ON CLOCKS AND WRISTWATCHES

<Outline of the Measure>

The United States calculates tariffs on finished clocks and watches as the aggregate of the tariffs on their components. These calculations are complex and the trade procedures are onerous. For example, the tariff on a wristwatch is the total of the tariffs on its: (a) movement; (b) case; (c) strap, band or bracelet; and (d) battery. A duty rate has not been set for 8 digit HS codes which classify wrist watches as completed products.

Although the rules were established for the purpose of protecting the US watch/clock industry, there is some opinion that the rules should be simplified from the point of view of benefitting of importers and consumers in the US.

<Problems under International Rules>

This calculation method is not a violation of WTO rules because it is in accordance with the US schedule of the tariff concession. However, the complex method of calculating tariffs places excessive burdens on traders and is an obstacle to the promotion of smooth trade. In addition, the US calculation method is based on the presumption of mechanical clocks and watches, only few of which are distributed in the world; therefore it does not reflect the actual state of distribution.

During the Japan-US Deregulation Dialogues in 1998 and 1999, Japan requested that the US revise its clock and watch import tariff calculation for complete units and simplify the trade procedures by classifying them and setting duties under a 6-digit HS code, rather than accumulate the tariff amounts for individual components. However, the report on tariff simplification published by the US International Trade Commission (ITC) in March 1999 failed to offer adequate improvements, and tariffs continue to be calculated under 8-digit tariff codes for each component and the total of them. In addition, calculation methods based on price divisions remain and there has not been adequate improvement.

<Recent Developments>

The issue was further discussed during the Japan-US Deregulation Initiative talks in 2002 and 2003. The Report issued in June 2004 reflected Japanese concerns over clock and watch tariff rate calculation methodology and rules of origin certificates. The report stated that negotiations would continue with deference to both the Japanese government’s position and the ongoing WTO discussions. Furthermore, Japan requested early improvement at the Japan-US Trade Forum held in 2005 and 2009, and also expressed its concerns during the WTO Trade Policy Review of the United States in 2008 and 2010. However, the Unites States has not yet improved the aforementioned measures as requested by Japan. Japan intends to continue asking the United States for the improvement.

D. Anti-Dumping Measures

1. Outline

The US is a traditional user of Anti-Dumping (AD) measures, and efforts are underway to regulate the administration and procedures of the US’s national AD system. The US’s system is characteristically more transparent than those of other countries, as the US investigation authority actively discloses information on the basis for their judgments, including the calculation basis of the margin of dumping in particular. This has made it easier for interested parties in the US to assess the progress of and issues surrounding investigations and has secured opportunities for interested parties to submit their views and rebuttal arguments in order to protect their interests.

While the US has a high level of transparency in its investigation procedures, it still maintains many elements of unilateralism and protectionism in its practice of the AD system. Many countries have complained about the problem of the US regime. The US legislation could be interpreted or applied in ways that are inconsistent with the AD Agreement, so it will be very important to monitor closely the US administration of AD system and, if any problems according AD Agreement exist, to point them out.

2. AMENDMENT OF THE AD ACT IN LINE WITH THE ENACTMENT OF THE TPA ACT

In 2015, the United States enacted the Bipartisan Congressional Trade Priorities and Accountability Act as legislation to reauthorize Trade Promotion Authority (TPA) in line with the Trans-Pacific Partnership (TPP) negotiations. The Act also incorporated amendment of the US AD Act (the Tariff Act of 1930 (19 U.S.C. 1677)). The specific contents of the major amendment items are described below. It is apparent that this amendment has revised national law in a direction that facilitates imposition of AD measures by the United States. Japan needs to watch closely on whether the provisions and application of the AD Act comply with the AD Agreement and the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”).

1) Adverse inferences (section 776 of the Tariff Act of 1930 (19 U.S.C. 1677e)

The provisions regarding adverse inferences, or so-called “adverse facts available (FA)” clearly stipulate that the authority is not required to determine, or make any adjustments to a weighted average dumping margin base on any assumptions about information the interested party would have provided if the interested party had complied with the request for information. The AD Agreement has provisions on FA in Article 6.8 and Annex II. In interpreting these provisions, the Panel report in DS414 (China–GOES/AD) determined that the use of FA should be distinguished from the application of adverse inferences and that Annex II of the AD Agreement does not provide a basis for drawing adverse interferences. The provisions in the amended US AD Act provide that, when applying FA, there is no case in which the US authority must apply the dumping margin that would have been calculated if an appropriate response was made. While it would depend on how the provisions are applied, there is a risk that they would allow the application of FA that diverge from appropriate calculation of dumping margins.

2) Injury (impact on the profitability of the domestic industry) (section 771(7) of the Tariff Act of 1930 (19 U.S.C. 1677(7))

The provisions stipulate that the ITC shall not determine that there is no material injury or thereat of material injury to a domestic industry merely because the domestic industry has recently improved. The second sentence of Article 3.4 of the AD Agreement provides “this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance” (the “list” refers to the economic factors and indices listed in the first sentence of the Article).

In a specific case where, for instance, it is difficult to deny injury due to the fact that, with evaluating all relevant factors, the domestic industry is profitable and the profit is so large although there is not another reason to make affirmative injury determination, the ITC would not be able to deny injury. In other words, the ITC would inevitably have to find injury according to these provisions. In that sense, the provisions make the profits and business performance of the domestic industry decisive criteria for determination of injury. Therefore, their consistency with the second sentence of Article 3.4 of the AD Agreement is a matter of concern.

3) Particular market situation (section 771(15) of the Tariff Act of 1930 (19 U.S.C. 1677(15), 1677b(e), etc.)

The provisions allow for broad discretion to use a calculation methodology of normal value other than sales of like products in the ordinary course of trade in the domestic market. With regard to calculating the constructed value, if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may resort to the Calculation methodology to be applied to nonmarket economy countries or "any other reasonable method".

The provisions provide that "any other reasonable method" may be used, and does not impose any restrictions. Its consistency with Article 2 of the AD Agreement may present a problem depending on future application of the provisions.

4) Reduction in the burden on the Department of Commerce (DC) by reducing the number of voluntary respondents in sampling (section 782(a) of the Tariff Act of 1930 (19 U.S.C. 1677m(a), etc.)

The current US AD law stipulates, as a condition where the authority shall establish an individual dumping margin for any exporter or producer not initially selected for individual examination under sampling examinations who submits to the authority the information requested from exporters or producers selected for examination, that "the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation" ("such information" refers to the information requested from exporters or producers selected for examination). The amendment proposes that the condition would be revised to "the number of exporters or producers subject to the investigation or review is not so large that additional individual examination of such exporters or producers would be unduly burdensome for the administering authority and ...(omitted)," and that not only internal factors of the investigation itself, such as the complexity of the issues concerning the case, but also external factors unrelated to the investigation, such as the total number of investigations conducted by the administering authority, can be taken into consideration as factors to be examined for determining "unduly burdensome." These provisions expand the factors to be examined to external factors unrelated to the investigation, such as the total number of investigations conducted by the administrating authority, going beyond the framework of the investigation subject to the sampling, and may be inconsistent with the second sentence of Article 6.10.2 of the AD Agreement, which provides for an exception to Article 6.10 of the AD Agreement, depending on how they are applied.

3. *MAJOR DISPUTE CASES*

In the past, Japan has pointed out numerous issues with the US's AD system to the US Government, demanding that they be improved. These issues include improper dumping determination through use of the zeroing procedure (see "Calculation of the Margin of Dumping via the Zeroing Procedure" below), criteria for determining related parties (see "Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan" below), treatment of like products within the scope of imposing AD duties, the Model Matching problem (see "Model Matching" below), the way to apply "facts available" (FA), and the criteria of "sunset reviews" (see "Unfairly long-term continuation of AD duties (Sunset Provision)" below). The following are major disputes between Japan and the US relating to the AD Agreement.

1) The Byrd Amendment (Amendment to the Tariff Act of 1930) (DS217/DS234)

<Outline of the Measure/Problems under International Rules>

The "Byrd Amendment (Continued Dumping and Subsidy Offset Act of 2000)" is a law that enables tax money that the government imposed through AD duties and countervailing tariffs from imports to be distributed to domestic producers who requested and supported applications of AD and countervailing measures. It was enacted in October 2000, initiated by Senator Byrd as an amendment to the Tariff Act of 1930.

In December 2000, Japan, the EU, Australia, Republic of Korea, Brazil, India, Thailand, Indonesia and Chile jointly requested consultations under WTO Dispute Settlement procedures against the US, arguing that the Byrd Amendment was inconsistent with the WTO agreements (DS217). In June 2001, Canada and Mexico also requested consultations (DS234).

In September 2001, a WTO panel was established. In September 2002, the panel released its report, which concluded that there were violations of the WTO agreements. Responding to this report, the US appealed. In January 2003, the WTO Appellate Body released its report, stating that the Byrd Amendment, by allowing distribution of the amount imposed, constituted specific measures against dumped imports and subsidies that are not permitted under the AD Agreement (Article 18.1) and the WTO Agreement on Subsidies (Article 32.5). Thus, the violations of the WTO agreements were confirmed. In the same month, this report was adopted at the WTO Dispute Settlement Body's meeting. In a WTO arbitration ruling (DSU Article 21.3 Arbitration), the US was ordered to fulfill the DSB recommendations by the end of 2003.

Because the US did not comply with the DSB recommendations within the term stated, in January 2004, 8 countries and regions including Japan, the EU, Canada and Mexico, requested that the DSB approve countermeasures against the US (DSU Article 22.6 Arbitration). In August of the same year, the arbitrator concluded that the maximum countermeasure for each year should be the most recent amount distributed according to the Byrd Amendment multiplied by 0.72. In November and December of the same year, the aforementioned 8 countries and regions including Japan requested approval as countermeasures of additional duties imposed on imports from the US within the maximum amount approved by the arbitrator's ruling; it was approved by the DSB. The EU and Canada in May 2005, Mexico in August 2005, and Japan in September 2005, respectively applied countermeasures. The countermeasure that Japan applied was the imposition of a 15% additional tariff for one year on 15 industrial items including 7 items of bearings and 3 items of steel products (the maximum amount of the countermeasure was approximately 5.68 billion yen).

In February 2006, the US passed the Deficit Reduction Act of 2005, which repealed the Byrd Amendment; therefore the US claimed that it had fulfilled its WTO obligation. However, this Act maintained the Amendment until October 1, 2007, and continued the distribution of the imposed amount on goods imported up to this date. Japan appreciates the fact that the US repealed the Byrd Amendment. However, the US legislative action does not rectify the violation of the WTO agreements since the distribution based on the Amendment continued. For this reason, Japan has extended the term for the aforementioned countermeasure by one year every year since September 2006.

The maximum amount imposed as countermeasures has fallen due to reduction in the amount distributed from September 2008 to 2012. The term of the countermeasure was therefore extended after amending the items targeted (1 or 2 items of bearings) and the duty rate. In 2012, the United States distributed approximately 8.15 billion yen that had been “reserved” since 2006 in addition to ordinary distribution (approximately 2.17 million yen) because the distribution qualification was under judicial review, resulting in a large increase in the amount distributed. Accordingly, the maximum amount of the countermeasure in fiscal year 2013 significantly increased to approximately 5.87 billion yen, and therefore the items subject to the countermeasure were extended to 13 steel-related items in addition to bearings, and the rate of the additional tariff was raised to 17.4% in September 2013. The measure was terminated at the end of August 2014.

The EU has also been continuing to enforce countermeasures. An additional tariff of 26% has been imposed on 4 items since May 2013. Canada and Mexico are not taking countermeasures as the distribution amount became zero on imports for both countries due to the ruling of the US Court of International Trade in April 2006 that application of the Byrd Amendment to Canada and Mexico was a violation of the NAFTA Implementation Act.

<Recent Developments>

Since the amount of Byrd distribution to Japan was very small in 2013 and 2014, Japan notified the WTO/DSB that it decided to retain the rights of the countermeasure and not to extend the countermeasures in 2014 and 2015.

However, it is believed that the Byrd Act distribution of the amount of AD and CVD duties imposed on goods that cleared customs before October 1, 2007, will continue for several more years. Japan will therefore discuss the content of the countermeasure for 2016 and later years, taking into consideration the amount of distribution by the US in recent years, etc. Japan will also continue to urge the US to promptly halt the distributions approved by the Byrd Amendment and to completely rectify the violation of the WTO agreements.

2) Calculation of the Margin of Dumping via the Zeroing Procedure (WT/DS322)

<Outline of the Measure>

The US has applied a procedure known as “zeroing” that in effect artificially inflates the margin of dumping. Under this procedure, in adding up margins calculated in an investigation into each model or export transaction, negative margins, which means where export prices are higher than the normal values in a domestic market (not dumping), are converted to zero (See Figure I-3-1).

Figure I-3-1 Examples of Calculation of the Margin of Dumping using the Zeroing Methodology (Note)

	Domestic Price ($)	Export Price ($)	Individual Margin of Dumping ($)
Product A	115	95	20
Product B	80	70	10
Product C	100	150	-50 (The practice of “zeroing” dictates that this margin of dumping (-50) is calculated as “0”)
Product D	105	85	20
Total	400	400	

(Sales volumes are all considered to be “1 unit” to simplify calculations)

(Note) The dumping margin (DM) would be calculated as follows if zeroing procedure was not used:

$$DM = \frac{20+10-50+20}{95+70+150+85} \times 100 = 0\%$$

There would be no margin of dumping. However, the use of zeroing results in the creation of an artificial margin.

$$DM = \frac{20+10+0+20}{95+70+150+85} \times 100 = 12.5\%$$

The WTO Appellate Body (DS141) report regarding the EU's measure imposing AD duties on cotton-type bed linen from India, adopted at the WTO Dispute Settlement Body meeting in March 2001, ruled that the zeroing methodology which the EU used in calculation of the margin of dumping comparing a weighted-average normal value with a weighted-average export price (so-called "W to W method") violated the AD Agreement. However, the US took the position that the WTO ruling against zeroing methodology applied only to the specific case ("as applied"), and did not constitute a finding that the "zeroing" methodology "as such" violated the WTO agreement. The US continued to apply the "zeroing" methodology.

Japan's industries, including the bearing industry, have been harmed for a long time because of AD duties at rates calculated via use of the zeroing methodology, since excessive and unjustifiable AD duties have been imposed. Given these circumstances, in November 2004, Japan requested WTO consultations with the US over the application of the zeroing methodology in AD measures in 13 cases, including those concerning Japanese steel plates and ball bearings, and the zeroing methodology itself, etc. (DS322), and then requested the establishment of a panel in February 2005.

<Problems under International Rules>

In January 2007, the WTO Appellate Body issued a report, which fully accepted Japan's claim that use of the zeroing methodology in the (original) investigation for determining the presence or absence of dumping and for deciding the margin of dumping and in procedures after the decision to apply the AD measures (e.g., as a part of an administrative review) is inconsistent with the WTO agreement. The report was adopted in the same month. Issues in dispute in this case and rulings of the panel/Appellate Body are as follows (see Figure I-3-2 for rulings of the WTO panel and the Appellate Body concerning zeroing disputes, including this case).

Application of zeroing methodology to individual cases under the original investigations (Articles 2.1, 2.4, and 2.4.2 of the AD Agreement) = "as such"

The Appellate Body supported the panel's ruling that the application of zeroing methodology in the original investigations is inconsistent with the AD Agreement, stating that the presence of dumping and the margin of dumping are determined, not on a transaction-to-transaction basis, but instead in relation to all products targeted for investigation and thus not just part but all of the comparisons of normal values and export prices need to be taken into consideration. The Appellate Body ruled that by applying the zeroing methodology in calculating the dumping margin based on a transaction-to-transaction comparison in the original investigations the United States violated Articles 2.4, 2.4, and 2.4.2 of the AD Agreement.

The zeroing methodology in administrative reviews (Articles 2.1, 2.4, 9.1, 9.3, and 9.5 of the AD

Agreement) = "as such"

The panel ruled that the application of zeroing methodology in administrative reviews, etc. does not violate the AD Agreement, but the Appellate Body reversed the panel's ruling. The Appellate Body ruled that, for the same reasons as (1), the zeroing methodology violates Article 2.4 of the AD Agreement, which requires "fair comparison" of export price and normal value, and Article 9.3 of the Agreement, which provides that the amount of AD duties shall not exceed the "margin of dumping".

Applications of zeroing in administrative reviews and sunset reviews (Articles 2.4, 9.1, 9.3, 9.5, and 11 of the AD Agreement) = "as applied"

The panel and the Appellate Body was ruled that the Unites States' application of the zeroing methodology in 11 administrative reviews and two sunset reviews with regard to AD measures on Japanese products violated Articles 2.4, 9.3, and 11.3 of the AD Agreement.

Figure I-3-2 List of WTO Panel/Appellate Body rulings concerning "zeroing" disputes

		Original Investigation				Administrative Review	
		W to W Method		T to T Method			
		As Applied	As Such	As Applied	As Such	As Applied	As Such
EC-India Bed Linen AD (DS141)	Appellate Body (Mar. 2001)	Violation	–	–	–	–	–
US-Canada Softwood Lumber AD (DS264)	Appellate Body (Aug. 2008)	Violation	–	–	–	–	–
US-EU Zeroing (DS294)	Panel (Oct. 2005)	Violation	Violation	–	–	No violation	No violation
	Appellate Body (Apr. 2006)	–	–	–	–	Violation	–
US-Canada Softwood Lumber AD (compliance) (DS264)	Appellate Body (Aug. 2008)	–	–	Violation	–	–	–
US-Japan Zeroing (DS322)	Panel (Sep. 2009)	Violation	Violation	–	No violation	No violation	No violation
	Appellate Body (Jan. 2007)	–	–	–	Violation	violation	Violation

(Note) The shaded portion indicates the case in which the ruling of violation of the AD Agreement was made for the first time for each type of zeroing and each stage in an AD proceeding. "-" indicates that no ruling was made for the item concerned.

<Recent Developments>

At Dispute Settlement Body (DSB) meeting in January 2007, the Appellate Body report on the US-Japan Zeroing case (DS322) was adopted. Thereafter, the implementation deadline for the DSB recommendation was set as 24 December 2007. However, the US's efforts ended in only partial remedial actions when the deadline expired. Therefore, the US had not implemented the WTO recommendation.

Accordingly, in January 2008, Japan applied for approval to implement countermeasures. The US filed an objection to this, and the case was submitted to arbitration to determine the level. Moreover, as the US declared that it had implemented the DSB recommendations and rulings, Japan and the US agreed to suspend the arbitration procedure noted above, and first have recourse to the compliance procedure. The compliance panel report, which was adopted in April 2009, completely accepted Japan's arguments and found that the United States did not fulfill its obligation to implement the DSB recommendation since it failed to correct the zeroing methodology as such and the actual application of zeroing throughout AD procedures as applied to individual cases. The Appellate Body completely supported the panel report (see Figure I-3-3 for rulings of a compliance panel and the Appellate Body). The decision that the United States has not fulfilled its obligation to implement the DSB recommendation was thus finalized. Since then, however, there has been no action by the United States to comply with the DSB recommendation. Therefore, in April 2010, Japan applied for resumption of the WTO arbitration procedure to determine the level of countermeasures, and the arbitration meeting was held in October of the same year.

After that, in December 2010, the United States made public a draft revision of the Regulations of the Department of Commerce for implementing the WTO recommendation concerning zeroing. Japan held several discussions with the US concerning the contents of the revision. As a result, in February 2012, the US concluded a memorandum of agreement to settle the dispute with Japan. Based on this memorandum, the US published the revision of the Department of Commerce regulations in the Federal Register in the same month. The outline of the regulation reform is as follows:

1) Generally, in calculating the dumping margin, the Department of Commerce will apply the method of calculation that compares a weighted-average normal value of domestic transactions and a weighted-average export price of export transactions (W to W method). It will calculate the margin, taking into account both the domestic average price and the higher export price (abolition of zeroing methodology). It will abolish zeroing in the method of calculation that compares individual transactions (T to T method) as well.
2) Margins calculated using the zeroing methodology in past administrative reviews which were determined to be a violation to the AD Agreement shall not be used as support for determining that there was "continuation or recurrence of dumping" in sunset review.

In addition, pursuant to section 129 of the Uruguay Round Agreements Act (URAA), in June 2012, the United States recalculated the deposited AD duty rates according to the modified regulations in order to make the measures determined to be inconsistent with the WTO Agreements by a panel or the Appellate Body consistent with the WTO Agreements. As a result, it changed the deposited AD duty rate on Japanese products (stainless steel sheet) from 0.54% to zero. In response, in August of the same year Japan stopped imposing countermeasures, based on the memorandum of understanding.

Although there was great progress in the resolution of disputes, in order to completely abolish zeroing, use of the practice of zeroing in the AD procedures must be set out in new regulations in accordance with the revised Regulation of the Department of Commerce.

With regard to AD measures on Japanese ball bearings and parts for which the application of zeroing was in dispute, Japanese bearing industry challenged the consistency of the ruling in the sunset review to extend AD duties for five years (from September 2006 to September 2011) under US domestic laws in a US court. The Japanese bearing industry won the case in the court of first instance (the US Court of International Trade) in May 2011, and the AD duty orders were temporarily cancelled in July of the same year. Recalculation of the deposit AD duty rates did not immediately take place after the memorandum was concluded. However, the ruling of the first instance court was reversed and Japanese industry lost the case in the court of second instance (the US Court of Appeals for the Federal Circuit) in May 2013, which ruled that the decision to extend AD duties was valid. The Department of Commerce then reinstated AD duty orders in November of the same year and gave notice that imposition of AD duties and review procedures would be resumed (the Japanese industry appealed to the Supreme Court in February 2014, but in June 2014, the Court decided not to accept the case). The 21st administrative review (for the period from May 2009 to April 2010; the preliminary determination was made in April 2011) and the 22nd administrative review (for the period from May 2010 to April 2011) were commenced. However, since there was no request from domestic industries in the third sunset review that was initiated in January 2014, the measure to impose AD duties was revoked in March 2014 (the measure was retroactively terminated as of September 15, 2011). (As shown below, US court proceedings are under way for some administrative reviews.)

Figure I-3-3 Rulings of the compliance panel and the Appellate Body on DS322

	Original Investigation		Administrative Review	New Providers Review	Sunset Review
	W to W Method	T to T Method			
As such (the system itself)	US Compliance completed	Compliance incomplete	Compliance incomplete	Compliance incomplete	-
As applied (individual measures)	US Compliance completed	-	Compliance incomplete	-	Compliance incomplete

COLUMN: DETERMINATION OF TARGETED DUMPING AND ISSUES CONCERNING ZEROING METHODOLOGY

To date panels and the Appellate Body have recognized that zeroing violates the AD Agreement in all stages of AD procedures, including original investigations and regular administrative reviews as in the above-mentioned case of DS322, etc. However, "a comparison of a weighted-average normal value with export prices on a transaction-to-transaction basis" provided for in the second sentence of Article 2.4.2 of the AD Agreement may be used for cases where "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison" (referred to as "targeted dumping"). As this provision appears to assume a comparison of normal value with a portion of export transactions, some Members claim that the zeroing methodology may be used under the provision. While Panels and the Appellate Body have repeatedly determined in past dispute cases that the zeroing methodology was inconsistent with the AD Agreement, none of these cases directly concerned the second sentence of Article 2.4.2, and they have not explicitly determined that use of the zeroing methodology to calculate dumping margins in such cases violates the Agreement. Therefore, while the inconsistency of the zeroing methodology with the Agreement has been confirmed in cases that do not concern the second sentence, there is concern that some Members may arbitrarily invoke the provision on targeted dumping and use the zeroing methodology in more and more cases under the guise of targeted dumping. In this respect, it is worth noting that in recent years the United States have been finding targeted dumping in many cases and is expanding and developing the use this methodology.

The United States first used calculation methods for targeted dumping in the September 2007 AD investigation of coated free sheet paper from the Republic of Korea (however, the dumping margin was "*de minimis*," as provided for in Article 5.8 of the AD Agreement, and thus the investigation terminated and measures were not imposed). In October of the same year, the US invited public comments on the thresholds, tests and guidelines for determining targeted dumping. In May 2008, it invited public comments regarding its detailed requirements for determining targeted dumping and specific calculation methods. In the almost total absence of actual determinations of targeted dumping, however, the proposed requirements were deleted in December of the same year, stating that there needed to be rulings in concrete cases. Subsequently, the United States determined targeted dumping in the original investigation of large residential washers from the Republic of Korea and in an administrative review of PET films from China, etc.

The Republic of Korea in August 2013 (DS464) and China in December of the same year (DS471) requested WTO consultations, claiming that the US applied the zeroing methodology in cases where targeted dumping was determined. The Republic of Korea then requested the establishment of a panel in December of the same year after taking into consideration the results of the above-mentioned consultations. At present, the Panels have completed their examination in DS464 and DS471, but Panel reports have not yet been distributed. With regard to the 21st administrative review (for the period from May 2009 to April 30, 2010) for AD measures on Japanese ball bearings and parts, the US domestic industry filed a complaint with a US court (the Court of International Trade) in March 2015 claiming that the failure of the Department of Commerce to use differential pricing analysis in calculation of dumping margins was in violation of U.S. laws and regulations.

Although to date the United States has not determined any targeted dumping in AD investigations/measures involving Japanese companies, Japan needs to pay attention to the consistency with the Agreement of the targeted dumping determinations and methods used for determining dumping margins by the US. In this respect, it is worth noting that in recent years the United States started using a method called "Differential Pricing Analysis"[1] in place of the conventional targeted dumping determination methods. In DS464, the consistency of this method with the second sentence of Article 2.4.2 has been an issue in dispute.

3) Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (WT/DS184)

<Outline of the Measure>

In October 1998, the United States initiated an investigation against certain hot-rolled steel products from Japan and, in June 1999, imposed AD duties.

In January 2000, Japan requested consultations with the US and challenged several aspects of the US measures, including the: (a) methodology of calculating the margin of dumping; (b) determination of "critical circumstances" (calling for retroactive imposition of duties); (c) determinations of injury and causal link; and (d) unfair investigation procedures. Japan considered each of these to be violations of the US obligations under GATT and the AD Agreement. The consultations failed to settle the dispute. This led to the establishment of a Panel in March 2000.

In February 2001, the Panel report was circulated to all Members. The Panel agreed with some of Japan's claims, but rejected others. Both the US and Japan, therefore, appealed to the Appellate Body in April and May 2001, respectively. The Appellate Body report, which upheld most of Japan's claims, was circulated in July 2001, and was adopted in August 2001.

<Problems under International Rules>

Japan's arguments supported by the Panel and Appellate Body were as follows:

1) The application of "facts available" to three investigated companies by the United States Department of Commerce ("DOC"), an investigating authority for dumping, in this case was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

---

[1] The Differential Pricing Analysis is a method for determining whether requirements provided for in the second sentence of Article 2.4.2 of the AD Agreement are met using statistical methods after categorizing export transactions into groups. The analysis comprises the following two stages. In the first stage, in order to determine the requirement that "the authorities find a pattern of export prices which differs significantly among different purchasers, regions or time periods", the export prices under the investigation are first categorized by model, and then further categorized into small groups by purchaser, region, or time period to determine the extent of the difference between each small group and other small groups. More concretely, the "Cohen's d test", which statistically measures the extent of the difference in the means between a transaction group (small group) subject to the analysis and a transaction group (small group) for comparison, is applied to analyze the extent of the difference in price between export transaction groups. Then, the "ratio test" is used to assess the percentage of the total value of the export transactions (set of small groups) determined to differ significantly from other transactions by the "Cohen's d test" in all export transactions. In the second stage, in order to determine the requirement of "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison", the extent of the difference between the dumping margin calculated using comparison of W to W method and the dumping margin calculated using W to T method (a method that compares a weighted average normal value with export prices of export transactions on a transaction-to-transaction basis) is examined. If the dumping margins calculated using W to W and W to T method differ at least to a certain extent (note that the US does not use the zeroing method in W to W method but uses it in W to T method, and therefore the margins calculated are generally different), the above-mentioned requirement of "explanation" is determined to be met. If the requirements of both the first stage and second stage are met, W to T method and the zeroing method are applied to the set of export transactions determined to differ from other transactions (or all export transactions if certain additional requirements are met). More details are provided in the Memorandum to AD cases of Xanthan Gum from Austria and China (final determination in July 2013).

2) DOC's inclusion of margins based partially on "facts available" in the calculation of the "all others rate", which is the dumping margin applied to imports from exporters or producers not individually examined, was inconsistent with Articles 9.4 and 18.4 of the Anti-Dumping Agreement.

In addition, provisions of the US AD Act stipulating calculation methods for the "all others rate" has the following problems with respect to the AD Agreement.

Under the AD Agreement, the authorities shall, as a rule, determine an individual margin of dumping for each known exporter of the product under investigation (the first part of Article 6.10). However, in cases where the number of exporters involved is so large as to make such a determination impractical, the authorities may limit their examination to a reasonable number of interested parties or products by using statistically valid samples (referred to as "sampling"; the second part of Article 6.10). For companies not sampled ("all others"), a dumping margin not exceeding the weighted-average margin of dumping established with respect to the sampled companies (referred to as the "all others rate"; Article 9.4) may be applied. However, as set forth in Article 6.10.2 of the AD Agreement, if individual dumping margins for sampled companies are partially based on facts available, the authorities shall disregard them in their calculation of the "all others rate" (the second part of Article 9.4). In contrast, the US AD Act stipulates that individual margins of dumping for sampled companies should be excluded from the calculation of all others rate only if they are entirely based on facts available, thus violating the AD Agreement (see Figure I-3-4).

Figure I-3-4 Example: calculation of the all others rate

	Sampled companies				Non-sampled companies	
Exporters	A	B	C	D	E	F
Dumping margins	10%	20%	30% (Partially based on facts available)	40% (Entirely based on facts available)	all others rate	all others rate

Note: The above figures are based on the assumption that the export volumes are the same for all cases.

The dumping margin for non-sampled companies in groups E and F:

→ Under the WTO AD Agreement (the second part of Article 9.4), the weighted average of the margins for groups A and B excluding those partially based on facts available = (10+20) / 2 = 15%

→ Under the US domestic law, the weighted average of the margins for groups A, B, and C excluding those entirely based on facts available = (10+20+30) / 3 = 20%

1) DOC's exclusion of sales to affiliates in Japan as "outside the ordinary course of trade" was arbitrary and inconsistent with Article 2.1 of the Anti-Dumping Agreement.

2) Injury was determined in a manner which "focused primarily" on the merchant market sector when calculating market shares of imported goods and the profit rate of the US steel industry. It was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement that the injury determination was made without analyzing merchant market sector.

<Recent Developments>

The Appellate Body Report of this case included the following four recommendations:

i) amend the statutory provision regarding the "all others" rate;

ii) eliminate the practice of excluding sales to affiliates from the normal value calculation;

iii) re-calculate dumping margins by DOC in a manner consistent with the Anti-Dumping Agreement; and,

iv) re-determine injury by ITC in conformity with the WTO Agreement.

In addition, the reasonable period of time (RPT) for compliance was set to November 23, 2002.

The US implemented (2) and (3) above, within the RPT, but it failed to fulfill its obligations in regard to (1) and (4). The US requested Japan to accept an extension of the RPT to implement the remaining recommendations. Japan agreed and the RPT was extended. The US then sought to amend the Act, but it was unsuccessful, and so requested extension and further extension of RPT. Japan agreed to continue to accept the US requests to extend the deadline.

In an effort to comply with the WTO decision, the Recommendation Implementation Act was proposed to Congress. However, the probability of completing implementation of the recommendations by the extended deadline was non-existent. For this reason, the 4th extension of the implementation period was discussed. However, on July 7, 2005, due to the ineffectiveness of repeated extensions and the loss of confidence in the reliability of the WTO dispute settlement procedures, Japan and the US concluded an agreement that Japan maintained the right to apply countermeasures. Later, at the end of 2006, in spite of Japan's successive requests for its completion of implementation, the Recommendation Implementation bill died due to the closure of the Congress without passing the bill.

Until 2010, at regular Dispute Settlement Body (DSB) meetings, Japan had continued to demand early implementation by the United States, and also took up the issue as an agenda item/question in Japan-US working-level consultations and during the Trade Policy Review (TPR) of the United States. In 2011, Japan took up the issue as an agenda item at the Japan-United States Economic Harmonization Initiative.

In June 2011, complying with the ruling of sunset reviews which was initiated in 2010, the US retroactively terminated, as from May 2010, the AD measure against Japanese-made hot-rolled steel plate, which had been in place since 1999.

Although the AD measure itself was terminated as described above, the US AD Act stipulating the calculation method of the all others rate has not been revised. Japan also made an inquiry in writing about the prospect for revisions of domestic laws specifying the calculation methods at the WTO Trade Policy Review Mechanism (TPRM) on the US measure in December 2014, and the US government replied that it would take appropriate measures in cooperation with the US Congress. However, full compliance with the WTO recommendations has not yet been achieved. As failure to comply with the DSB recommendations may damage the credibility of the WTO dispute settlement system, Japan needs to urge the United States to take measures to revise its legislation in accordance with the recommendations.

4) Unfairly long-term continuation of AD duties (Sunset Provision)

<Outline of the Measure>

Article 11.3 of the AD Agreement provides the Sunset Provision, stipulating that definitive anti-dumping duties shall be terminated on a date not later than five years from their imposition unless the authorities determine in a review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The US Tariff Act also provides the Sunset Provision, and sunset reviews have been implemented. However, of the 104 cases (the second and later reviews are each counted as one case) of AD duties against Japan in which there were sunset reviews five years after AD duties had been imposed, most of the 52 cases (approximately 70% or 35 cases) in which AD duties were revoked involved US domestic industries that expressed no concern about continuation of the measures. In addition, the Department of Commerce did not determine to revoke any cases. As a result, over half of US AD measures have continued in effect for over ten years (Figure I-3–5). As of the end of February 2016, there were 13 AD measures against Japanese products, which had lasted for more than

10 years (Figure I-3-6).

Figure I-3-5 Revocation and continuance of AD measures against Japan (including price undertakings) by Sunset Reviews

(January 1995 – end of February 2016)

Inauguration of Reviews	Before 1999				After 2000			
Results	Expire (No expression of concern from domestic industries	Sunset Review			Expire (No expression of concern from domestic industries	Sunset Review		
		ITC revokes	DOC revokes	Continuance		ITC revokes	DOC revokes	Continuance
	17	11	0	17	18	5	0	36

Notes: (1) The US has also implemented Sunset Reviews on measures imposed before enactment of the WTO Agreement (before 1995), sequentially between 1998 and 1999.

(2) Figures include second Sunset Reviews. Partial revocation is counted as continuance (as of February 2016).

Figure I-3-6 AD measures against Japan continuing over 10 years (as of the end of February 2016, including price undertakings)

Date of measure imposed	Products	Continuance
8 December 1978	Prestressed concrete steel wire strand	37 years
10 February 1987	Carbon steel butt-weld pipe fittings	29 years
12 August 1988	Brass sheet & strip	27 years
10 May 1991	Gray Portland cement & clinker	24 years
21 February 1995	Stainless steel bar	20 years
2 July 1996	Clad Steel Plate	19 years
15 September 1999	Stainless steel wire	17 years
27 July 1999	Stainless steel plates	16 years
26 June 2000	Large-diameter Carbon Steel Seamless Pipe	15 years
26 June 2000	Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4 ½ inches)	15 years
28 August 2000	Certain Tin Mill Products	15 years
6 December 2001	Welded Large Diameter Line Pipe	14 years
2 July 2003	Polyvinyl alcohol	12 years

<Problems under International Rules>

Article 11.3 of the AD Agreement stipulates that any definitive AD measure shall be terminated in five years unless the authorities determine in a sunset review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. However, as described above, continuation of AD measures was determined in 53 of 104 cases (the second and later reviews are each counted as one case) against Japan in which there were sunset reviews. This indicates that the US sunset regime is implemented so that AD measures shall be continued in general and revoked as the exception, which is a reversal of the rule and the exception.

Therefore, in order to confirm the basic principle that any definitive AD measure shall be terminated in five years, Japan requested bilateral consultations with US in January 2002 about the sunset review of

AD measures against Japanese corrosion-resistant carbon steel flat product, that the interest of Japanese steel industry was high (DS244). A panel was established in May 2002 (Brazil, Canada, Chile, the EU, India, the Republic of Korea and Norway participated in the Panel proceeding as third parties).

In August, 2003, the Panel rejected Japan's claims and determined that the US decisions under the sunset review were not inconsistent with the WTO Agreements. Japan appealed to the Appellate Body in September and in December, the Appellate Body accepted part of Japan's claims, but concluded that, there was an insufficient factual basis to complete the analysis of Japan's claims that the United States did not act consistently with the WTO Agreements.

Japan's claims and the arguments in the Appellate Body report are summarized below:

(1) The Appellate Body reversed the Panel's findings that the consistency of the internal regulations of the Department of Commerce (Sunset Policy Bulletin (SPB)) with the WTO Agreements was not a challengeable measure; it ruled that the SPB is a measure that is "challengeable", as such, under the WTO Agreement, whether it was a mandatory legal instrument or not (however, as a result of the "lack of relevant factual findings by the Panel or uncontested facts on the Panel record", the Appellate Body stated that it was unable to rule on the consistency of the US measure).

(2) The Appellate Body held that, in determining the likelihood of continuation or recurrence of dumping in sunset reviews, the authorities are not required to calculate the dumping margins in accordance with Article 11.3 of the AD Agreement. However, when the authorities determine that there is likelihood of continuation or recurrence of dumping based on the dumping margins that were legally flawed because they were calculated in a manner inconsistent with the AD Agreement because a "zeroing" methodology was used, this could give rise to an inconsistency with Articles 2.4 and 11.3 of the AD Agreement. (However, given the lack of factual findings by the Panel on this point, the Appellate Body could not determine that DOC acted inconsistently with the AD Agreement).

(3) The Appellate Body found that Article 11.3 of the AD Agreement (sunset review) did not require investigating authorities to make company-specific likelihood determinations in sunset reviews and Article 6 of the AD Agreement (on evidence and procedures), which is applied *mutatis mutandis* with reviews by Article 11.4 of the AD Agreement, also did not provide such requirement. Therefore, it determined that making likelihood determinations in sunset reviews on an order-wide basis instead of company-specific basis did not violate Articles 6.10 and 11.3 of the AD Agreement.

(4) The Appellate Body determined that (a) in determining the likelihood of continuation or recurrence of dumping in Article 11.3 of the AD Agreement, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated; (b) an affirmative "likelihood" determination may be made only if the evidence demonstrates that dumping would be "probable" if the duty were terminated, and not simply if the evidence suggests that such a result might be "possible" or "plausible"; and (c) Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review, and determined that it was therefore not unreasonable for the Department of Commerce to conclude that analyzed factors pointed in the same direction towards likely future dumping.

<Recent Developments>

In connection with the aforementioned DS244, major Japanese and US automakers jointly requested the revocation of the AD measures on corrosion-resistant carbon steel flat products mentioned above in view of their impact on the price competitiveness of US automobiles in the international market. As a result, the US International Trade Commission determined that the expiry of the duty would not lead to recurrence of injury to the US industry, and this measure was terminated in February 2007.

There are cases where an AD measure was terminated owing to companies' efforts, like the case of corrosion-resistant carbon steel flat products. However, in the United States, continuation/termination of an AD measure is determined on the premise that "exports have declined (or have ceased) because of the imposition of AD duties and exports would resume once the AD measures are terminated," without taking into account the global supply-demand situation and the perspectives of cost-benefit performances of companies that respond to regular administrative reviews and sunset reviews. This is one of the causes of long-term continuation of AD measures.

Through bilateral consultation, Japan claimed that unfairly long AD measures would have an adverse effect not only on the industries of countries as to which the AD duties are imposed, but also on US domestic industries, indicated by the above-noted cases, and requested the US to terminate AD measures in five years and to implement appropriate reviews consistent with the WTO Agreements.

In 2011, at WTO AD Committee meetings held in spring and fall, Japan requested the early abolition of the long-term measures. In February and July, at the working-level meeting of the Japan-US Economic Harmonization Initiative in October, the Appellate Body meeting, and the additional ad hoc conference, Japan also requested the early abolition of long-term measures and discussed details of the issue with the US. Furthermore, Japan requested that the US quickly revoke long-term measures at the WTO AD Committee meetings held in spring and autumn 2013, 2014 and 2015.

5) Model Matching

<Outline of the Measure>

In calculating dumping margins, the investigative authorities categorize the subject products and similar domestic products in the exporting country into several models. Next, they identify domestic models that are "the same as" or "the most similar to" the export models for comparing the prices (referred to as "model matching"). With respect to model matching, the Department of Commerce stated in its 15th annual administrative review regarding AD measures for ball bearings originating in Japan (for the period between May 2003 and April 2004), without any persuasive reason, that it would change the model matching methodology previously used in all of the past 14 reviews.

In those 14 administrative reviews, in a comparison between the price of an export product and the prices of like products of the exporting country, products of the exporting country subject to the comparison were limited to those with the exact dimensional characteristics, etc. of the product (referred to as "families"), and in cases where no family exists, constructed normal values of the products sold in the US calculated based on their costs, etc. were used (family method). In the 15th and later administrative reviews, the methodology used for comparison was changed to include products with the dimensional characteristics, etc. not exact but within a specific range to the subjects for comparison (total difference method). In addition, submission of the exporting country's data on costs, expenses, and sales was previously required only for transactions of the products that are compared with the products exported to the United States, but under the total difference method, submission of such data is required for all products subject to investigation for the period of investigation regardless of whether they are subject to comparison or not. This requires Japanese companies to submit enormous volumes of data concerning domestic sales and prices and imposes an excessive and unreasonable burden.

<Problems under International Rules>

While AD Agreement Article 2.4 requires a fair comparison between export price and domestic price, the “total difference method” may require comparisons between products that are not essentially similar. This creates unreasonable dumping margins that would not likely have been generated by the conventional “family method” and poses a problem from the point of view of fair comparison.

<Recent Developments>

The Japanese bearing industry filed lawsuits claiming that the determinations of the Department of Commerce were in error because no evidence existed that the new model-matching methodology used for calculating the duty rates in the 15th and later administrative reviews as described above was more precise than the methodology used previously. However, the above claim was dismissed in the court of first instance (the US Court of International Trade) and in the court of second instance (the US Court of Appeals for the Federal Circuit).

Meanwhile, Japan pointed out problems in the change of methodology and asked the US again to explain the reasonable grounds of the adoption of the new model matching methodology at sessions of the Japan-US Regulatory Reform Initiative in 2006 and 2009. In 2010, Japan took up the issue as an agenda item/question in Japan-US working-level consultations and during the Trade Policy Review of the United States.

At the conference of the Japan-US Economic Harmonization Initiative was held in 2001, the Japanese and US governments as well as Japanese enterprises and domestic users in the US discussed the following problems:

i) use standards of cap numbers (range of products to be included in subjects for comparison) in the total difference method

ii) the burden of data submission

iii)unreasonable matching results from the comparison of products that is not essentially similar.

The US expressed its stance on the above issues as follows:

i) the US will examine the logic of this matching method

ii) the US will seek possibilities to simplify the data collections and submissions

iii)the matching method is conducted appropriately.

Understanding the above issues and their arguments, constructive discussions will continue as needed

E. Subsidies and Countervailing Measures

The 2014 Farm Bill

<Outline of the Measure>

The United States introduced a price support loan program in 1930, and a deficiency payment system, which covers the difference between target prices and market prices subject to participation in production adjustment programs, in 1973. The 1996 Farm Bill (applicable period: from FY1996 to FY2002) eliminated the deficiency payment system, in which the amount of payments changed according to the market prices, and replaced it with the production flexibility contract payment system, in which the amount of payments is fixed regardless of the level of the market prices.

However, the slump in grain prices that began in 1997 resulted in economic damage to farmers that could not be offset with the production flexibility contract payments alone, because the amount of such payments was set in advance. The United States therefore provided emergency farm assistance packages four times between 1998 and 2001 totaling $27.3 billion.

In consideration of such circumstances, the 2002 Farm Bill (applicable period: six years from FY2002 to FY2007) essentially continued the policies of the 1996 Farm Bill while introducing a counter-cyclical payment system to cover the differences between the target prices and the market prices as done in the abolished deficiency payment system.

The 2008 Farm Bill (applicable period: from FY2008 to FY2012) basically continued the policies of the 2002 Farm Bill while introducing a new Average Crop Revenue Election (ACRE) program to cover decreased income.

Serious discussions about the next Farm Bill began in 2011 as the expiration of the 2008 Farm Bill was nearing. However, discussions stalled because the majority and minority parties could not agree on the amount of farm budget reductions. Disagreement about reductions in the overall budget deficit and the presidential election in November 2012 also had an effect. The 2008 Farm Bill expired in September 2012 without being replaced by a new one. Discussions continued after the extension of the 2008 Farm Bill for a year in January 2013. The 2014 Farm Bill (applicable period: from FY2014 to FY2018) was enacted in February 2014. It abolished the deficiency payments, production flexibility contract payments and ACRE program and introduced agriculture risk coverage, price loss coverage and supplemental coverage option, etc.

I. Domestic Support

The 2014 Farm Bill abolished the previously-available deficiency payments, production flexibility contract payments and ACRE program, and introduced agriculture risk coverage, price loss coverage and supplemental coverage option. It also introduced a new insurance policy for cotton because of the ruling of the US-Brazil Cotton Panel. The price support loan program was basically retained, although the loan rates were changed because of the ruling of the US-Brazil Cotton Panel.

i. Agriculture risk coverage (introduced by the 2014 Farm Bill)

The agriculture risk coverage (ARC) covers the difference between the revenue of the current year and 86% of the three-year average revenue over the last five years when the revenue of the current year is lower than 86% of the average revenue. The upper limit of the amount paid by ARC is 10% of the average revenue, and choosing between the ARC and price loss coverage (*see* (b) below) is an option.

ii. Price loss coverage (introduced by the 2014 Farm Bill)

The price loss coverage (PLC) covers the difference between the target prices and the market prices (or the loan rates when the market prices are lower than the loan rates) when the market prices are lower than the predetermined target prices. This system makes payments based on the past planting results and is basically the same as the abolished deficiency payments, but the target prices are significantly raised when compared to deficiency payments.

iii. Price support loan program (continued)

The price support loan program provides farmers with short-term loans by the Commodity Credit Cooperation (CCC) and allows the farmers to suspend their obligations to guarantee repayments by mortgaging their products when the market prices are lower than the loan rates. The 2014 Farm Bill changed the loan rates for cotton because of the ruling of the US-Brazil Cotton Panel, and the conventional system was basically retained for other products.

iv. Supplemental coverage option (introduced by the 2014 Farm Bill)

The supplemental coverage option (SCO) is supplemental insurance for covering the portions not covered by the agricultural insurance subscribed to by farmers. The difference between the guaranteed revenue/yields of the agricultural insurance subscribed to by farmers and 86% of the standard revenue/yields of the agricultural insurance is covered.

II. Export Promotion of Agricultural Products

In the 1980s, the European Union, faced with a serious glut of agricultural products, increased its subsidized exports. In order to counter this, in the 1985 Farm Bill the US introduced the export enhancement program (EEP) and dairy export incentive program (DEIP). However, in response to the growing criticism against export subsidies at the WTO, etc., in the 2008 Farm Bill the US reduced the amount expended, and abolished the EEP and part of the export credit guarantee program. In addition, the DEIP was abolished and the guarantee period of the remaining export credit guarantee program was shortened by the 2014 Farm Bill.

i. Export credit guarantee program

The export credit guarantee program seeks to promote exports of US agricultural products by having the Commodity Credit Corporation (CCC) provide debt guarantees for loans to finance exports of US agricultural products imported on a commercial basis by developing countries. The 2002 Farm Bill provided: (1) a short-term credit guarantee program (GSM-102) that provided debt guarantees on export credit transactions for 90 days to three years; (2) a medium-term credit guarantee program (GSM-103) that provided debt guarantees on export credit transactions for three to 10 years; (3) a suppliers export credit guarantee program (SCGP) that guaranteed a part of accounts receivable by exporters of US agricultural products from importers; and (4) a facilities financing guarantee program (FGP) that provided debt guarantees on investments for improving facilities related to agriculture in importing countries, with the intention of promoting exports of US agricultural products in an emergent market. Of these, GSM-103 and SCGP were suspended in 2006 in view of the outcome of the 2004 US-Brazil Cotton Panel, etc., and were abolished by the 2008 Farm Bill. The upper limit on GSM-102 fees was abolished by the 2008 Farm Bill, and the upper limit of the debt guarantee period was shortened from three years to two years by the 2014 Farm Bill.

<Problems under International Rules and Recent Developments>

I. Domestic Support

The WTO Doha Round negotiations on agriculture have featured debates not only on the rules for reducing the aggregate measure of support (AMS) subject to reduction but also on the rules requiring substantial reductions in overall trade-distorting support (OTDS), including blue-box policies and *de minimis*. In December 2008, the chairperson of the negotiations on agriculture proposed draft modalities setting the goal of reducing the United States' OTDS by 70% (down to a 14.5 billion dollar level after the reduction). As a result, in the 2014 Farm Bill, the flexible production payments contract, which is classified as a green policy, was abolished while the price decline measures and revenue compensation measures, which are likely to be classified as yellow policies, were enhanced. Japan needs to pay attention to whether or not the amount of domestic support exceeds the WTO commitment level.

II. Export Promotion of Agricultural Products

Although export subsidies were fully abolished by the 2014 Farm Bill, frequent use of export credits, which is insufficient in making the disciplines of the WTO Agreement on Agriculture effective, gives an advantage to US agricultural products in terms of export competitiveness. Under this system, the CCC takes on the debts when the guaranteed debts go into default, making the system extremely close to circumventing export subsidies. At the 10th WTO Ministerial Conference in Nairobi, Kenya in December 2015, the members agreed on matters including the following with regard to agricultural export credits: (i) clearly define “export credits”; (ii) make the maximum repayment term no more than 18 months; and (iii) ensure that export credit programs are self-financing and cover the long-term operating costs and losses.

F. Rules of Origin

Special Marking Requirements of Origin on Watches and Clocks

<Outline of the Measure>

According to the rules of origin marking prescribed in the US Tariff Act of 1930, origin markings on watches and clocks must be stated on the component part (i.e., movements, batteries, cases, bands, etc.). In addition, the ways of marking, such as imprinting and tagging, are elaborately provided in the Act. Such rules impose severe burdens on manufacturers of watches/clocks in the context of production control. Therefore Japan urges the US to reduce/simplify such marking requirement and leave the choice of marking methods to the discretion of the manufacturers.

Although the rules were established for the purpose of protecting the US watch/clock industry, some take the position that the rules should be simplified from the point of view of benefitting importers and consumers in the US.

<Problems under International Rules>

Simplification of these requirements is consistent with GATT Article IX: 2, which provides that the difficulties and inconveniences that marks of origin may cause to the commerce and industries of exporting countries should be reduced to a minimum. Such action would comport with the spirit of the Agreement on Rules of Origin.

<Recent Developments>

The Government of Japan submitted a request to the US in 2002 and 2003 under the Japan-US Regulatory Reform Initiative. As a result, a report released in 2004 confirmed that “the Government of the United States acknowledges the concern of the Japanese Government concerning the rules governing origin labeling and will continue dialogue with the Japanese Government on the revision the rules based on the discussion of WTO.”

Japan expressed its concerns at the Japan-US Trade Forum in 2005 and 2009, and Japan did so again at the WTO Trade Policy Review (TPR) of the US in 2008 and 2010. However, there was no improvement regarding the above-mentioned problem. Japan intends to continue asking the United States for improvement until this problem is solved.

G. Standards and Conformity Assessment Systems

1. American Automobile Labeling Act

<Outline of the Measure>

The American Automobile Labeling Act was enacted under Section 210 of the Passenger Motor Vehicle Content Information Disclosure Act of October 1992. It requires all passenger cars and light trucks to carry labels indicating their percentage content of value-added in the United States and Canada. More specifically, the labels must indicate:

- The content percentage of United States and Canadian parts (on a model-by-model basis);
- The country, state and city of final assembly;
- If countries other than the United States and Canada supply 15 percent or more of the parts in the vehicle, the label must indicate the top-two countries supplying parts and the percentages supplied by each country;
- The country of origin of the engine and transmission (the country adding 50 percent or more of the value or the most added-value).

The Act took effect on October 1, 1994. Violators are subject to a fine of $1,000 per vehicle.

<Problems under International Rules>

The United States claims that the system helps consumers make better purchasing decisions by providing them with information on the percentage of the automobile's price in relation to the amount of the vehicle that was produced in the United States/Canada. But the system is, in fact, a "Buy American" provision that implicitly attempts to call on consumers to buy domestic goods. The law forces foreign auto makers with operations in the United States, who tend to use large amounts of non-US/non-Canadian parts, and dealers who import vehicles, to take on an enormous amount of clerical work and record-keeping in order to calculate parts percentages. The system is therefore likely to become an unnecessary obstacle to trade and may be in violation of Articles 2.1 and 2.2 of the TBT Agreement.

<Recent Developments>

In January 2001, the National Highway Traffic Safety Administration (NHTSA) presented a report that evaluated the impact of the operation of the Act. According to this report (January 2001), more than 75% of consumers do not know the existence of the labelling system under this Act. Furthermore, none of the consumers take the ratio of origins of United States and Canadian parts into consideration.

In response to this, in March 2004, the Association of International Automobile Manufacturers (AIAM), which consists of foreign automobile manufacturers participating in the US market, submitted a report to the US Congress requesting the elimination of this measure, stating that: (1) labeling rules do not help consumers make better purchasing decisions; and (2) consumers are indifferent to labels. Organizations, such as Japanese automobile companies and other foreign manufacturers, have been requesting abolition of the Act.

Japan raised this issue at the Japan-US Economic Harmonization Initiative in 2011 and requested its abolition since examination and evaluation have shown there are no apparent effects from implementation of this Act. However, after presentation of the report by NHTSA of 2001, the US replied that it had not conducted further analysis or evaluation.

2. Regulation on Corporate Average Fuel Economy (CAFE)

<Outline of the Measure>

The Energy Policy and Conservation Act of 1975, which includes Corporate Average Fuel Economy (CAFE) regulations, obligates automobile manufacturers and importers to achieve certain levels of average fuel economy for the vehicles they handle, and levies fines for violations. CAFE regulations stipulate that domestic and imported vehicles be distinguished and that their average fuel economy be calculated separately.

<Problems under International Rules>

In May 1992, the EU requested consultations with the United States because it viewed the CAFE regulations as being inconsistent with the national treatment provision of Article III: 4 of the GATT. In March 1993, it requested that a GATT panel be established. In September 1994, a Panel report was issued.

The panel noted that separate foreign-fleet accounting prevented manufacturers of large domestic cars with low fuel economy from meeting the CAFE requirement for their domestic fleet by adding to its small foreign cars with high fuel economy. Such manufacturers could avoid fines only when they increased the volume of business of small domestic cars with high fuel economy. In such cases the CAFE measure placed small foreign cars in a less favorable competitive position with respect to small domestic cars. In such cases the CAFE measure also placed large foreign cars in a less-favorable competitive position with respect to large domestic cars. The panel, therefore, found the CAFE regulation in violation of Article III: 4 of the GATT because the requirement of separate foreign fleet accounting under the CAFE regulation accorded foreign products conditions of competition less favorable than those accorded to like domestic products. The Panel further found that the practice could not be justified under Article XX(g) of the GATT. The report was not adopted and the United States has taken the position that since the CAFE regulations do not harm EU commercial interests, there was no reason to revise them.

<Recent Developments>

In March 2006, the National Highway Traffic Safety Administration (NHTSA) took steps to tighten CAFE regulations on small trucks. Also, CAFE regulations on passenger cars were tightened for the first time in 32 years in the New Energy Policy enacted on December 19, 2007. This law required that CAFE regulations be gradually strengthened from 2011 and raised by 2020 to 35 miles per gallon for all models of passenger cars and light trucks. In May 2009, the US President announced the goal of formulating new fuel costs/GHG (greenhouse gas) emissions standards for passenger cars and small trucks manufactured between 2012 and 2016, and of reducing GHG emissions by 0.9 billion tons by raising fuel costs for those manufactured in 2016 to 35.5 miles per gallon. In response to this, the draft standards were announced in September 2009, and new fuel costs/GHG emissions standards for passenger cars and small trucks manufactured between 2012 and 2016 were made public on April 1, 2010, after going through the public comment procedure. The rules set the average fuel costs standards for cars manufactured in 2016 at 34.1 miles per gallon, and continue to maintain the method of accounting that distinguishes between domestic cars and foreign cars.

Moreover, on May 21, 2010, following directions from the US President, the US commenced discussions for the establishment of regulations on medium and heavy trucks and a plan for new standards for passenger cars and light trucks.

On July 29, 2011, the US Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) announced their plan to propose strict federal standards for greenhouse gas emissions and fuel economy standards that apply to passenger cars and light trucks with an implementation period from 2017 to 2025. On November 16, both agencies submitted the proposed regulation to the Federal Register. In September 2011, the plan for establishment of new regulations for medium and heavy trucks with an implementation period from 2014 to 2018 was also announced.

3. *Adoption of the Metric System*

<Outline of the Measure>

The ISO and other international standardization institutions have adopted the international system of units (SI), which, based on the metric system, dictates the units to be used in formulating international standards. While virtually every other country in the world uses the SI - the metric system - the United States still uses yards and pounds for most purposes. Indeed, it is the only major trading country not to have made any progress in adopting the metric system. The US is an original member country of the Metre Convention. The government has been continuing efforts to adopt the metric system in accordance with the “Metric Conversion Act of 1975”. However, the use of the metric system has not yet spread fully in the United States.

Usage of the metric system is permitted on packages in 48 out of 50 states in the US. The National Institute of Standard and Technology (NIST) under the US Department of Commerce, is promoting the removal of the ban on the usage of the metric system in the remaining 2 states, Alabama and New York.

Currently, at the federal level, dual labeling in metric units and imperial units is required on packaging for consumers that are specified by the Fair Packaging and Labeling Act (FPLA). According to the publications (“Voluntary Metric Labeling report” and “Marketplace Assessment – Metric Labeling on Packages in Retail Stores”) released by NIST in December 2009, metric labeling is gradually increasing but there has been no movement in the US Congress at this time to amend the FPLA to approve labeling that exclusively uses the metric system.

<Problems under International Rules>

Article 2.4 of the TBT Agreement provides that “where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations”. The metric system is the standard of units adopted by international standards organizations such as ISO, etc. However, prohibition of the use of only the metric system in labeling by two states of the United States (Alabama and New York) indicates that the US does not use international standards as a basis for technical regulations, thus violating this Article.

<Recent Developments>

Japan has repeatedly urged the US to adopt the metric system for many years. Japan also raised this issue as an agenda of the Japan-US Economic Harmonization Initiative in 2011. Japan needs to continue to urge the US to further promote the use of the metric system.

H. Trade in Services

1. The Foreign Investment and National Security Act of 2007 : FINSA (former the Exon-Florio Amendment)

*** 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.**

<Outline of the Measure>

The Foreign Investment and National Security Act of 2007 authorizes the President to investigate acquisitions, mergers and takeovers of US firms by foreign persons or entities, and to suspend or prohibit transactions that threaten US national security.

This Act, generally known as the "Exon-Florio Amendment", is a revision of Article 721 of the Defense Production Act of 1950, which governs matters concerning foreign investment examinations in terms of national security. Major changes made in this revision include: establishing the Committee on Foreign Investment in the United States (CFIUS) as a statutory institution, instituting reviews of examination criteria (incorporating the impact on critical infrastructure and technology), and strengthening Congressional oversight (requiring notification to Congress of the examination results of individual cases), etc. Upon submission of allegations by the parties concerned or requests from CFIUS members, CFIUS decides whether to conduct an investigation, and, where it does, submits a report to the President. The President decides on suspension or prohibition of the investment on the basis of the report.

In the past, several Japanese firms had to change their original plans because of CFIUS investigations of their acquisitions of US firms. For example, when Toshiba purchased the Westinghouse Electric Co in 2006, an examination was conducted by CFIUS since, among other products, Westinghouse built nuclear power plants.

<Concerns>

Although the WTO Agreement has no general rules on investment, the GATS disciplines service trade activities through investment. Although this Act itself does not necessarily violates the WTO Agreements and the GATS Agreement allows exceptions for national security reasons under certain conditions, it is necessary for the United States to operate its investment restriction measures in conformity with the WTO Agreement and the GATS.

<Recent Developments>

Japan has been pointing out the problem of transparency and fairness in administration of foreign investment examinations.

According to the CFIUS' report to Congress in 2013, 97 notifications were issued by CFIUS in 2013. There have been 18 cases in which Japanese companies were involved (screenings and examinations were conducted on 48 cases out of the 97 cases). In 2013, an examination was conducted regarding investment by SoftBank in Sprint Nextel Corporation. Therefore, it is necessary to keep watch to ensure that this Act will not impact investments in the United States in the future.

(Reference) Implementation status of screening, etc. by CFIUS based on the Foreign Investment and National Security Act

No. of subject transactions, withdrawn cases, and President's decision (2010 – 2012)						
Year	No. of notifications	No. of notifications for investment from Japan	No. of notifications withdrawn during the screening period	No. of investigations	No. of notifications withdrawn during investigations	No. of President's decisions
2010	111	7	1	40	5	0
2011	114	9	2	45	20	1
2012	97	18	3	48	5	0
Total	322	34	6	133	30	1

No. of cases subject to notification in which Japanese companies were involved by form of transaction (2010-2012)				
Manufacturing	Mining, Public Projects, and Construction	Wholesaling	Information	Total
14	1	2	6	23

(Prepared by the Ministry of Economy, Trade and Industry based on the "CFIUS ANNUAL REPORT TO CONGRESS (public/unclassified version)")

2. *FINANCIAL SERVICES*

*** 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.**

<Outline of the Measure>

The United States has diverse regulations related to financial services; they vary from state to state. In some states, foreign banks are prohibited from opening branches or agencies. Only limited number of states such as Massachusetts, Michigan and New York permit all types of establishments (branch, agency, representative office, etc.).

There are no US federal laws or federal regulatory agencies regulating insurance, except for a federal law regulating the pension operations of insurance companies. Rather, each state has its own insurance laws and insurance regulators.

Furthermore, when it comes to reinsurance, if foreign insurance companies undertake reinsurance from US insurance companies across borders, then in most states foreign insurance companies are required to either leave an amount equivalent to 100% of their liability in a trust account in the United States as collateral, or else submit a letter of credit to the affected reinsurance company in the United States. For the reinsurance business in the United States, this measure unfairly imposes unreasonable costs on foreign insurance companies.

In the WTO commitments in financial services, the United States made many reservations and has shown no visible effort to reduce them. In addition, some states still have clauses that discriminate against foreign firms that are not granted exemption in the WTO Agreement, such as the law that obligates foreign insurers to renew their licenses every year while in-state insurers have no-time-limit licenses.

<Concerns>

The United States should repeal clauses that discriminate against foreign firms and are not granted exemption in the WTO Agreement. It is desirable that the United States should discontinue or improve regulations that make entries of foreign firms difficult from the viewpoint of liberalizing financial services. Moreover, even with reservations set in place, the United States is the only developed country which imposes such strict collateral requirements for the reinsurance market, in which extreme internationalization is moving forward. It is hoped that these requirements will be promptly rescinded or mitigated.

<Recent Developments>

In some states there have been improvements in regulations that made it difficult for foreign companies to enter the market.

In order to revise the disadvantages arising from the fact that the regulations vary from state to state, an insurance bill covering all of the United States was proposed in both houses of Congress in 2006 with the objective of introducing an "Optional Federal Charter (OFC)" for the insurance sector, though this has yet to be discussed. Additionally, in July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act was passed. The Federal Insurance Office was established under the Department of the Treaty based on the aforementioned Act. However, the Federal Insurance Office does not have the authorities to direct or regulate, and therefore the system that each state controls financial supervision and control remained the same.

These moves toward unification of state regulations on standards should also benefit foreign insurers, and Japan looks forward to furthering progress in this regard.

New regulation regarding reinsurance was enacted in the states of Florida, New York, New Jersey and Indiana. This regulation allows for a reduction in the collateral that is required when accepting reinsurance for insurance companies that are qualified in certain conditions under relevant regulations. In November 2011, the National Association of Insurance Commissioners (NAIC) reformed the model law and model regulation that concern reinsurance, and these laws and regulations were introduced in some states. In order to be covered by measures to reduce collateral amounts based on these laws and regulations, the locations of insurance companies must be approved by NAIC as Qualified Jurisdictions. Seven countries and regions, including Japan, have been approved as Qualified Jurisdictions since January 2015.

Until now, Japan has raised issues with the U.S. government and requested improvement on various occasions such as bilateral consultations.

3. TELECOMMUNICATIONS

*** 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.**

<Outline of the Measure>

The United States retains foreign ownership restrictions for direct investment in wireless telecommunications services by virtue of Article 310 of the Federal Communications Act (direct investment up to 20%, indirect investment up to 25% (unless the indirect investment is in the public interest)).

In case of investment by a foreign country in radio station licenses, “public interest” determination under the “Foreign Carrier Entry Order” of 1996 requires the degree of market opening in the country of the foreign company to be at the same level as that in the United States (equivalency test); investments that exceed the upper limits of the investment ratios may be approved after taking into consideration other public interest factors presented by the Executive Office of the President, including concerns over national security, law enforcement, foreign policies, and trade policies.

In the WTO Agreement on Basic Telecommunications Services of February 1997, the United States retained restrictions only for direct investment (20%) and committed to eliminate restrictions for indirect investment. In consideration of this, with regard to indirect investments, equivalency determination was eliminated for WTO member countries, and the U.S. adopted interpretation to enable free entry in principle that, in the FCC (Federal Communications Commission) regulations (November 1997) on the entry of foreign carriers, the public interest is served even when the investment by WTO member countries does exceed 25%. However, the regulation has not yet been eliminated. In order to ensure a flexible network of foreign telecommunication business, elimination of the regulation is desired. Also, concerning the eligibility criteria of “public interest” for entry of foreign businesses into the US market in relation to Articles 214 and 310(b)(4) of the Federal Communications Act as set forth by the above-mentioned FCC regulations, preliminary reviews based on factors not related to telecommunications policies, such as “trade concerns”, “foreign policy”, and “significant danger to competition”, inhibit the period and predictability for foreign business entries, and thus constitute substantial barriers to foreign company participation in the market. As an example, it took an inordinately long time for a Japanese company’s subsidiary to be granted a license.

Furthermore, in these public interest examinations, there is no legal basis to have a body called “Team Telecom” from authorities concerned, and the content of examinations is also unclear.

Elimination or clarification of the examination criteria is desired to ensure opportunities and predictability for foreign business entries.

<Concerns>

The abovementioned measures do not violate the WTO Agreement so long as they do not contravene GATS commitments of indirect investment on radio station license. However, it is desirable that liberalization be made under the spirit of the WTO and the GATS.

<Recent Developments>

Japan has raised concerns and requested improvement of the above problems on several occasions.

4. Maritime Transport

<Outline of the Measure>

The United States provides various forms of assistance to its domestic shipping industry, such as the reservation of a percentage of government-related shipping contracts for the domestic industry. It has been suggested that such programs may, in fact, be a disincentive for the domestic shipping industry to make efforts to recover its competitiveness. The overall US protectionist attitude and negative approach to negotiations regarding this matter were a cause of the failure to continue maritime transport negotiations in the Uruguay Round. Specific protective measures are as follows:

Section 19 of the Merchant Marine Act of 1920 (the so-called "Jones Act") and Foreign Shipping Practices Act of 1988

(As to the relation to 1994 GATT, see "National Treatment" in this chapter)

Section 19 of the Merchant Marine Act of 1920 mandates retaliatory measures against discriminatory actions by foreign governments that violate the interests of US shipping. Decisions to retaliate are made by the Federal Maritime Commission (FMC).

On 4 September 1997, the FMC imposed sanctions under this law on three Japanese shipping companies making calls at US ports. The sanctions included a $100,000 fine per call at a US port. In making its decision, FMC alleged that US shipping interests were harmed by the prior consultation system employed by Japanese ports. On October 16, the FMC announced that Japanese ships were to be barred from entering or leaving US ports unless their companies paid the September fines. This forced the three Japanese shippers to pay FMC $1.5 million in fines. FMC suspended the sanctions indefinitely on November 13, citing an agreement that had been reached on improvements to the prior consultation system and an exchange of documents that had taken place between the two governments.

In January 1998, Japan initiated consultations on the measure with the United States under the US–Japan Treaty of Friendship, Commerce and Navigation, which guarantees national treatment and most-favored-nation status to ships from each other's countries in order to seek its full withdrawal. The FMC withdrew the sanctions on May 28, 1999, but the withdrawal did not mean that the FMC agreed the Japanese arguments. The FMC has continued to demand reports from domestic and foreign shipping companies on practices in Japanese ports. In August 2001, claiming that amendments to Japan's Port Transportation Law (effective as of November 2000) had not dealt with exclusive Japanese port practices, the FMC issued an order expanding the scope of shipping companies covered under the provision requiring the submission of information. This order demanded that Japanese shipping firms submit Japanese laws and notifications. This is beyond the scope for which it is considered appropriate to demand submissions by shipping firms, placing unjustifiable and excessive burdens on them.

On January 26, 2011, the FMC concluded that it would be practical to withdraw the order to report periodically on the status of Japanese port practices after witnessing improvements in such treatment.

The Public Law Lifting the Ban on the Export of Alaskan Oil

The Alaska Power Administration Asset Sale and Termination Act, which was passed in November 1995, obligates the use of US ships with US-national crews in the export of Alaskan crude oil.

This measure based on the Act has been criticized as violating the WTO Ministerial Decision on not applying new measures during the negotiation period of the Doha Development Agenda.

Maritime Security Program

In 1937, the United States enacted a subsidy program that paid US shipping companies operating on routes to major countries the difference between their operating costs and the operating costs of foreign shippers. This was done in order to prepare a merchant marine fleet that would be available in times of national emergency. Large government subsidies have been paid to US shipping companies ever since. This system was curtailed in 1998, and the last contract ended in 2001. However, the system's successor, the Maritime Security Program (MSP), which has been operating since 1996, provides subsidies amounting to $100 million per year to certain US-registered vessels over ten years. In 2003 this system was extended for a period of 10 years (continuing until 2015).

In addition, the vessels targeted by the new Program have been expanded (from 47 to 60 vessels), and the payments will increase (from $2.1 million per vessel to $156 million from FY2006-2008, $174 million from FY2009-2011, and $186 million from FY2012-2015). This and other examples are indicative of the fact that aid to shipping companies has been expanded. Clearly this distorts free and fair competition in the international maritime transport market. It must be discontinued as soon as possible.

<Problems under International Rules>

As stated above, the US maritime service systems include many unilateral sanctions and some of which may infringe the WTO Agreements. It is desirable that they be rectified as soon as possible.

The United States has made no commitment for liberalization in the sector of maritime transport in the GATS, but it is necessary that the US make efforts towards liberalization in the light of the spirit of the WTO Agreement and the GATS.

<Recent Developments>

Japan has repeatedly requested the United States to rectify the above-described problems, including the removal of the measures during the Japan-US Economic Harmonization Initiative in March 2011. Japan also seeks liberalization of US maritime services during the WTO DDA negotiations.

I. PROTECTION OF INTELLECTUAL PROPERTY

1. TRADEMARKS SYSTEMS (WT/DS176; US OMNIBUS ACT 211)

<Outline of the Measure>

Section 211 of the Omnibus Act of 1998 prohibits US courts from approving and executing ownership on behalf of Cuban nationals of trademarks, etc. that are related to assets confiscated by the government of Cuba, but this provision does not apply to US national successors, etc.

<Problems under International Rules>

This provision is inconsistent with the national treatment and most-favored-nation obligations of the TRIPS Agreement. Such unilateral measures by the United States are fundamentally inconsistent with the multilateral trading system and WTO principles. They distort trade and should be immediately improved.

The EU requested bilateral WTO consultations regarding the matter in July 1999. Because the matter was not resolved in the consultations, the EU requested establishment of a Panel. After going through the Panel and the Appellate Body procedures, in January 2002, the Appellate Body partially overturned the panel report, finding that Article 211(a)(1), which could disadvantage non-US national successors over US national successors, was inconsistent with national treatment and MFN treatment.

The Appellate Body and panel reports were adopted on February 1, 2002, and the United States informed the panel of its intention to adhere to its WTO obligations.

<Recent Developments>

The EU and the US agreed on the end of December 2002 as a reasonable period for the implementation of reforms to the US legal system; however, multiple extensions were made because of a lack of implementation. On July 1, 2005, the US and the EU reached an understanding to reserve their rights to take countermeasures. Progress has been reported at regular meetings of the WTO Dispute

Settlement Body (in January 2016, etc.), but the law has not yet been revised. Now that a final judgment has been made in WTO Dispute Settlement proceedings, the US should move quickly to modify systems that are not in compliance with the Agreement. Japan will monitor US efforts in this regard. At the ordinary meetings of the TRIPS Council in June and November 2012, implementation issues of TRIPS obligations by the US were raised by Cuba. A bill including abolition of Section 211 of the Omnibus Act was submitted[2] to the 114th Congress, but no subsequent action has been taken on the proposed revision in this bill.

At present it has not directly affected Japan's interests, but from the point of view of securing the effectiveness of the WTO Agreements, it is necessary to keep watch continuously on the status of deliberations in the Congress to see if a similar bill is introduced.

2. COPYRIGHT AND RELATED RIGHTS

(1) Clarification of video-game rental rights

<Outline of the Measure>

Article 11 of the TRIPS Agreement provides for copyright holders to grant rights to commercially rent copyrighted computer programs to the public. Article 106(3) and Article 109(b) of the US Copyright Act grant rental rights for computer programs in general, but Paragraph (b)(1)(B)(ii) of the same article exempts videogames which are inseparable from the game machine from the granting of program rental rights.

<Problems under International Rules>

This restricts the protection of rental rights for videogame programs, and may violate Article 11 of the TRIPS Agreement, which requires the granting of rental rights to computer programs in general.

<Recent Developments>

In the Recommendations by the Japan-US Regulatory Reform Initiative of October 2007, Japan requested the United States to promptly revise its domestic copyright law to specifically grant rental rights for all videogame programs. However, the situation has not improved, and the problem has yet to reach a solution. It is necessary to continuously keep a watch on the United States' future responses.

(2) Copyright Exception (WT/DS160; US Copyright Act 110(5)(b))

<Outline of the Measure>

Section 110(5) of the US Copyright Act allows some exceptions to the public transmission rights of the copyright holders. In subparagraph (b), it grants exceptions for a store with small floor space or in a store using only a small television or speaker.

<Problems under International Rules>

The EU claimed that provisions such as Section 110(5) (b) of the Copyright Act violate Articles 9 and 13 of the TRIPS Agreement, and made two points:

---

[2]Meanwhile, it has been reported that, in January 2016, the US Patent and Trademark Office decided to allow Cuba's state-owned company to renew the term of protection of a trademark for rum, which is said to have triggered the enactment of Section 211. It has also been reported that at the DSB meeting in January 2016 the EU evaluated such US action positively, and stated that it would not request the United States to report on the progress status at every DSB meeting in the future.

1) Article 9.1 of the TRIPS Agreement is based on Articles 1-12 of the Berne Convention, and Article 11 of the Berne Convention grants exclusive rights to the copyright holder to agree to public transmission of music and other copyrighted works. The Berne Convention customarily allows limitations on copyrights within the scope of “minor reservations” as exceptions to this, but the US copyright law provisions do not correspond to other exceptions to the Berne Convention, including minor reservations.
2) Article 13 of the TRIPS Agreement allows members to limit the exclusive rights of the copyright holder in “certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” The US provisions do not correspond to this exception

At the request of the EU, a panel was established in May 1999 (Japan, Australia, Canada and Switzerland are participated as third parties).

On June 15, 2000, the panel found that that Section 110(5)(b) of the Copyright Act did not constitute legitimate exceptions under the TRIPS Agreement, and thus, the US measures must be brought into conformity.

<Recent Developments>

In January 2001, the arbitrator ruled that the United States had 12 months from the panel report to implement the recommendation; in other words, until July 2001.

When the United States made no move to amend the Copyright Act as required, the case was referred to arbitration to determine appropriate compensation and countermeasures. In June 2003, the US and the EU reached a temporary agreement under which the United States would compensate the EU a total of $3.3. Although the agreement was in effect until December 21, 2004, the situation had not improved. After that, the United States made a progress report at regular meetings of the Dispute Settlement Body (October 2015, etc.); however, the law has not yet been modified. This also raises issues regarding the effectiveness of panel recommendations, and continued scrutiny is needed.

1) Expansion of the Subjects Protected by Performers’ Right

<Outline of the Measure>

Article 1101 of the US Copyright Act protects only the sounds or sounds and images of a live musical performance. The US Copyright Act does not provide any protection for live performances other than musical ones. As a result, if a Japanese actor performs a play or “rakugo” (a traditional Japanese performance) in the United States, it would not be protected under the US Copyright Act.

<Problems under international rules>

There are doubts regarding compliance of Article 1101 of the US Copyright Act with the TRIPS Agreement, as Article 14 of the TRIPS Agreement does not limit the protection of live performances to “musical performances.”

<Recent Developments>

Live performances in the US by Japanese performers are likely to increase, and appropriate protection will be needed for the rights of these artists. Japan, in the Recommendations by the Japan-US Regulatory Reform Initiative of October 2008, requested that the United States expand the subjects protected by the US Copyright Act to include all live sound and audio-visual performances; and reinforce the protection of performers’ rights as soon as ones closely related to the copyright.

(3) Section 337 of the Tariff Act of 1930

<Outline of the Measure>

Section 337 of the Tariff Act of 1930 targets unfair import practices by excluding from the United States imports that infringe upon valid US-registered intellectual property rights. The Omnibus Trade and Competitiveness Act of 1988 removed the requirement of injury in cases involving the infringement of patents, trademarks, copyrights, and layout-designs of integrated circuits. This removal of the injury requirement in 1988 simplified the burden of proving a violation of Section 337, and thus made Section 337 an easily accessible remedy for US domestic industries (See Figure I-3-6).

Figure I-3-6 Number of Investigations Initiated under Section 337

Year	Total Number of Cases	Cases Involving Japan
2003	18	2
2004	26	4
2005	29	3
2006	33	2
2007	35	5
2008	41	10
2009	31	10
2010	56	10
2011	69	20
2012	40	10
2013	42	6
2014	34	6
2015	36	3

<Problems under International Rules>

ITC's exclusion orders were issued against products, and thus third parties that are not respondents would not be able to import the products. The EU initiated a dispute proceeding in GATT in 1987, claiming that Section 337 of the US Tariff Act violated the national treatment principle provision of GATT Article III:4 because in ITC procedures (1) the examination period is shorter than litigation in domestic courts, and respondents are not provided with sufficient time to prepare rebuttal arguments; and [2] domestic products plaintiffs can file lawsuits in the US courts in case of domestic infringing products but can also file lawsuits in ITC in case of foreign products, thus imposing heavy burdens, etc. on respondents. In November 1989, the GATT Council adopted a panel report that concluded that although, Article XX(d) of the GATT establishes an exception permitting the exclusion of imports that infringe upon patents and other intellectual property rights under certain circumstances, in light of the above-mentioned points, suspected infringing imported products are accorded treatment less favorable than like products of US origin in the domestic court procedures, and so Section 337 procedures violated the national treatment provisions of Article III:4 of the GATT and could not be justified by Article XX(d).

Despite such a clear and definitive statement of inconsistency with the GATT, even after the adoption of the report, however, the United States did not implement the panel’s decision. Japan regarded this as a significant problem and requested improvements at GATT Council meetings, etc.

<Recent Developments>

In its Uruguay Round implementing legislation enacted in December 1994, the United States significantly amended Section 337 so that it more fully complied with the GATT Council's recommendations. The deadline for final relief was eliminated, though the ITC still establishes a "target date" for final determination in each investigation within 45 days of the initiation of an investigation, depending on how it is administered, could result in discriminatory treatment of imports. On January 12, 2000, the EU requested bilateral consultations regarding this provision. Japan should continue to continuously monitor developments closely.

In addition, on June 24, 2013 the ITC introduced a pilot program aimed at shortening examination periods. Under this program, decisions of examination are to be made within 100 days, and time lines are set based on that time schedule. This program was applied for the second time on March 12, 2015, but it is not clear whether it has been fully introduced. Japan therefore needs to pay attention to formal introduction of the pilot program in the future.

COLUMN: THE US INTELLECTUAL PROPERTY PROTECTION SYSTEM

As economy and business activities become globalized, protecting intellectual property from principles and procedures that differ between countries is extremely costly for other country's citizens. It may inhibit the liberalization and facilitation of trade and investment, since it reduces the predictability of rights acquisition and the stability of rights. The major US intellectual property protection systems that Japan finds problematic are detailed below.

1. PATENTS

Japan has sought improvements in several problematic areas of the US patent system at the Working Group on Intellectual Property Rights under the US-Japan Framework for a New Economic Partnership that started in October 1993. In 1994, an agreement was reached to make improvements.

Due to the establishment of the America Invents Act on September 16, 2011, major improvements have been made with respect to matters that Japan had been requesting for a long time. These include the transition from a first-to-invent system to a first-to-file system[3], and the introduction of post-grant opposition that includes deficiency in the description requirement as a reason for reconsideration.

On the other hand, the introduction of the early publication system has not been implemented fully even after Japan and the United States reached an agreement. Since provisions, which stipulate the publication of all patent applications as a basic principle, have not been put in place even in the America Invents Act, it is necessary to continuously seek implementation of that and Japan has made this request to the United States in the Japan-US Economic Harmonization Initiative.

2. COPYRIGHT AND RELATED RIGHTS

Improvement of several of the American copyright protection measures that Japan finds particularly problematic has been requested in the US-Japan Regulatory Reform and Competition Policy Initiative, which was initiated in October 2001. For measures that should be improved according to the request, see Section I Chapter 3 "The United States." Aside from the requests Japan already has made, expansion of

[3] If an applicant files a patent application within a year from the disclosure of an invention, the application is not influenced by the disclosure or filing of a patent application for the same invention by a third party that takes place between the applicant's disclosure of invention and filing of the patent application. This so-called first-to-publish principle is different from the first-to-file principle, which is generally applied around the world.

the protection related to moral rights and improvements in the protection of unfixed copyrighted works also are necessary.

Furthermore, there is the issue of the operation of the United States being undecided concerning the right of making works available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them through uploading the works to a server or when sending copyrighted works via the Internet (the so-called right of uploading), This right has been approved for authors, performers, and producers of phonograms as stipulated in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The United States has not stipulated this right in their Copyright Law, and while such right is considered to be guaranteed through the distribution right (section 106(3) of the Copyright Law), there has been a court decision suggesting that merely making an unauthorized copy of a copyrighted work available to the public does not constitute violation of the distribution right (Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976 (D. Ariz. 2008). Therefore, there is a risk that the right to make copyrighted works available, as recognized under the WCT and the WPPT, may not be protected. Japan has clearly stipulated the content of this right in the Copyright Act and the EU in the Copyright Directive. Therefore, it is necessary to continue to observe US practices concerning this right, including relevant US court decisions. Meanwhile, the US Copyright Office released a report on the right of making available, indicating that in the United States the right of making available is fully covered by the right of distribution under the Copyright Law, and that the right of distribution extends to works which are only uploaded an have yet to be downloaded.

J. GOVERNMENT PROCUREMENT

US BUY AMERICAN LEGISLATION

<Outline of the measure>

1. "Buy American" Federal Legislation

Major "Buy American" federal legislation follows.

i. Buy American Act of 1933 at the Federal Level

The Buy American Act of 1933 provides the US legal basis for discriminating against foreign products at the federal level of the US government. It directs federal agencies to purchase, for public use, only "un-manufactured articles, materials and supplies ... produced in the United States", and "manufactured articles, materials and supplies ... manufactured in the United States substantially from ... materials ... produced or manufactured ... in the United States" (41 U.S.C. § 10(a)-(d)). For products or materials to be considered "produced" or "manufactured" in the United States, at least 50 percent of their content must be of domestic origin. (This provision pertains to the place of manufacture or production and not to the nationality or ownership of the contractor. Therefore, products manufactured in the United States by foreign affiliates, for example, are eligible under the Buy American Act.)

The Act permits the purchase of foreign products only under certain circumstances. For example, foreign products may be purchased when purchasing a US product is not in the public interest. The statute also permits purchasing foreign products when the price of a US product is at least six percent higher than that of a comparable foreign product, making its procurement "unreasonable." The purchase of foreign products is also allowed when the required product is not produced in the United States.

The guarantee of procedural transparency does not alter the fact that the Buy American Act contains provisions that expressly discriminate against foreign products. Thus, preferential treatment for domestic products is a basic policy of federal government procurement.

The Trade Agreements Act of 1979, to some extent mitigated the discriminatory treatment mandated by the Buy American Act. As a result, federal procurement procedures were rendered transparent and national treatment was accorded to countries that acceded to the former Agreement on Government Procurement (GPA). In addition, the Uruguay Round Agreements Act allows the President to refrain from applying the “Buy American” restriction to countries that: (1) have acceded to the GPA; and (2) provide appropriate reciprocal procurement opportunities for US products and US suppliers. With respect to other countries, however, and to fields not covered by the Agreement, “Buy American” legislation remains essentially unchanged.

In December 2009, a bill to amend the 1933 Buy American Act (H.R.4351) was submitted to the Senate and the House of Representatives. The bill included a provision setting stricter requirements for exemption from the obligation to procure US products under the Buy American Act of 1933. However the bill did not pass. In addition to the Buy American Act at the federal level, which sets the general rules, as mentioned above, the following individual Acts contain provisions providing preferential treatment for US products or provisions that ensure implementation of the Buy American Act.

ii. The US Federal Agency Annual Budget Appropriations Acts

US federal agency budgets are provided under annual appropriations acts passed by the Congress. Those acts include many provisions restricting government procurement of a wide range of foreign products and services.

For example, the Department of Defense Appropriations Act, 2007 (P.L. 109-289), a budget-related law of FY2007, provided that budgets allocated by this law can be used by the Department of Defense only where the details of expenditure are in accordance with the provisions of the Buy American Act. In addition, when goods were purchased using these budgets, the Congress urged the Department of Defense to purchase American-produced products if American-produced products were competitive in terms of price and performance and were easy to obtain (see Sec. 8036). (However, for countries with which the United States had concluded procurement agreements for national defense material, specified products were exempt from application of this law.) In addition, the Department of Homeland Security Appropriations Act, 2007 (P.L. 109-295) provides that expenditures based on this law must not violate the Buy American Act irrespective of the nature of the purchase (see Sec. 512). Likewise, the Department of Defense Appropriations Act (P.L. 110-116) provides that when carbon, alloy or armor steel plates are purchased for use in any Government-owned facility or property under the control of the Department of Defense using budgets allocated by this law, those goods shall be limited to those which were melted and rolled in the United States or Canada (see Sec. 8026). In addition, it provides for detailed rules of rescinding of the Buy American Act. (See Sec. 8029).

The energy and water-related appropriations bill (H.R.3183) submitted to the House of Representatives in July 2009 included a clause that “prohibits use of funds for purchase of passenger motor vehicles other than those manufactured by Ford, General Motors, or Chrysler.” However, the clause was deleted before the bill was enacted.

The National Defense Authorization Act for Fiscal Year 2011 (Public Law 111-383), that was enacted at the end of 2010 stipulates stricter application of the Buy American Act in relation to procurement of solar panels, thereby restricting sales to the Department of Defense by countries other than the parties to the Agreement on Government Procurement (GPA).

In 2013, the Department of Defense Appropriations Act of 2014 was passed by the House of

Representatives. Procurements that comply with the Buy American Act are required by Section 8035. However, the Buy American Act is not applied to countries that concluded a memorandum of defense procurement with the US.

iii. The Fixing America's Surface Transportation Act

There are two types of Buy American regulations in this Act:

・ Buy America Provisions Governing the Federal Transit Administration

To receive federal funds from the Federal Transit Administration for mass transit projects, including the purchase of mass transit "rolling stock", Buy America provisions require that procurement be restricted to steel, iron and other manufactured products that are made in the United States. The provisions stipulate that, even if such requirements are not met, it is still possible to receive federal funds by satisfying requirements such as the following: (i) the cost of the domestic components of any vehicles or rolling stock purchased must comprise more than 60% of the cost of all of the components of the vehicles or rolling stock in 2016 and 2017, more than 65% in 2018 and 2019, and more than 70% in 2020 (for all parts including railroad cars, motors, brakes, air conditioners, doors, and seats, the cost of US-manufactured products must constitute at least the above percentage of the combined cost of the parts purchased by a railroad car manufacturer from a sub-contractor and the manufacturing performed by the railroad car manufacturer itself); and (ii) the final assembly of the rolling stock must occur in the United States.

・ Buy America Provisions Governing the Federal Highway Administration

In order to receive federal funds from the Federal Highway Administration for federal-aid highway projects, all steel and iron used in a project must be manufactured in the United States.

As for the requirement for receiving federal funds from the Federal Highway Administration under this Act, the cost of components produced in the United States must be more than 60% of the cost of all components at present, but this percentage is to be gradually increased in the future. Meanwhile, new provisions have been introduced to obligate the Department of Transportation to notify the applicant in writing and post the relevant information on its website when rejecting an application seeking exemption from the requirement for receiving federal funds. No change seems to have been made to the provisions on the requirements for receiving federal funds for highway projects and other procurement-related provisions.

(Note) This act was enacted in January 2016 to succeed the Intermodal Surface Transportation Efficiency Act of 1991, the Transportation Equity Act for the 21st Century enacted in 1998, the Safe, Accountable, Flexible, Efficient Transportation Equity Act enacted in 2005, and the Moving Ahead for Progress in the 21st Century Act.

iv. The Rail Passenger Service Act

The national passenger rail service provider, Amtrak, which is funded by the US government, is obligated to purchase domestic goods when procuring goods worth $1 million or more.

v. American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act passed on February 17, 2009 requires exclusive use of all US-made iron and steel in the construction, renovation, and repair of public buildings and other public projects pursued under this Act and included Buy American provisions that also mandated the use of US-made manufactured goods in public projects. The Act did allow for exceptions when such use would run counter to the public interest, when such products were not produced in sufficient quantity or quality within the US, or when the use of US-made products would increase total projects costs by 25%

or more.

This Act also mandated the use of US-made textile products such as clothing and tents (those directly related to national security) provided for the Department of Homeland Security in accordance with this Act, and stipulated that exceptions might be made in cases when products were not available that met the required conditions.

However, all of these clauses contain the qualification that “This section shall be applied in a manner consistent with United States obligations under international agreements.” In May 2009, the Federal Acquisition Regulation concerning the application of Buy America provisions and in June, the OMB (Office of Management and Budget) Guidance was published. However, both of them are provisional regulations, and their final versions have not been published as of March 2010.

Incidentally, the Hiring Incentives to Restore Employment Bill (H.R.2847) passed by the House of Representatives in December 2009 includes a provision to the effect that the Buy America provisions in the American Recovery and Reinvestment Act (including the statement “applied in a manner consistent with US obligations under international agreements”) shall apply to the appropriations that are based on that bill.

Problems at the State Level (Buy American regulations, Buy State regulations, etc.)

The United States also maintains procurement laws and systems at the state and local level that clearly require favorable treatment for state companies as described below.

i. California

In August 1999, the California state legislature passed a bill requiring the state government to sign contracts with businesses providing US or California-made products for public works undertaken with state funds and valued at $50,000 or more. The bill was vetoed by the state governor that September and never became law. However, because California is among the sub-central government institutions “offered” as part of the Agreement on Government Procurement, this legislation serves as an example of a potential violation of the Agreement’s national treatment provisions. In September 2000, the California State Legislature passed a law (SB 1888) requiring businesses delivering goods and services to the state government to attest that they were not produced with forced labor and the like. The purpose of the law is to eliminate from government procurement foreign materials, goods and services produced with forced labor, prison labor and child labor.

ii. Illinois

Regulations require businesses to specify that foreign products provided under contracts with the state government were not produced with child labor.

iii. Ohio

The Authorization Act for Fiscal Year 2012-2013 (HB131), enacted in June 2011, provides the obligation to give purchasing priority to US products based on the Surface Transportation Assistance Act of 1982.

iv. Maryland

The Buy American Bill (HB191), passed by the House of Representatives and effective in October 2013, requires public entities to purchase US products used in constructing or maintaining public works or for machinery or equipment installed at public work sites except where it is against the public interest, etc.

v. Texas

Section 17.183 of the Texas Water Code requires from September 2013 onward that in contracts with the Texas Water Development Board (TWDB) US steel or products used in a public work be purchased except where quantity or quality cannot be secured or there is a price difference of at least 20%.

These laws, however, have the potential to violate the Agreement on Government Procurement depending upon the procurement amounts involved. Japan will continue to monitor the legislation.

<Problems under International Rules>

The Federal Buy American Act may not necessarily violate the Agreement on Government Procurement because it generally applies only to entities not covered under the Agreement. However, its influence on free trade is significant. All forms of discriminatory treatment vis-à-vis foreign products should be eliminated and Japan reiterated this position during negotiations to expand the scope of the Government Procurement Agreement.

As stipulated in the qualification "This section shall be applied in a manner consistent with United States obligations under international agreements." to the "Buy American" clause included in the American Recovery and Reinvestment Act, all measures necessary to ensure conformity with government procurement agreements must be taken in implementing this Act, and the administration of this Act should be monitored to ensure that the US takes responsible courses of action in keeping with its obligations under international commitments and international efforts to combat protectionism.

With respect to Buy America provisions at state level, the Agreement on Government Procurement covers only 37 states. Procurements by US state governments account for 50% of total US government procurement and have as great an influence on trade as procurement by the Federal Government. Therefore, Japan needs to continue to monitor the administration of government procurement by these states exempted from the Agreement, and trade impacts caused thereby.

<Recent Developments>

Since the Japan-US Deregulation Talks started in 2001, Japan has demanded that the US government should review the Buy American Act at the federal and state levels and give equal opportunities to US and foreign companies. In the "Recommendations by the government of Japan to the government of the United States regarding regulatory reform and competition policy" submitted to the US in October 2008, Japan requested to abolish the Buy America provisions in the "Safe, Accountable, Flexible, Efficient Transportation Equity Act". Regarding the American Recovery and Reinvestment Act, the Buy American clause therein states that a Buy American provision shall be "applied in a manner consistent with US obligations under international agreements." However, Japan expressed, at the meetings of the WTO Committee on Government Procurement in February and May 2009, its intention to pay close attention to the application of that act, and also pointed out, in the Japan-US Regulatory Reform Initiative, that there must be thorough implementation of the principle of non-discrimination between domestically produced and imported products in government procurement and review of protectionist measures, including this measure, in the spring of the same year. In addition, in May and June 2009, Japan submitted public comments on the Federal Acquisition Regulation concerning the application of Buy America provisions and the OMB Guidance, and thereby requested that the United States revise the content so as to secure an application that is less discriminatory between domestically produced and imported products and to ensure that new Buy America provisions will not be introduced in other laws and regulations in the future. After that, Japan has continued to monitor the application of Buy American Act by taking up this issue as an agenda item/question during the Trade Policy Review of the United States and meetings of the WTO Committee on Government Procurement (June and October 2014 and February 2015).

In January 2015, the state of New Jersey (not subject to the Agreement on Government Procurement) passed a bill, which obligates the use of products produced within the United State in all procurement contracts by the state government, but the state governor vetoed the bill in February of the same year. In order to avoid such efforts from spreading at federal level and to other states, Japan needs to continue making requests on this issue.

K. UNILATERAL MEASURES

1. RELATED TO SECTION 301 OF TRADE ACT OF 1974

Various provisions of US law direct or permit unilateral measures against other countries to counter perceived unfairness in other countries' laws, policies, and practices. The primary legal authority for such action is Section 301 of the Trade Act of 1974 ("the 1974 Act"). Section 301 and its related provisions were amended by the Omnibus Trade and Competitiveness Act of 1988 ("the 1988 Act"). The 1988 Act allowed the government to take sanctions more easily, introduced procedures which narrowed the discretion of administrative authorities (Super 301) and set up more speedy special procedure for intellectual property (Special 301).

In addition, it established sanctions in the area of telecommunication trade (Section 1371-1382 of the 1988 Act) and newly stipulated the procedure for sanctions regarding discriminatory treatment in government procurement by amending the Buy American Act of 1933.

Furthermore, in the Uruguay Round Agreements Act of 1994, the Super 301 provision was enacted into law as a temporary statute limited to 1995. (In September 1995, an Executive Order was issued to extend the provision for two years, but, at present, the provision has expired.)

The sections below consider each of these provisions in greater detail and discuss how they have been applied by the US government in recent cases.

1) Section 301 of the Trade Act of 1974 (procedure after amendment by Section 1301 of the 1988 Act) and other related provisions

<Outline of the Measure>

Section 301 of Trade Act of 1974 authorizes the United States Trade Representative (USTR) to investigate and take action against unreasonable, unfair or discriminatory practices or violations of international agreements. The 1988 amendments transferred authority for recognizing unfair practices and invoking unilateral measures from the President to the USTR, theoretically divorcing actions from other political considerations and thus making them easier to invoke. In addition, through the amendments, sanctions became mandatory in certain instances, affording the USTR less discretion.

Amendments in the Uruguay Round Agreements Act, on the whole, clarified existing provisions, delineating the scope of the unilateral measures to be taken as "any action that is within the power of the President with respect to trade in goods or services or with respect to any other area of pertinent relations with a foreign country," and the priorities to be operated under. They also added some interpretive information on what constitutes "unreasonable actions, policies, and practices" that may trigger unilateral measures. Finally, they enhanced the requirements for invoking unilateral measures against infringements of intellectual property rights and anti-competitive behavior. This amendment seems to have further clarified the problems of this article.

Investigation Procedures

The USTR engages in the following investigation procedures under Section 301: (a) initiates investigations into trade practices based on complaints from interested parties or on its own authority; (b) simultaneously enters into consultations with the country in question as prescribed in the GATT or other international arrangements; (c) determines what action the USTR should take, within a set period of time (for violations of trade agreements, 30 days from the conclusion of dispute settlement procedures or 18 months from the beginning of investigations, whichever comes sooner; for others, 12 months from the beginning of investigations); and (d) implements the action, in principle, within 30 days of the decision (the USTR may delay action for not more than 180 days).

I. Reason for Retaliatory Measures for mandatory action (Section 301(a))

The USTR shall take action if the act, policy or practice of a foreign government (a) is in violation of the GATT or other trade agreements or otherwise denies benefits to the United States; or (b) is unjustifiable and burdens or restricts US commerce.

II. For discretionary action (Section 301(b))

The USTR may take action in cases where an act, policy, or practice of a foreign country place is unreasonable or discriminatory and burdens or restricts US commerce and action by the United States is “appropriate”. The meaning of “unreasonable” measures taken by foreign country is not clearly defined; the law only stipulates that it applies to measures that are “not necessarily in violation of or inconsistent with U.S. legal rights,” but which are “deemed to be unfair and inequitable.”

Up to now, only a few measures have been cited as examples of unreasonable measures, such as “denial of opportunities to establish a company”, “denial of protection of intellectual property rights”, “denial of market opportunity”, “export targeting” and “denial of labor rights.” Toleration of government toward the organized anticompetitive activities by private companies is mentioned as an example of the denial of market opportunity, but there a great possibility that it could lead arbitrary implementation since it means mere “omission” by a foreign government is a problem.

<Problems under International Rules>

In November 1998, the EU requested WTO consultations with the United States because Section 301 procedures require the USTR to reach a decision on sanction within 18 months of the initiation of investigations (Section 304). These procedures could potentially permit unilateral measures by the US government without waiting for a WTO panel decision. Because no agreement was reached in the consultations, a panel was established in March 1999. Japan participated as a third party and presented arguments in support of the EU’s position.

The panel report on Section 301 of the US Trade Act was adopted at the DSB meeting in January 2000. The panel found that: (1) the wording of Section 304 of the US Trade Act seemed to contravene the WTO Agreement, but (2) when read in conjunction with the interpretative guidelines for the Trade Act prepared by the US President and other statements by the US government, the United States had instructed its officials to administer Section 301 in a manner that does not violate the WTO Agreement and therefore Section 301 procedures on their face are not WTO violations. The panel decision is based on the assumption that the United States will adhere to statements it made during the panel meetings. We therefore expect, and will watch for, faithful administration of the US statement. We also note that the panel essentially found sanctions pursuant to Section 301 that did not comply with the WTO procedures would be in violation of WTO obligations unless there are interpretative guidelines or statements by government as mentioned above. The United States should consider this as a serious warning.

The Special 301, telecommunications provisions and government procurement provisions (Title VII) were formulated based on the intentions and procedures of Section 301. The United States should administrate these measures in conformance with the WTO Agreement. Japan will continue to vigilantly monitor trends in the United States in this area.

Super 301, which had strong unilateral characteristics and required automatic launching of investigations, terminated in 2002. However, the possibility of establishing similar laws and regulations still exists and it is necessary to monitor US trends.

<Recent Developments>

Major investigations based on Section 301 of the Trade Act recently initiated are summarized in Figure I-3-7.

Figure I-3-7 Major cases of investigations based on Section 301 of the Trade Act recently initiated

Subjects	Developments	
EU Technical barriers on hormone-treated beef	Feb. 2005	The EU requested the establishment of a compliance panel.
	2008	The EU appealed to the Appellate Body.
	Oct. 2008	The Appellate Body determined to continue the approval of the countermeasures made in July 1999.
	Jan. 2009	The US decided to change the countermeasures taken in July 1999. (The change was effective until May 23, 2009.)
	May 2009	The US and the EU announced the conclusion of a MOU. As the first stage measures, the EU would impose a tariff quota on 20,000 tons of beef in which certain hormonal growth promotants are not used and the US, in return, would not increase the additional tariffs imposed as of May 23, 2009. The MOU also stated the second stage measures that the EU would extend the tariff quota to 45,000 tons of beef in which a certain hormonal growth promotants are not used and the US would terminate all the additional tariffs imposed in relation to this dispute case.
	Aug. 2012	The second stage measures based on the MOU were implemented. (The time limit is one year)
	Aug. 2013	The US announced that the US and the EU would extend the second stage measures until August 2015.
	Oct. 2013	The US and the EU officially agreed to revise the MOU to include the extension of the second stage measures.
China Wind power generating equipment	Oct. 15, 2010	Investigation initiated in response to a complaint from the United Steelworkers of America (USW)
	Dec. 22, 2010	Request for consultations (the EU and Japan announced their participation in the consultations.) * China terminated its subsidy system for wind power generation facilities.
Ukraine Pirated software	May 30, 2013	Investigation initiated
	Sep. 10, 2013	Public hearing held
	Nov. 29, 2013	3 month investigation extension announced (Scheduled to be completed on Feb. 28, 2014)
	Feb. 28, 2014	An affirmative determination was made. As of the end of January 2016, punitive tariffs, etc. have not been imposed in consideration of the current political situation in Ukraine.

2) Special 301

<Outline of the Measure>

Based on the Special 301 provision, the USTR identifies (a) countries that “deny adequate and effective protection to the intellectual property rights” and (b) countries that “deny fair and equitable market access to United States persons that rely upon intellectual property protection” as “priority foreign countries” in the report to be submitted within 30 days after the submission the National Trade Estimate Report on Foreign Trade Barriers. The USTR then initiates investigations and consultations with the “priority foreign countries”, and proceeds with sanction procedures as countermeasures in case the consultations fail.

The Special 301 generally requires that investigations be concluded within 12 months or, in the case of violations of agreements, within 30 days following the deadline established by the treaty for the settlement of disputes or within eighteen months, whichever is earlier.

In the Uruguay Round Agreements Act of 1994, the investigation period for TRIPS Agreement items was lengthened from 6 months to 18 months, the same as under ordinary Section 301 procedures (though it remains six months for items not covered under the TRIPS Agreement).

<Problems under International Rules>

The United States claims that even if a country is in full compliance with the TRIPS Agreement, it will be designated as a priority country if it is found to infringe on US intellectual property rights in areas outside the scope of the Agreement. This stance reflects the US position that unilateral measures can be imposed without resorting to WTO dispute settlement procedures for items not covered by the WTO Agreement. (We have already discussed the problems inherent in this position.)

<Recent Developments>

In the “2014 Special 301 Report” released by the USTR in April 2014, 10 countries were placed on the Priority Watch List, 27 countries on the Watch List, and 12 countries under Section 306 Monitoring. In 2013, Ukraine was included in the list of “priority foreign countries”, but no actions were taken in consideration of its current political situation. In the 2014 Report, Israel, Italy and the Philippines, which were placed on the 2013 Watch List, were removed from the Watch List.

3) Telecommunications Provisions

<Outline of the Measure>

The telecommunications provisions[4] have two main features. The first is the mandate for negotiations under threat of unilateral measures. The USTR is required to identify as “priority foreign countries” those countries that deny “mutually advantageous market opportunities” to US telecommunications equipment and services. After receiving the USTR’s report, the President is directed to initiate negotiations to conclude bilateral or multilateral agreements that ensure market opportunities for US products and services. Should an agreement not be concluded after a set period of time (the law specifies 18 months, or in the case of additional designation, one year from the date of designation), an array of measures are open to the President, including abrogation of US obligations regarding imports and government procurement of telecommunications equipment.

---

[4] Sections 1371-1382 of the Omnibus Trade and Competitiveness Act of 1988: The “Telecommunications Trade Act of 1988.

The second feature is the “review of trade agreement implementation.” The USTR is required to review annually the operation and effectiveness of each telecommunications trade agreement in force between the United States and other countries. In the review, the USTR determines whether or not any act of a foreign country that entered into the agreement is in compliance with the terms of the agreement, or otherwise denies mutually advantageous market opportunities to US telecommunications products and services. An affirmative determination under section 1377 must be treated as an affirmative determination under Section 301.

<Problems under International Rules>

Even if the issues in question under the above provisions are beyond the scope of the WTO Agreements, the unilateral measures taken may be in contradiction with the WTO Agreements, as already discussed. (The telecommunications provisions are similar to those in Section 301 of the US Trade Act, as described in <Problems under international rules> of (1) “Section 301 of the Trade Act of 1974” above). Section 301 of the Trade Act of 1974 could potentially permit unilateral measures by the US government without waiting for a WTO panel decision, and therefore would constitute a violation of the WTO Agreements unless there are self-control measures by government to ensure operations consistent with the WTO, such as the interpretative guidelines for the Trade Act prepared by the US President and other statements by the US government.

<Recent Developments>

In a report entitled “2015 Section 1377 Review On Compliance with Telecommunications Trade Agreements,” the USTR cites the following points as major problems.

<table>
<tr><td colspan="4">Major problems during 2014–2015 cited in the 2015 Section 1377 Review On Compliance with Telecommunications Trade Agreements</td></tr>
<tr><td colspan="2">Topic</td><td>Subject country</td><td>Indication</td></tr>
<tr><td rowspan="4">Transactions of services using the Internet</td><td rowspan="2">Data distribution across borders</td><td>Russia</td><td>・A law requiring companies to store personal data enacted in September 1, 2015; the United States will monitor whether the law contributes to cross-border data distribution in service sectors including accounting, data processing, and wholesale distribution</td></tr>
<tr><td>Nigeria</td><td>・Possibility that the guidelines on content development in the telecommunications sector established by the National Information Technology Development Agency (NITDA) would unfairly impose disadvantageous conditions on foreign companies</td></tr>
<tr><td rowspan="2">VoIP (Voice over Internet Protocol services)</td><td>Indonesia</td><td>・Vague definition of providers of a “public service” that are required to establish local data centers</td></tr>
<tr><td>China
India</td><td>・Need for relaxation of the regulations on new entry to VoIP services by foreign countries</td></tr>
<tr><td colspan="2">Neutrality of supervisory authority</td><td>China</td><td>・Issues with neutrality of the Ministry of Industry and Information Technology (MIIT)
・Need for adjustments with other authorities and revision of relevant laws</td></tr>
</table>

Foreign investment	China	• Need for elimination of investment regulations and mandatory requirement of JV with state-owned enterprises • Concerns over the expansion of the regulation coverage due to the revision of the definition of information services
Competitive environment	Vietnam	• Need for the removal of regulations on investments for communications companies from overseas
	Dominican Republic	• Elimination of the lack of transparency in the structure of mobile termination rates • Establishment of roaming services, etc.
	China	• Need to allow participation of foreign-invested enterprises in the Pilot Program for Mobile Communications Resale Business, which is launched as a pilot project
International call fee	Pakistan Tonga Fiji	• Need for correction of fee regulations by the Government
	EU	• Need to eliminate the situation where higher rates are charged for the termination of international traffic originating from outside the EU than for international traffic between sovereign states inside the EU, particularly in France, Germany, and the Czech Republic
	Uganda	• Need to eliminate the tax imposed on inbound international calls
Satellite services	China	• Stagnation in granting new business licenses
	India	• Restrictions on business contents of foreign business operators
Telecommunications equipment	China	• Adoption of various protection policies and China-specific standards • Need to abolish the guidelines that require suppliers to disclose technical contents to Chinese authorities with regard to use of ICT technology in the banking sector
	India	• Changes in licensing conditions
	China India Brazil	• Concerns over obligations to acquire electromagnetic compatibility certifications for communications equipment (China and India in particular impose obligations to conduct inspections in their countries)
Development of communications infrastructure	Brazil Nigeria Indonesia	• Obligations to use domestic products in the development of communications infrastructure (regulations not at national level; individual cases are presented)

4) Provisions Involving Government Procurement: Title VII (The Federal Buy American Act amended by the Omnibus Trade and Competitiveness Act of 1988)

<Outline of the Measure>

Under Title VII[5], the President is required to provide an annual report to Congress outlining discrimination against US products and services under a foreign government's procurement laws and practices from 1990 to 1996. The USTR is required to immediately enter into consultations based on the report's findings. Subsequently, it provided by Executive Order 13116 issued in 1999 that the President should submit annual reports from 1999 to 2001.

To be concrete, if the offending practices were not rectified within 60 days after the commencement of consultations, and the practices were violations of the Agreement on Government Procurement, the practices were initially handled in accordance with the dispute settlement procedures provided by that Agreement. Failure to achieve settlement within 18 months required mandatory unilateral measures. For other discriminatory practices, bilateral talks were initiated and if the offending practices were not rectified within 60 days of the commencement of consultations, necessary unilateral measures would be imposed.

The United States regarded the government procurement sector as one of the three priority sectors in the US-Japan Economic Framework Talks and in July 1994, identified Japanese public sector procurement of telecommunications and medical technology as discriminatory. The two countries continued negotiations on the issue and finally reached an agreement before the deadline to invoke unilateral measures expired at the end of September 1994.

The US announcement on April 30, 2001 did not designate any discriminatory government procurement practices, but did note the following four areas for monitoring: (1) Japan's public works; (2) Chinese Taipei's discriminatory government procurement practices and procedural obstructions; (3) state government procurement practices in Canada; and (4) the German government's "protection clause".

Title VII was terminated in 1996, and no report was published after 2001 when a report was submitted based on the Executive Order issued in 1999. Japan will continue to monitor the operations of the US government for consistency with the WTO Agreements.

<Problems under International Rules>

Sanctions imposed in cases that fail to resolve the dispute within 18 months may be in violation of the unilateral measure ban under DSU Article 23.

<Recent Developments>

Figure I-3-8 Practices Found to Be Discriminatory under Title VII

Country	Issue
Germany	Heavy electrical equipment, telecommunications equipment April 1996 Designation as discriminatory government procurement July 1999 Decision of 90 days extension to implement retaliatory measure

[5] The Federal Buy American Act as amended by Section 7003 of the Omnibus Trade and Competitiveness Act of 1988.

	October 1999	Decision of second extension to implement retaliatory measure due to agreement by Germany to make efforts for realization of fair government procurement (US government also designated it as monitoring item under Super 301 and would pay attention to outcome of amendment of the system)
Republic of Korea	Bidding on the airport construction project	
	April 1999	Designation as discriminatory government procurement
	June 1999	Establishment of panel under the Government Procurement Agreement
	June 2000	Panel Report that admit the measure of Korean government was in conformity of WTO agreement was adopted

5) The Carousel Rule on Amending Items Subject to Retaliatory Measures

<Outline of the Measure>

The US Trade and Development Act of 2000, passed in May 2000, includes a “carousel provision” that obligates the USTR to rotate the items subject to retaliatory measures every 180 days (like a “carousel”) in order to guarantee the effectiveness of sanctions imposed for cases in which the WTO panel’s recommendation is not implemented. The purpose of this provision is to increase the effectiveness of sanctions and to place pressure on trading partners when measures are not implemented quickly, as in the cases lost by the EU involving beef hormones and bananas.

<Problems under International Rules>

Rotating items subject to sanctions is inappropriate because of the potential for trade sanctions to exceed the suspension of obligations originally envisioned when sanctions were approved. The measure likely violates several WTO provisions, including Article 22.4 of the DSU (equivalency). As of this writing, the “carousel provision” had not been applied, but vigilance must be maintained so that this measure is not administered in ways that would inconsistent with the DSU.

<Recent Developments>

The EU requested WTO consultations over this position in June 2000; Japan requested to participate as a third party, but the United States refused to allow Japan’s participation (the consultations have yet to be held as of 2015). Japan sent a letter of protest to the United States charging discriminatory treatment that allowed some countries to participate, while barring others.

2. OTHERS

The United States has certain internal laws that provide for the application of unilateral measures to natural and juridical persons outside the United States for trade or security reasons. Many of these laws, setting penalties for enterprises that invest in the targeted country, constitute serious barriers to the activities of enterprises, such as direct investment. Although they do not constitute “unilateral measures” as defined in this chapter, they nonetheless are similar in that they use domestic laws to determine whether foreign companies are “violating” the rules according to their own criteria.

The following organizes the content of certain laws providing for sanctions as mentioned above, and also considers problems with individual measures provided for in those laws in terms of WTO

Agreements and international law.

In addition to this, there are also cases of requiring natural and juridical persons outside the United States to provide information in the tax/financial fields. For example, the Foreign Account Tax Compliance Act (FATCA), enacted mainly for the purpose of preventing taxpayers with US nationality from evading taxation (scheduled to enter into force in 2013), imposes on certain financial institutions located outside the United States the obligation to deduct tax from income at source for certain transactions related to certain accounts which natural and juridical persons with US nationality have at said financial institutions, requires disclosure of information on such accounts as a requirement for exemption from the obligation, and requires such financial institutions to take actions, including closure of such accounts, where such disclosure is impossible. It is necessary to consider whether these measures are an excessive exercise of jurisdiction on a case-by-case basis in the future.

1) The Helms-Burton Act

<Outline of the Measure>

The United States has imposed economic sanctions against Cuba since the Cuban Revolution of 1959. These sanctions were strengthened in the Cuban Democracy Act of 1922. After small private American aircraft were shot down by the Cuban military, new legislation took effect in March 1996. Besides the indirect financing prohibition (Section 103), and the prohibition of importation of certain Cuban products (Section 110) in Title I of the law, the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996) regulates the following areas:

1. Title III provides that “any person that, after the end of the three-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after 1 January, 1959, shall be liable to any United States national who owns the right to claim compensation for damage.” This section, in effect, allows US nationals to sue for damages in US courts.
2. Title IV specifies that “the Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of the enactment of this Act, has confiscated or has directed or overseen the confiscation of property, a claim to which is owned by a US national.”

With respect to Title III, successive administrations have continued to suspend implementation of this measure since it took effect in August 1996, and there was no period when lawsuits could be filed.

With respect to Title IV, reportedly a Canadian mining and resources company and an Israeli agricultural company were among the recipients of Title IV notices (no recipient has been observed since 2006).

<Problems under International Rules>

In addition to issues concerning consistency with WTO rules -- such as that export restrictions, refusal to issue visas and expulsion of foreign nationals from the United States based on the Act may violate GATT and GATS -- the Helms-Burton Act could also be an excessive external application of domestic law, which is not permitted under international law. This would depend on how it is applied in actual cases since it is the type of US domestic law that can be applied to companies in third countries. The United States should implement the law carefully, ensuring consistency with international law. In particular, the United States should refrain from implementing the law frequently against companies in third countries. Countries around the world, including Japan, have expressed strong concerns about the actions taken by the United States, particularly regarding the fact that the Act applies to non-US companies. In addition, the EU enacted regulations in November 1996 barring all natural persons and companies within the region from following third-country measures. Canada and Mexico have also formulated similar blocking statutes.

In May 1996, the EU requested WTO consultations with the US over the Helms-Burton Act. As no progress was made in the consultations, a panel was established in November 1996. In April 1997, the EU agreed to request the suspension of WTO Panel procedures in exchange for the US government asking Congress to grant the President extended Chapter IV authorization. Although no progress was made thereafter, the Panel was disbanded in April 1998.

<Recent Developments>

On April 13, 2009, the United States' government relaxed the restrictions on Cuba. This included: (i) elimination of passage restriction, (ii) elimination of restriction on remittance of Cubans' in the United States, (iii) introduction of measure to promote information and commerce between families from both countries and (iv) expansion of items permitted to be exported to Cuba for the purpose of humanitarian assistance (e.g., clothing and sanitation related items). On September 3, 2009, the government officially announced implementation of the relaxation of the measure, realizing the policy declared in April.

On January 15, 2015, the US government expressed its intention to further relax the restrictions on Cuba This included relaxation of passage restriction, elimination of regulations on the travel, insurance, and financial sectors, and elimination of restrictions on imports or re-imports for the purpose of supporting Cuban people, etc.

2) Myanmar Sanctions Act

(See 3. Major Cases of Government Procurement in Chapter 14, Part II)

3) Comprehensive Iran Sanctions, Accountability, and Divestment Act

<Outline of the Measure>

Although P5+1 (permanent members of the United Nations Security Council and Germany) negotiated with Iran over the nuclear issue in 2009, the negotiations failed to achieve any progress, which led to the Security Council Resolution in June 2010. In addition, as the Iran Sanctions Act in the past had never been actually put into effect for specific objects, there was a growing movement in the US Congress to require strengthening the content of the Iran Sanctions Act and obliging the President to put the Act in effect. This bill was passed by the Senate and the House of Representatives in June 2010 as a bill to strengthen the Iran Sanctions Act of 2006. President Obama signed it in July.

In the fields of petroleum and petroleum refining, three or more of the nine types of sanctions (*1) are imposed on persons (both in and outside the United States) for whom the President determines that the persons have made an investment of 20 million dollars or more, which contributes to Iran's production of petroleum resources, etc., and persons who fall under certain requirements (*2).

Also, in the financial field, US banks are prohibited from or have strict conditions imposed on conducting financial transactions (conclusion and maintenance of correspondent contracts) with foreign financial institutions that fall under certain requirements (*3).

The provision on Iran sanctions in the National Defense Authorization Act of 2012 enacted in December 2011, provides that inter-bank transactions with foreign financial institutions designated by the U.S. Treasury Department, including institutions that have considerable amount of transactions with Iran's financial institutions, including the Central Bank of Iran, are prohibited in the Unites States except under certain conditions. In addition, foreign financial institutions that have financial transactions involving crude oil also are subject to the sanctions. (However, provisions exist that exempt countries that decreased their purchase of crude oil from Iran to a considerable extent from the sanctions for a specific period; the U.S. Government applied this exemption to Japan a total of four times in March and September of 2012 and March and September 2013. The measures to relax sanctions against Iran from January 20, 2014 included a statement that "the US government will not impose sanctions on countries that are currently importing crude oil from Iran unless the imported volume exceeds the current level".)

In August 2012, upon enactment of Iran Threat Reduction and Syria Human Rights Act, the scope of financial transactions which the Central Bank of Iran approves was limited to those for "bilateral trade of goods and services" and new options were added to the CISADA menu of sanctions (*4). Also, in the same month, a Presidential Decree on Iran Sanctions was issued, adding sanctions against those who purchase goods or provide services that contribute to the growth and production of Iran's petrochemical products.

In the 2013 National Defense Authorization Act, enacted in January 2013 and effective in July 2013, sanctions against those who provide goods and services in certain fields (energy in general except crude oil and natural gases, ports, shipping and shipbuilding) and those who conduct transactions involving certain raw materials (such as aluminum and steel) were added, imposing further economic sanctions against Iran.

(*1) (1) Assistance of the Export-Import Bank of the United States, (2) prohibition of issuance of export permissions by the US authorities, (3) prohibition of loans by US financial institutions, (4) prohibition of underwriting of US government bonds, (5) prohibition of government procurement, (6) restriction on import from a sanctioned person, (7) prohibition of access to foreign currencies within the United States, (8) prohibition of access to the US banking system, and (9) prohibition of real estate transactions in the United States ((1) to (6) succeed the content of the past Iran Sanctions Act).

(*2) (1) Persons who provide to Iran goods, services, technology, information, or support that contributes to Iran's production of refined petroleum products, (2) persons who have exported to Iran refined petroleum products, and (3) persons who provide to Iran goods, services, technology, information, or support that contributes to Iran's import of refined petroleum products.

(*3) Having a business relationship with any of (1) institutions that provide support for Iran's nuclear development/terrorist activities, (2) institutions subject to sanctions pursuant to the United Nations Security Council Resolution, (3) Iran's Revolutionary Guard Corps or any of its agents or affiliates, or (4) financial institutions subject to asset freeze.

(*4) (1) Prohibition of Americans investing in those subject to sanctions, and buying shares or bonds, (2) prohibition of issuing visas for those subject to sanctions, and (3) application of sanctions on those subjected to sanctions by the President.

<Problems under International Rules>

Sanctions under this Act may be directly applied to overseas companies, which can be excessive extraterritorial application beyond the scope permissible under international law (the same problem as for the past Act).

In addition, among these sanctions, (2) prohibition of issuance of export permissions to a sanctioned person by the US authorities and (6) restriction on import from a sanctioned person, fall under "prohibitions or restrictions other than duties, taxes or other charges" on import, and thus may violate Article XI: 1 of GATT.

<Recent Developments>

In June 2013, Presidential Decree 13645 was issued, prohibiting the purchase and provision of goods/services that contribute to the production of Iran's automobile products. In addition, sales and possession of considerable amounts of funds in rials and holding of accounts in rials by foreign financial institutions are prohibited.

However, after the inauguration of the Iranian President, who had promised to improve relations with the United States (August 2013), consultations on the nuclear issue between Iran and P5+1 made progress. A "Joint Plan of Action" for a comprehensive solution was agreed upon on November 24, 2013, and measures to ease the sanctions, including the following, were taken for the six-month period between January 20, 2014 and July 20 of the same year on the premise that the nuclear issue was being properly dealt with by Iran.

1) Maintaining import volumes of crude oil from Iran at the present considerably low level
2) Terminating export prohibition measures in gold/precious metal, petrochemical, and automobile sectors

In addition, the period for relaxing sanctions was extended twice, initially to November 24, 2014 and then to the end of June 2015, as it was determined through continuous consultations that Iran was properly dealing with the nuclear issue.

Later, on July 14, 2015, the "Joint Comprehensive Plan of Action: JCPOA" was adopted at P5 + 1 for promoting the JPOA in an even more comprehensive manner, and the above-mentioned easing measure was extended.

In line with the JCPOA, the Department of State set an additional sanction-easing measure through "JCPOA contingent waivers." This easing measure allows foreign nationals who do not have US nationality to carry out certain transactions with Iranians (transactions in the Iranian currency "Rial," transactions with Iranian banks, financial transactions such as transfer of Iranian commercial benefits to outside Iran, insurance transactions, crude oil transactions, transactions in petrochemical products, transactions with Iran's energy sector, transactions with port management bodies, transactions with the distribution industry, transactions in precious metals such as gold, and transactions with the automobile industry).

4) US Re-export Control Regimes

<Outline of the Measure>

The US re-export control regime is a system that imposes restriction on specific products that are exported from the United States and then re-exported to third countries. It requires permits from the US government for all exports, including from Japan, in cases of: (i) US made products (cargoes, software, technologies); (ii) products including US-made products over a certain level (built-in product); (iii) specified direct products produced by using US-made technologies and software; and (iv) products produced at a plant with US direct products as major parts. These rules are applied even to exports that have passed through the export control procedures of the government of Japan, which adheres faithfully to all international agreements on export controls.

There is no need to impose the duplicated restrictions on the export from countries, including Japan, which are members of various international regimes on export controls. In addition to that, US exporters are not obliged to provide sufficient information on commodities exported from the U.S. (Export Control Commodity Number (ECCN), etc.) to importers (re-exporters). Therefore, importers (re-exporters) have difficulties in identifying commodities and determining the applicability of the regulation to their commodities. This might hinder proper processes for export control.

<Problems under International Rules>

The US re-export control regime is a potential violation of international law because it entails broad extraterritorial application of domestic laws.

<Recent Developments>

On occasions such as the Japan-US Deregulation and Competition Policy Initiative (hereinafter referred to as the Japan-US Deregulation Initiative) held since 2001, Japan pointed out the possibility of excessive exterritorial application of US domestic laws, and requested that the U.S. exempt exports from Japan which have participated in various international regimes on export control and implemented export control fully and effectively from the application of US re-export control. At the same time, Japan requested the US to introduce a tentative measure until the re-export control operation is improved: (i) to establish a Japanese web site that lets Japanese companies understand the details of the legislation; (ii) to allocate export control expert(s) at the US Embassy in Japan for consultation service; and (iii) to mandate that US exporters provide sufficient product information so Japanese companies can determine the applicability of the regulation to their products.

As a result of Japan's request, in April 2003, the US Department of Commerce (DOC) posted on its website a brief description in Japanese of its Re-export Control Regime. The US government also took measures to deepen understanding of its Re-export Control Regime, such as holding a seminar regarding the Regime in Tokyo in June 2003. In November 2003, DOC created the "Best Practices for Transit, Transshipment, and Re-export of Items Subject to the Export Administration Regulations (hereinafter referred to as "Best Practices"), stipulating that exporters should provide commodity information such ECCN to their customers ("Best Practices" was updated to the 2011 version). Although no change in the operation was observed, in a statement it released in January 2014, the Bureau of Industry and Security (BIS) indicated its position that "BIS recommends that US exporters send the EECN's of exporting products to foreign importers and obtain copies of import licenses in the respective countries before exporting based on 'Best Practices'". The BIS also provides the SNAP-R (Simplified Network Application Redesign) system online to enable application for re-exports and checking of the classification of items, etc.

However, these "Best Practices" do not have legal binding force and cannot fundamentally solve the problems of importers (re-exporters) in acquiring information regarding commodities exported from the U.S. Based on these points, in December 2006, at the Japan-US Deregulation Initiative, Japan presented a formal request to the US government, demanding that: Japanese importers (re-exporters) be exempt from the US re-export regulations and, as a provisional measure in cases where exemption from re-export regulations involves difficulty, US exporters should be obliged to provide Japanese importers (re-exporters) with sufficient commodity information such as the Export Control Commodity Number (ECCN) when the US export control authority will grant licenses. Further discussions are necessary to secure the provision of sufficient commodity information on commodities that are not excluded from the STA. The commercial section of the Embassy of the US in Japan and the BIS jointly hold briefings, etc. in Japan on a regular basis to make the system widely known. On the most recent occasions, briefings were held on April 23-24, 2014 to explain and answer questions about related systems.

5) Foreign Account Tax Compliance Act: FATCA

<Outline of Measure>

1) FATCA, consisting of 13 provisions, was signed and subsequently enacted into law on March 18, 2010 as a part of the Hiring Incentives to Restore Employment Act (HIRE). (effective on January 1, 2013) The primary goal is to prevent tax evasion by U.S. taxpayers transferring their assets to foreign countries. The provision that imposes reporting requirements on specified foreign accounts further adds a new chapter to the Internal Revenue Code -- Chapter 4: Taxes to Enforce Reporting on Certain Foreign Accounts. Its primary role (mentioned below) is to newly subject payments to foreign financial institutions to withholding tax.

2) The aforementioned new Chapter 4 provides for a withholding tax to be imposed on all payments that include interest, dividends, rent and certain other income of U.S. sources, and gross proceeds from the sale or other disposition of assets generating interest or dividends of U.S. sources that are made to the Foreign Financial Institutions ("FFI"). FFIs, which are defined in Chapter 4 (See Section 1471 (d) (5)), will be subject to withholding tax regardless of whether payments are made for proprietary trading, and the 30% withholding tax rate will apply if such payments do not satisfy certain requirements prescribed by the U.S. Treasury Department. Such withholding tax may be refunded based on the relevant tax treaty, provided, however, that that amount of amount would be fixed for the time period until receipt of the refund, and no interest will accrue for that time period. One of the requirements prescribed by the U.S. Treasury Department for exempting payments to an FFI from the withholding tax is that such FFI enters into an FFI agreement with the U.S. Treasury Department. The major provisions of such agreement are that: (1) the FFI shall conduct due diligence procedures and verification specified by the U.S. Treasury Department, in order to identify United States Accounts (defined as the financial accounts of "specified United States Persons", such as U.S. citizens or residents, U.S. corporations, or foreign business entities substantially (e.g., no less than 10% shares) owned by U.S. persons (Internal Revenue Code Section 1471 (d) (1)), from the customers' accounts in that FFI or its Expanded Affiliate Group institutions; (2) the FFI shall report to the IRS annually certain information on the United States Accounts; (3) in cases where the disclosure of the information on a United States Account is prohibited by law, the FFI shall request that the customer waive that prohibition on the disclosure of information, and if such waiver is not granted, the FFI shall close the relevant United States Accounts.

3) The FFI agreement shall further provide that the FFI shall collect a 30% withholding tax on "pass-through payments" (withholdable payments) to recalcitrant account holders, who do not agree to provide materials for determination of whether their accounts are United States Accounts, and Nonparticipating FFIs which fail to enter into FFI agreements. The Notice that was released by the U.S. Treasury Department and IRS stipulates that, due to the difficulties in proving pass-through payments, the amount of such pass-through payments shall be calculated by multiplying the total amount of interest and other incomes of U.S. sources by the percentage of the U.S. assets in all assets of the FFI. That means that part of the interest and certain other incomes of U.S. sources of the FFI shall be deemed to have been paid to the relevant account holders, without excluding the incomes generated from investments not made by that FFI for the relevant account holders' accounts (i.e., including those made as its own proprietary trading).

(See 4 through 5) of the same section of the "2013 Report on Compliance by Major Trading Partners with Trade Agreements" for the background of the FATCA enactment and comments from the Japanese Bankers Association)

<Problems under International Rules>

FATCA allows the U.S. government to effectively force foreign financial institutions which conduct activities outside the United States to control customer and accounts in a manner that is specified by the U.S. Treasury Department, including those for collecting personal information such as birth place, location of residence, etc., conducting strict due diligence to verify customers' identities, enforcing the provision of specified information on United States Accounts, collecting withholding tax from the account holders, and the cancellation of accounts. Such treatment may contradict and violate the Personal Information Protection Act of Japan and may also cause excessive burdens unexpected from other relevant laws and regulations of Japan. The number of U.S. persons (practically, U.S. citizens) in Japan of whom the Immigration Bureau of Japan was aware as of the end of 2009 was approximately 52,000, which constituted 0.04% of the population of Japan, and only 2.4% of all non-Japanese nationals in Japan (approximately 2.19 million). The Japanese Banker Association thus requested mitigation of the burden of surveying all financial accounts (whose number amounts to as many as 790 million as of March 2010). Based on the aforesaid estimated ratios of the U.S. persons, there is no objective ground to consider that U.S. source income such as interest income that Japanese financial institutions earned, belong to the accounts of those who are not qualified for the reduced tax rate under the Japan-U.S. tax treaty. It is objectively questionable whether in this situation this law is a reasonable exercise of the legislative jurisdiction of the United States. The law applies a single rate of 30% withholding tax equally to all U.S. source income including interest income that the FFIs in Japan receive, without regard to whether that income is generated from transactions conducted in accounts of U.S. persons who are not subject to the reduced tax rate under the Japan-U.S. tax treaty. It also demands the conclusion of FFI agreements that provide for not only those FFIs, but also for their affiliates that do not earn any U.S. source income, to carry out customer and account management in the manner specified by the U.S. Treasury Department to identify U.S. persons' accounts. This means that the law is applicable to all financial institutions that make investments in the United States as a result of proprietary trading or whose affiliate does the same, merely on the ground that there is a possibility that a U.S. person may hold accounts and without regard to whether they have a specific and sufficient link to the United States. The issue of legislative jurisdiction concerns the relationship between nation states, and thus the fact that private financial institutions have entered into FFI agreements does not solve this problem.

<Recent Developments>

On February 8, 2012, the U.S. Government established a framework concerning the implementation of FATCA for international information exchange with France, Germany, Italy, Spain and the UK. It also issued a joint statement for reduction of burdens on foreign financial institutions.

On June 21, 2012, the Ministry of Finance, the National Tax Agency, and Financial Services Agency of Japan along with US Department of the Treasury and the Internal Revenue Service issued the “Joint Statement from the United States and Japan Regarding a Framework for Intergovernmental Cooperation to Facilitate the Implementation of FATCA and Improve International Tax Compliance”. The joint statement stated that the Japanese authorities would agree to direct Japanese financial institutions to register and report to the US Internal Revenue Service, and the US authorities would agree to eliminate the obligation of Japanese financial institutions that meet certain conditions to enter into FFI agreements directly and to eliminate U.S. withholding under FATCA on payments to Japanese financial institutions that meet certain conditions.

The final regulations on implementing FATCA issued in the United States on January 17, 2013, were consistent with the intergovernmental agreements of the US and other foreign governments, and included provisions on phased implementation, range of payment that is not subject to withholding, and the clarification of the obligation to comply and confirm FFI.

On June 11, 2013, in order to clarify the contents of cooperation between the US and Japanese authorities and procedures that Japanese financial institutions should follow in implementing the U.S. FATCA, the US and Japanese authorities released the "Joint Statement from the United States and Japan Regarding a Framework for Intergovernmental Cooperation to Facilitate the Implementation of FATCA and Improve International Tax Compliance". In this statement, it was confirmed that termination of the account of or imposition of pass through payment withholding on payments to recalcitrant account holders would not be requested, and for accounts held by recalcitrant account holders only the aggregate number and aggregate value needs to be reported. This reduces burdens on Japanese financial institutions in implementing the U.S. FATCA.