<REFERENCE>

EXPORT RESTRICTIONS

THE SIGNIFICANCE OF DISCUSSING EXPORT RESTRICTIONS

Export restrictions on natural resources and foodstuffs have been raised recently as a problem issue in terms of international trade, and have been a topic of discussion several times, including in the WTO Doha Round negotiations in the fields of Non-Agricultural Market Access (NAMA) and agriculture. Quantitative restrictions have conventionally focused on imports, but in this section we will particularly look at the export aspect, explaining the disciplines over export restrictions prescribed mainly in the WTO Agreements, in addition to considering current problems and future potential strategies.

A. PROBLEMS RELATING TO EXPORT RESTRICTIONS

1. CURRENT SITUATION

Similar to restrictions on imports, a number of countries implement restrictions and controls on exports. The following export restrictions can be observed and categorized depending on their objectives.

1) EXPORT TARIFFS (TAXES) DESIGNED TO GENERATE FISCAL REVENUE

One type of measures, as seen in developing countries where domestic tax collection mechanism is insufficiently developed, involves restricting exports in order to generate fiscal revenue. This usually takes the form of an export tax (export tariffs), which can be effectively levied at borders. (See Chapter 5, “Tariffs” (1) 2. “The function of tariffs”)

2) EXPORT RESTRICTIONS/EXPORT TARIFFS (TAXES) TO PROTECT DOMESTIC INDUSTRY

Similar to import restrictions, export restrictions are sometimes used not only to generate fiscal revenue from exports, but also to maintain the competitiveness of a country’s industry. For example, restricting the export of a rare resource material and allocating it preferentially for domestic industry allows country to maintain the competitiveness of their domestic industry.

3) EXPORT LIMITS/EXPORT TARIFFS (TAXES) TO PROTECT DOMESTIC SUPPLY

If a country is short of foodstuffs, export restrictions on food are sometimes imposed, in order to ensure sufficient domestic supply.

4) INVESTMENT-RELATED EXPORT DEMAND

The execution of certain measures may be required (performance requirement) as one condition of authorizing investment. One example of this is an export performance requirement that seeks a specific level of exports, etc. (for rules relating to investment-related performance requirements, see Part III, Ch.5).

5) OTHERS (DIPLOMATIC MEASURES, TRADE SECURITY MANAGEMENT, ETC.)

Export restrictions may also be implemented as a diplomatic tool. For example, as an economic sanction measure based on United Nations Security Council Resolution 748, Japan prohibited engaging in the export in or the trade agency for trade in aircrafts and component parts to Libya by revising the Foreign Exchange Order and the Export Trade Control Order. (The sanctions based on the Security Council resolution in question were later suspended after the resolution of the case. The Japanese government thus decided, in principle, not to prohibit or reject such transactions on basis of the Security Council Resolution when applying laws and regulations since then).

Furthermore, export restrictions may be implemented based on United Nations Security Council resolutions, international treaties, and international export control frameworks, with the objective of preventing the proliferation of nuclear and other weapons of mass destruction (see the column below).

In the past, often exports were voluntarily restrained according to the demands of the importing country. As explained below, however, currently voluntary export restrictions including requests for such restrictions are now clearly prohibited by the Agreement on Safeguards.

Of all the types mentioned above, export restrictions on natural resources implemented by producing countries have the greatest potential to become a vital problem from the point of view of individual countries' economic activities and security, due to the fact that countries with few natural resources, such as Japan, are dependent on imports of natural resources such as crude oil and rare metals from a limited number of countries. Furthermore, export restrictions on food also cause serious problems that directly affect the lives of people in developing countries and other countries that import food by leading to the reduction of food supply to international market and raising international prices.

COLUMN: SECURITY TRADE CONTROL

In many countries, weapons, and goods and technologies that could be converted into nuclear weapons or other weapons of mass destruction are subject to export restrictions, based on Security Council resolutions and international treaties, etc., in order to maintain national and international peace and security. Some major international frameworks are indicated below.

1) SECURITY COUNCIL RESOLUTION 1540 (ADOPTED 28TH APRIL 2004)

Requests each states to enforce strict export control by deciding that all states shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials.

2) International Treaties

(1) Treaty on the Non-Proliferation of Nuclear Weapons (effective 1970, ratified by Japan in 1976)

Prohibits the transfer by nuclear-weapon states of such weapons to other countries, and the receipt, manufacture and procurement of nuclear weapons by non-nuclear weapon states.

(2) Biological Weapons Convention (effective 1975, ratified by Japan in 1982)

Prohibits the development, manufacture or storage of biological or toxic weapons, and stipulate their disposal.

(3) Chemical Weapons Convention (effective 1997, ratified by Japan in 1995)

Prohibits the development, manufacture or storage of chemical weapons, and restrict the transfer, etc., of toxic chemical substances that could be used in chemical weapons.

3) International Export Control Regimes

(1) Wassenaar Arrangement

In order to prevent the excessive stockpiling of conventional arms that could threaten regional stability, the Arrangement provides a framework to manage the export of weapons and highly sensitive dual-use goods and technologies, with 41 participating states (as of February 2015).

(2) Nuclear Suppliers Group (NSG)

In order to prevent the proliferation of nuclear weapons, the framework regulates controls on the export of items that are especially designed or prepared for nuclear use and items or technologies that can contribute to develop nuclear weapons. As of February 2015, there were 48 participating states.

(3) Australia Group (AG)

A framework that controls the export of raw materials for chemical agents or goods and technologies that can contribute to produce biological weapons or equipment. As of February 2015, there were 41 participating states.

(4) Missile Technology Control Regime (MTCR)

A framework that controls transportation methods for missiles and other weapons of mass destruction, as well as the export of goods and technologies that can contribute to their development. As of February 2015, there were 34 participating states.

Based on these Security Council resolutions, international treaties and international export control frameworks, Japan implements trade security controls via its Foreign Exchange and Foreign Trade Law. Were Japan's high-level goods and technologies to be used in the development of weapons of mass destructions in countries such as North Korea or Iran, which are considered in danger of developing nuclear abilities, it would present a significant threat not only to Japan but also to international society as a whole; for this reason, it is necessary to ensure that such threats are prevented in advance through the strict security trade control. From this perspective, GATT Article XXI permits certain exceptions for security reasons.

2. PROBLEMS ARISING WITH INTERNATIONAL RULES REGARDING EXPORT RESTRICTION MEASURES BY VARIOUS COUNTRIES

The chapters of Section 1 of this report comment on the following individual countries' export restriction measures.

a) China (See Part I, Chapter 1: China)

- Export restrictions on raw materials

b) ASEAN (See Part I, Chapter 2: ASEAN)

- Export restrictions, etc. on logs and processed wood (Indonesia)
- Export restrictions on mineral resources (Indonesia)
- Export restrictions on raw minerals (the Philippines)

c) USA (See Part I, Chapter 3: USA)

- Export control systems
- Export restrictions on logs

d) Canada (See Part I, Chapter 10: Canada)

- Export restrictions on logs

e) Ukraine (See Part I, Chapter 13: Miscellaneous Issues)

- Export restrictions on grain

B. OVERVIEW OF THE EXISTING RULES

1. OUTLINE OF LEGAL PROVISIONS

The current WTO Agreement contains provisions relating to export restrictions. The WTO Agreement can be broadly divided into (i) general prohibitions on quantitative restrictions, (ii) provisions relating to the procedures for application, and (iii) other considered regulations. In addition, provisions other than those in the WTO Agreement are outlined briefly below.

1) GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS

(1) General Elimination of Quantitative Restrictions (GATT Article XI)

This is the major provision setting forth the general prohibition of quantitative restrictions, and it is applicable to exports as well as imports. There are many exceptions for a variety of reasons (see Chapter 3 "Quantitative Restrictions" 1. Overview of rules, and Chapter 4 "Justifiable Reasons"). As set out in this article, the prohibition does not apply to tariffs and other charges, so the prohibition does not apply to export tariffs (there is a debate, however, as to whether export tariffs fall under the scope of tariff concessions as in GATT Article II. Furthermore, high rates of export

tariff (to an extent that is considered normally unthinkable, for example an export tariff of 3,000%) can also be pointed to as equivalent to quantitative restrictions as defined in GATT Article XI. On the other hand, it could be argued that such an export tariff does not constitute a quantitative restriction since exports are not prohibited so long as the exporter pays the tax. This issue requires further consideration. The definition/significance of tariffs is discussed in Chapter 5 “Tariffs”.)

Furthermore, there are many exception provisions that apply to exports as well as imports.

<Exceptions to GATT Article XI>

Exception in order to meet shortage in domestic supply of substance in question

- GATT Article XI:2(a) Shortage of food or other vital substance*
- GATT Article XI:2(c): Import restrictions on agricultural and fisheries products

*Article 12 of the Agreement on Agriculture contains the obligation of notification when GATT Article XI:2(a) (critical shortage of food or other vital substance) is applied, and an obligation to act considerately towards importing countries.

Other exceptions

- GATT Article XX: General Exceptions (in particular, (b) measures necessary to protect human, animal or plant life or health, (g) measures to conserve limited natural resources, (i) measures to guarantee the availability of vital raw materials for domestic processing industries, and (j) measures for the acquisition or allocation of commodities that are in short supply
- GATT Article XXI: Security Exceptions

Figure II-3-1(Ref) Exceptions to the application of GATT Article XI, and application to export measures

	Application to import measures	Application to export measures
GATT Article XI:2(a): Shortage of food or other vital substance	○	○
GATT Article XI:2(c): Import restrictions on agricultural and fisheries products	○	× (Obligation to notify and take consideration, outlined in Article 12 of Agreement on Agriculture, applies, however)
GATT Article XX: General Exceptions	○	○
GATT Article XXI: Security Exceptions	○	○

(2) Provisions regarding procedure for application

General Most Favored Nation Treatment (GATT Article I: 1)

As with imports, WTO Members must grant most favored nation status to equivalent

commodities from of other Members (see Chapter 1 “Most Favored Nation Treatment”)

Non-Discriminatory Administration of Quantitative Restrictions (GATT Article XIII)

As with imports, restrictions implemented on exports based on exceptional provisions must, in principle, be applied on a non-discriminatory basis (see Chapter 3 “Quantitative restrictions” . Overview of rules).

Fees and Formalities (GATT Article VIII)

Fees and formalities relating to exports must be restricted to the calculated cost of services supplied. The need to restrict the complexity of procedures, and to reduce and simplify the required paperwork, is acknowledged.

Publication and Administration of Trade Regulations (GATT Article X)

All laws and legal decisions, etc., related to international trade must be published immediately on issue. The publication and execution of trade regulations relating to exports are subject to the discipline of this regulation, as one of the conditional regulations of GATT regarding transparency.

Understanding relating to the interpretation of GATT Article XVII

Defines the notification obligations of entities engaging in state trade.

(3) Other significant regulations

Agreement on Safeguards (Article XI: 3)

Prohibits so-called “grey area measures”, in which the government of an importing country requests or extorts the government of an exporting country to impose autonomous export restrictions or similar actions (see Chapter 8 “Safeguards”).

Agreement on TRIMS (Article II: 1)

Prohibits investment related to trade that infringes GATT Article III (National Treatment) or Article XI. A typical example would be export-performance requirements (see Chapter 9 “Trade-related Investment Measures”).

Figure II-3-2(Ref) Comparison between provisions regarding importing and exporting countries with respect to agricultural products

	Import side	Export side
Tariffs	● Concessions to import tariffs on all agricultural products ● Required to reduce through UR agreement ● Safeguard measures in line with rules may be used to raise tariffs	● No concessions regarding export tariffs ● No requirement to reduce export tariffs ● No provisions, so new tariffs and raising of tariffs unregulated
Quantitative restrictions	● Import quantitative restrictions must in principle take the form of tariffs ● Minimum import opportunity (“Minimum access”) defined	● New export restrictions can be set based on the following conditions: 1. Consideration of the impact measures may have on food security in the importing country 2. Prior notification, and agreement with the importing country if required

2. *OTHER PROVISIONS*

1) WTO ACCESSION NEGOTIATIONS

Since the establishment of the WTO, countries negotiating membership have been required to make certain promises relating to export restrictions and are required to strictly observe certain obligations regarding these on admission to the organization.

According to the OECD report TD/TC/WP (2003) 7/FINAL: ANALYSIS OF NON-TARIFF MEASURES: THE CASE OF EXPORT RESTRICTIONS), promises relating to export restrictions can be classified into the following categories.

I. Promise or confirmation of strict adherence to the existing WTO Agreement (regulates adherence, regarding export restrictions, to GATT Articles XI, XII, XIII, XVII, XVIII, XIX, XX, XXI, the Agreement on Agriculture and the Agreement on Safeguards).

II. Emphasis on transparency requirements in GATT Article X

III. Provisions relating to commodities of interest to Member countries (ex. Mongolia: cashmere wool and non-ferrous metals; Albania: hides and leather; Moldova: wine)

IV. Additional requirements beyond the provisions of GATT (ex. China is required to make annual notifications of non-automatic export restrictions, export tariffs can only be imposed on commodities on which China reserved its rights in the Accession Protocol)

Outline of provisions relating to export restrictions on accession to the WTO (note)

Ecuador (acceded 1996)	I. Obligation exceeding those in the WTO Agreement ● Elimination of export restrictions unjustified within the WTO Agreement, which were not declared in the accession Working Group Report at time of accession.
Bulgaria (acceded 1996)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Export tariffs applied in order to reduce critical shortage of food and critical poverty of supply to domestic industry. These tariffs to be applied consistent with the WTO Agreement subsequent to accession. ● Subsequent to acceding to the WTO, export tariffs to be minimized, or their size and scope of application to be changed, and details to be published in official publication.
Mongolia (acceded 1997)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● After acceding to the WTO, applicable conditions for licensing cessation of imports/exports or limiting trade volumes to be adapted to conditions in the WTO Agreement. III. Provisions relating to commodities of interest to existing Member countries ● Maintain export prohibition measures on cashmere wool until 1st October 1996 (subsequent introduction of 30% ad tax value export tariff) ● Elimination of export license conditions for iron and non-ferrous metals by January 1997 IV. Obligation exceeding those in the WTO Agreement ● Progressive reduction in export tariffs, with elimination within 10 years of

	acceding
Panama (acceded 1997)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● After acceding to the WTO, applicable conditions for licensing cessation of imports/exports or limiting trade volumes to be adapted to conditions in the WTO Agreement. ● Subsequent to accession, export controls may only be applied where they are consistent with regulations in the WTO Agreement
Republic of Kyrgyzstan (acceded 1998)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Subsequent to accession, export license controls to be brought in line with conditions in GATT Article XI
Latvia (acceded 1999)	IV. Obligation exceeding those in the WTO Agreement ● Publish all (export) tariff changes in official publication ● Abolish all export tariffs, other than those applied to antiquities, covered by regulations in Appendix 3, by 1st January 2000
Estonia (acceded 1999)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Ensure complete alignment of export control conditions still in existence on accession with the WTO Agreement regulations IV. Obligation exceeding those in the WTO Agreement ● Subsequent to acceding to the WTO, minimize the application of export taxes and bring those still applied in line with regulations in the WTO Agreement and with details published in official publication. Changes to the size and scope of application to be published in official publication.
Jordan (acceded 2000)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations
Georgia (acceded 2000)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations
Albania (acceded 2000)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations ● Subsequent to accession, only export restrictions consistent with the regulations of GATT Article XI may be applied III. Provisions relating to commodities of interest to existing Member countries ● Decision taken on 16th September 1999 to abolish export prohibitions on designated leather and other commodities
Oman (acceded 2000)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations
Croatia	I. Confirmation of strict adherence to obligations related to export

(acceded 2000)	restrictions in the WTO Agreement ● Subsequent to accession, only export restrictions consistent with the regulations of the WTO Agreement may be applied IV. Obligation exceeding those in the WTO Agreement ● As of January 1999, all export allocations, export prohibitions and other forms of export restrictions abolished
Lithuania (acceded 2001)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Subsequent to accession, only export restrictions consistent with the regulations of GATT Article XI may be applied
Moldova (acceded 2001)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● All new policy mechanisms introduced in the future to be completely in line with regulations in the WTO Agreement III. Provisions relating to commodities of interest to existing Member countries ● Interim export restrictions imposed on non-bottled wine, designed to improve the image of Moldovan wine, to be lifted
China (acceded 2001)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● All customs fees and levies, as well as domestic taxes and domestic surcharges (including additional value tax) to be brought in line with GATT ● Strict adherence to regulations in the WTO Agreement with regard to non-automatic export permits and export limits ● Align external trade laws with GATT conditions ● Subsequent to accession, only export limits and permits justified by the regulations GATT may be applied IV. Obligation exceeding those in the WTO Agreement ● Abolition of all levies and surcharges on exported goods, except where the accession agreement specifically details otherwise or the charge is in line with the regulations of GATT Article VIII. (Where tariffs are levied, upper limits for tariffs must be set.) ● The list of export permits/accredited supervising agencies to be kept up to date, and changes to be published in an official publication ● Remaining non-automatic export limits to be notified to the WTO on an annual basis, and to be lifted other than where they are justified based on the WTO Agreement or China's accession agreement
Chinese Taipei (acceded 2002)	No additional obligations in addition to those relating to export restrictions in the WTO Agreement
Macedonia (acceded 2003)	No additional obligations in addition to those relating to export restrictions in the WTO Agreement
Armenia (acceded 2003)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Export license conditions and other export control conditions to be made consistent with regulations in the WTO Agreement
Cambodia (acceded 2004)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Subsequent to accession, export measure laws and regulations, and their

	application, to be made consistent with regulations in the WTO Agreement
Nepal (acceded 2004)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Surcharges, fees, etc., occurring in relation to exports to be made consistent with the WTO Agreement ● Export license conditions and other export control conditions to be made consistent with regulations in the WTO Agreement
Saudi Arabia (acceded 2005)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● All laws, regulations, conditions and surcharges/taxes relating to exports, as well as export control conditions remaining at time of accession, to be made consistent with WTO obligations. IV. Obligation exceeding those in the WTO Agreement ● No export control measures to be maintained, other than those regarding certain exceptional commodities (plants, bred horses and subsidized wheat/flour) ● No controls on the export of wheat/flour, other than subsidized products, and export licenses to be approved ● Any trading company or manufacturing company to be able to apply for an export license without paying a fee ● Reasons for the automatic/non-automatic approval of export licenses to be detailed in appendix ● Export license application procedures to be published on website, and any changes to the details of export restrictions to be published in official publication ● Export prohibitions on scrap metal to be abolished before accession ● Conditions for approval of re-exports of food to be abolished on accession (re-export of subsidized foods to depend on the repayment of the subsidy value) ● Export tariffs may only be applied to leather (level of tariff to be specifically regulated) - Iron and steel scrap may not have export tariffs imposed.
Viet Nam (acceded 2007)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Export restrictions to be brought completely in line with regulations in the WTO Agreement
Tonga (acceded 2007)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● Export restrictions to be brought in line with regulations in the WTO Agreement
Ukraine (acceded 2008)	I. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement ● All future export license requirements, export restrictions, quantitative export restrictions and other measures to be consistent with the WTO Agreement ● Export license fees to be made consistent with GATT Article VIII, both now and in the future IV. Obligation exceeding those in the WTO Agreement

	● No application of staged reduction, increase or other effect equivalent to an increase in export tariffs relating to designated commodities (except in cases justified by GATT exceptions) ● Publication of all changes in policy relating to the application of existing export tariffs ● No application of minimum export price restrictions subsequent to accession ● Abolition of existing export restrictions relating to non-ferrous metals, precious metals other than gold or silver, precious stones other than diamonds, or cereals ● Revision of quantitative export restrictions applied as part of trade bail-out decision process
Russian Federation (acceded 2012)	I. Confirmation of compliance with obligations related to export restrictions in the WTO Agreement ● Export restrictions such as quantitative export restrictions and export licenses, etc. to be brought in line with regulations in the WTO Agreement ● Export tariffs to be eliminated or reduced in accordance with the specified schedule

(Note: Created by METI from regulations relating to export restrictions, export tariffs, etc., included in accession Protocols and accession Working Group reports for each country/region. In addition to these provisions regarding exports, it is important to remember that various types of "Export subsidies" and "State trade", etc., also exist.)

2) PROVISIONS IN BILATERAL/MULTILATERAL AGREEMENTS

Some provisions relating to export restrictions have also been defined in bilateral or multilateral agreements. A look at Japan's EPAs shows the following regulations (for details, see Part III, Chapter 1 "Issues on Trade in Goods", 4. Related Provisions). Furthermore, the Japan-Brunei EPA, which features the first chapter relating to energy ever included in a Japanese EPA, regulates implementing export restrictions in existing contracts, and requires notification in writing when such measures are introduced. Additionally, the Japan-Indonesia EPA and the Japan-Australia EPA include a chapter on energy and mined resources, as well as defining a range of requirements in relation to export and import restrictions (see Part III Chapter 7 on "Energy").

- Export tariffs

Prohibitions on export tariffs	Japan-Singapore EPA, Japan-Mexico EPA, Japan-Chile EPA (with conditions attached), Japan-Brunei EPA (in relation to new tariffs only), Japan-Switzerland EPA, Japan-Peru EPA, Japan-Australia EPA
Working towards abolition of export tariffs	Japan-Philippines EPA

- Export limits

Reconfirming GATT regulations	Japan-Mexico EPA, Japan-Chile EPA

3) OTHER PROVISIONS (MULTILATERAL AGREEMENTS (BASEL CONVENTION, MONTREAL PROTOCOL, WASHINGTON CONVENTION)

The Basel Convention (the Basel Convention on the Control of Transboundary Movements of

Hazardous Wastes and their Disposal), the Montreal Protocol (the Montreal Protocol on Substances that Deplete the Ozone Layer) and the Washington Convention (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) include provisions relating to export restrictions (for the Relationship between the WTO Agreement and trade restrictive measures pursuant to multilateral environmental agreements, see first half of this chapter "(4) Relationship between the WTO agreement and trade restrictive measures pursuant to multilateral environmental agreements")

In addition, "International Commodities Agreements" also have provisions to regulate export regulations. International Commodities Agreements aim to facilitate the sustainable development of emerging economies, through ensuring a stable supply of primary commodities to consumer countries, and avoiding price crashes or sudden fluctuations. Japan is party to several such agreements. Additionally, in the WTO Agreement, GATT Article XX(h) regulates "measures undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved", thereby acknowledging such agreements in GATT's General Exceptions. (To date, however, no such procedures have been approved).

COLUMN: CHINA'S REGULATIONS ON EXPORT OF RARE EARTHS AND THE WTO RULES

In August 2014, the Appellate Body circulated its report of the WTO dispute settlement procedures on China's export regulations (imposition of export duties, quantitative export restrictions, and restrictions on rights to trade) on rare earths[1], tungsten, and molybdenum (DS431, DS432, DS433) requested by Japan, the Unites States and the EU. The Appellate Body fully accepted the claims of Japan, the United States and the EU, and upheld the Panel's determination that China's measures were inconsistent with the WTO Agreements. Thus, the decision that China's export regulations on rare earths, etc. were inconsistent with the WTO Agreements became final.

In recent years, there have been an increasing number of cases where resource-producing countries and emerging countries impose obligations to process/increase the value-added within the country, obligations to give priority to domestic sales, or export regulations on domestically produced resources for various purposes, such as gaining fiscal revenue, protecting domestic industries, and/or securing domestic supply. In such cases, a tense relationship may arise between the resource-producing countries' rights to their industrial policies or natural resources and international rules such as the WTO Agreements. In this column, we will provide a detailed description of the rare earths case, because it is a useful precedential case where the Panel and the Appellate Body made important determinations on the relationship between the rights of resource-producing countries and international rules, and where the WTO dispute settlement mechanism effectively functioned.

1) OUTLINE AND BACKGROUND OF THE RARE EARTH ISSUE

(1) China's Mineral Resources Policy

[1] The name "rare earth" collectively refers to 17 types of elements that are indispensable minerals for the high-tech industry and are used in a broad range of products, including rare earth magnets, abrasive agents for glass substrates of hard disk drives and liquid crystal panel displays, and catalysts for automotive emissions and petroleum refining.

China is one of the world's leading resource-producing countries and has a wealth of natural mineral resources, including energy, minerals such as oil, natural gas, coal, uranium, and geothermal heat, metallic minerals such as iron, copper, lead, and zinc, and non-metallic minerals such as graphite, phosphorus, sulfur, and potassium salt. Among these, China has the richest reserves in the world of coal, tin, antimony, titanium, gypsum, bentonite, sodium sulfide, magnesite, barite, fluorite, talc, graphite, rare earths, tungsten, and molybdenum, etc. Japan relies on China for many of these resources.

China considered mineral resources as an important national strategy, and listed sustainable development and rational utilization of mineral resources in the "National Program on Mineral Resources" in 2001 and the "Program of Action for Sustainable Development in China in the Early 21st Century" in 2003. In particular, rare earths were considered as one of the most important resources[2]; Chinese leader Deng Xiaoping said in 1992 during his Southern Tour that: "The Middle East has its oil, China has rare earth". The United States once produced the largest amount of rare earths in the world, but the low-priced export from China in the 1990s led a number of rare earth mines in other countries to close. As a result, the world's rare earth production was left in the hands of China (as of 2012, China produced 97% of the total amount produced in the world).

Since 1990, China has gradually introduced export regulations on various mineral resources, including rare earths, tungsten, and molybdenum, by setting certain export quotas on individual items (quantitative export restrictions) and imposing restrictions on importing companies such as an export licensing system and minimum capital requirement (restrictions on rights to trade).

China became a WTO Member in 2001. Every year since 2001, WTO Members including Japan, the United States and the EU have been expressing their concerns to China through the Transitional Review Mechanism (TRM)[3] and at the WTO Committee on Market Access/Council for Trade in Goods that China's export regulations on various mineral resources were likely to be in violation of GATT XI.

China also initiated the imposition of export duties, in addition to quantitative export restrictions, on a number of raw materials, including rare earths, tungsten, and molybdenum, in 2006 (see "Export Restrictions" in Chapter 1 "China", Part I). Unlike quantitative export restrictions, imposition of export duties is not generally prohibited under the WTO Agreements. In the case of China, however, at the time of its accession to the WTO in 2001, China committed itself under paragraph 11.3 of its WTO Accession Protocol to eliminate export duties on items other than those listed in Annex 6 of the said Protocol. Many of the export duties introduced after 2006 were imposed on items not listed in Annex 6 (see "Export Restrictions" in Chapter 1 "China", Part I).

(2) Preceding Case (China — Raw Materials I)

The United States, the EU and Mexico requested consultations in June 2009, claiming that China's imposition of export regulations, including export duties and quantitative export restrictions, on nine items, namely bauxite, coke, fluorite, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc, were in violation of the WTO Agreements (China - Raw

[2] See "Column: China's Rare Earth Policy" in Chapter 3, Part II of the 2014 Report on Compliance by Major Trading Partners with Trade Agreements for details.

[3] Section 18 of China's WTO Accession Protocol provides for the establishment of the Transitional Review Mechanism (TRM) for monitoring the execution status of the WTO obligations and annual reviews to be held every year at the respective WTO councils and committees and the General Council (first review within one year after the accession). At the General Council meeting, recommendations can be made to China and other Members. This system will be implemented every year for eight years after China's accession, and the final review will be held on the 10th year (or earlier date decided by the General Council).

Materials I). A Panel was established in December of the same year (Japan participated as a third party).

The Panel circulated its report in July 2011, determining that China's measures were inconsistent with the WTO Agreements, including the GATT 1994 and the WTO Accession Protocol of China. China appealed, but the Appellate Body generally upheld the Panel's ruling in its report circulated in January 2012, and concluded that China's measures were inconsistent with the WTO Agreements. China responded by eliminating export duties and quantitative export restrictions on nine items of raw materials, including bauxite, etc. by January 1, 2013.

(3) Issues Concerning Reduction in Export Quotas and Stagnant Exports of Rare Earths

The export quotas on rare earths set by the Chinese government had been relatively stable at around 50,000-60,000 tons a year prior to 2010. The export quotas on tungsten and molybdenum also remained at stable levels. However, in the list of export quotas on rare earths for the second half of 2010 released by the Ministry of Commerce of China in July 2010, the export quotas on rare earths were significantly reduced. For the whole year 2010, the export quota was 30,000 tons, a reduction of approximately 40% from the previous year.

<Table> Export quotas on rare earths, tungsten, and molybdenum

	Rare Earth	Tungsten	Molybdenum
2006	61,560	15,800	-
2007	60,173	15,400	N/A
2008	47,449	18,828	42,753
2009	50,145	18,526	41,582
2010	30,259	19,490	41,678
2011	30,184	19,925	41,678
2012	30,996	18,967	40,862
2013	30,999	19,066	40,679
2014	31,000	19,404	35,923

Furthermore, export of rare earths to Japan had reportedly been stopped since September 21, 2010 due to strict enforcement of customs procedures by the Chinese government. On the next day, the 22nd of September, the New York Times covered China's embargo on rare earths to Japan as a retaliatory measure against the Senkaku Islands ship collision incident occurred in the same month. The Ministry of Commerce of China promptly responded and held a press conference at which it explained that "China did not have a trade embargo on rare earth exports to Japan", and that China was merely "strengthening procedures to prevent unlawful export". However, the stagnant rare earth exports continued for nearly two more months.

(4) Responses by the Governments of the Respective Countries

The Japanese government used various channels and held consultations with China to discuss the issues of significant reduction in export quotas and stagnant exports of rare earths to Japan. For instance, at the Japan-China High-Level Economic Dialogue held in August 2010 and the courtesy visit to the Chinese prime minister by the Cabinet members at the same occasion, the Minister of Economy, Trade and Industry and the Minister for Foreign Affairs of Japan requested the Deputy Prime Minister and the Cabinet members of China to withdraw the reductions in export quotas. At the APEC meeting in Yokohama in November of the same year, the Minister of Economy, Trade

and Industry of Japan conferred with the Chairman of the National Development and Reform Commission and requested early correction of the issues. In this conference, China replied that they would "soon resolve the issues". Exports of rare earths from China resumed in around mid-November.

In the United States[4], in October 2010 the United States Trade Representative (USTR) initiated investigations on the issue of export restrictions on rare earths under Section 301 of the US Trade Act at the request of the United Steelworkers. In addition, the United States expressed its concerns at dialogues under the U.S.-China Joint Commission on Commerce and Trade (JCCT). China, however, did not change its stance. Therefore, in the annual report on China submitted to the Congress in December of the same year, the USTR clearly expressed its policy that it would "not hesitate to take further actions, including filing a complaint to WTO".

The EU also criticized the reductions in export quotas on rare earths by China, stating in the National Trade Estimate Report on Foreign Trade Barriers released in October 2010, that it was a measure that discriminated against foreign companies and would bring distortions to the market. At forums including high-level economic meetings, etc., the EU expressed its concerns over the reductions in export quotas on rare earths and requested an increase in export quotas.

However, because there had been little improvement in China's responses, Japan, the United States and the EU decided to refer the issues of export duty imposition, quantitative export restrictions, and restrictions on rights to trade on rare earths, together with the issues of similar export regulations on tungsten and molybdenum, to WTO dispute settlement procedures. Japan, the United States and the EU thus requested consultations in March 2012 and requested the establishment of a panel in June of the same year. The Panel was established in July of the same year.

2) Legal Issues regarding Export Restrictions on Rare Earths, Etc. (International Rules on Export Restrictions on Natural Resources)

After World War II, the independence of formerly colonized countries took place one after another. There was an increased trend in so-called "resource nationalism"[5] in these countries, reclaiming ownership/management rights and interests on resources held by multinational enterprises of advanced industrial countries, including former colonizing countries. Due to the nationalization of oil by Iran in 1951, this issue was raised at the 7th UN General Assembly in 1952, and the resolution "Permanent Sovereignty over Natural Resources" was adopted at the 17th UN General Assembly in 1962. According to this resolution, (1) natural resources belong to the possessing country and should be used for the national development and the well-being of the people of the country concerned, (2) a resource-producing country can impose rules and conditions

[4] In the United States, restrictions on rare earths supply and reliance on certain countries for that supply are not only considered economic issues but also are viewed as threats to national security. In the report submitted to the Congress in April 2010, the Government Accountability Office (GAO) pointed out that rare earths were widely used in the national security sector and that it would take up to 15 years to reconstruct the supply chain in the United States, etc. See "Column: China's Rare Earth Policy" in Chapter 3, Part II of the 2014 Report on Compliance by Major Trading Partners with Trade Agreements for details.

[5] The word "nationalism" was originally used mainly to refer to the act of reclaiming the rights and interests seized by advanced industrial countries, mainly formerly colonizing countries, in the colonial days. In recent years, however, cases where emerging countries, etc. impose obligations to process/increase the added value within the country, obligations to give priority to domestic sales, or export regulations for the purpose of gaining fiscal revenue, protecting domestic industries, and/or securing domestic supply, etc. are increasing (for example, see "Export Restrictions on Mineral Resources and Local Content Issue" under "Quantitative Restrictions" of "2. Indonesia" in Chapter 2, Part I), and the word "nationalism" is now used also to refer to these trends.

that are considered to be necessary or desirable with regard to the activities of foreign capital engaged in the resource development, and (3) the profits derived from resource development must be shared in the proportions agreed upon between the investors and the recipient country, etc. Based on the idea of such permanent sovereignty, resource-producing countries potentially have the right to control the resource development and to adjust the proportions for sharing developed resources in addition to the rights to own/hold the interests of their resources.

In contrast, however, the GATT regime established after World War II, and the WTO, which succeeded GATT in 1995, severely limited trade-restrictive measures taken by member countries, in consideration of the fact that the protectionist policies of the respective countries had led to the disaster of the great depression and World War II. For instance, GATT Articles I and III obligate member countries to treat other member countries equally (MFN treatment) and not to treat nationals of other member countries less favorably than their own nationals (national treatment) in respect of trade in goods; and GATT Article XI (general elimination of quantitative restrictions) provides that "No prohibitions or restrictions other than duties, taxes or other charges shall be instituted or maintained by any contracting party", and prohibits trade-restrictive measures through means other than duties, taxes or other charges (see Chapter 3 "Quantitative Restrictions", Part II). Furthermore, there are cases, including that of China, where additional obligations such as elimination of export duties are imposed according to the agreement at the time of its accession to the WTO.

As is clear from the above, there are tensions between the rights of resource-producing countries over natural resources and WTO rules, including GATT, often causing conflicts between resource-producing countries intending to hold/manage their resources from the viewpoint of industrial policies or nationalism, and the countries that depend on imports from these resource-producing countries. While WTO member countries have inherent rights over domestic industrial policies and natural resources, they are obliged to act within the rules of the WTO, to which they have acceded, in exercising such rights. The WTO Agreement provides adjustment provisions, including general exceptions under GATT Article XX, which could justify quantitative restrictions and other trade-restrictive measures when certain requirements are met. In many cases, conflicts of interests between resource-producing countries and importing countries are contested through interpretation of these exception provisions.

In actual cases, many resource-producing countries claim policy objectives such as environmental protection and conservation of natural resources as justification for their trade-restrictive measures such as export restrictions on natural resources. In this context, among the exceptions under GATT Article XX, subparagraph (b) "[measures] necessary to protect human, animal or plant life or health" and subparagraph (g) "[measures] relating to the conservation of exhaustible natural resources" are particularly important. In the rare earths case, China claimed environmental protection and conservation of natural resources as justifications for its export restrictions on rare earths, tungsten, and molybdenum from the very beginning.

Article XX: General Exceptions

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> …
>
> (b) necessary to protect human, animal or plant life or health;

…

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

3) RULINGS OF THE PANEL AND THE APPELLATE BODY ON THIS CASE

Based on the basic framework of international rules described above, China's claim (justifications) regarding the measures at issue in this case, as well as the rulings of the Panel and the Appellate Body and their significance, are explained below.

1) China's Claim

China did not contest that the measures to impose export tariffs on rare earths, etc. violated its commitment to eliminate export tariffs under paragraph 11.3 of the Accession Protocol. However, China claimed that the purpose of the tariffs was to prevent environmental destruction and health hazards associated with the mining of rare earths, etc., and the measures were therefore justifiable as "[measures] necessary to protect human, animal or plant life or health" under GATT Article XX(b) (protection of life and health).

China also admitted that quantitative export restrictions violated the prohibition of quantitative restrictions under GATT Article XI, but claimed that the measures were aimed at preventing unlawful export and illegal mining of rare earths, etc. through quantitative export restrictions, thereby facilitating actions by overseas users to suppress the demand for rare earths, etc. and to procure them from countries other than China. Thus, according to China, they were justifiable as "[measures] relating to the conservation of exhaustible natural resources" under GATT Article XX(g).

2) Rulings of the Panel and the Appellate Body

The Panel and the Appellate Body concluded that both the imposition of export tariffs and quantitative export restrictions on rare earths, tungsten, and molybdenum could not be justified by subparagraph (b) (protection of life and health) or subparagraph (g) (resource conservation) of GATT Article XX.

a) <u>Ruling on Export Duties (Justifiability under GATT Article XX(b))</u>

Export duties are not prohibited under GATT but they are under paragraph 11.3 of the Accession Protocol of China. Therefore, whether or not exceptions under GATT Article XX are applicable to the clauses of the Accession Protocol must be determined before determining whether the requirements of GATT Article XX (b) are met. In the case of China – Raw Materials I, the Appellate Body determined that GATT Article XX did not apply to paragraph 11.3 of the Accession Protocol. The Panel and the Appellate Body in this case also determined that GATT Article XX did not apply to China's export duties on rare earths, etc.

As described above, since GATT Article XX (b) does not apply to paragraph 11.3 of the Accession Protocol, it was not necessary to determine whether China's export duties meet the requirements of subparagraph (b). The Panel, however, discussed this issue and concluded that the requirements were not met. (China did not appeal, and thus the Panel's ruling became final).

More concretely, to be justified as being "necessary to protect human, animal or plant life or health" under GATT Article XX(b), the following conditions must be met: (1) the policy objective of the measure is to "protect human, animal or plant life or health"; (2) for this purpose, the measure is "necessary"; and (3), as the requirements of the chapeau of Article XX require, the

measure does not constitute "a means of arbitrary or unjustifiable discrimination" and "a disguised restriction on international trade".

The Panel first discussed (1) the policy objective above, and acknowledged that serious health hazards could result from water pollution, air pollution, radioactive substances caused by strongly acidic discharged water due to mining of rare earths, etc., and that this issue must be dealt with.

With respect to (2) being "necessary" above, the Appellate Body said the decision framework should focus on (i) the importance of the interests/values to be gained, (ii) the extent to which the measure contributes to the achievement of the policy objectives, and (iii) the degree of trade-restrictiveness of the measure, etc., considered in a comprehensive manner, and then (iv) whether or not other less trade-restrictive measures could be used to obtain the same effects; if such measures existed, the measure should be determined to be not "necessary".[6] Based on this framework, the Panel on the China - Raw Materials I case determined that China's export regulations did not meet the requirements of GATT Article XX(b). (China did not appeal, and the Panel's ruling became final).

The Panel discussed the design and structure of export duties on rare earths, etc. and concluded that the export duties were not "necessary" for the protection of the environment because, first, export duties by definition would only raise the prices in foreign countries, but then lead to lowering the domestic prices, as a result increasing domestic consumption; therefore, the export duties would not limit the mining of rare earth, etc. on the whole and so would not contribute to the objective of protecting the environment. Second, other less trade-restrictive measures such as strengthening environmental standards, a deposit system for environmental recovery, environmental taxes, pollution taxes, and mining regulations, etc. could be used for protecting the environment.

With respect to (3), the requirements of the chapeau, the Panel concluded that China's argument was mere assertion and was not based on sufficient grounds.

b) <u>Ruling on Quantitative Export Restrictions (Justifiability under GATT XX(g))</u>

Whether or not China's quantitative export restrictions could be justified as being a measure "relating to the conservation of exhaustible natural resources" under GATT Article XX (g) also was at issue.

To satisfy subparagraph (g), the following conditions must be met: (1) the measure is one that "relating to" the conservation of exhaustible natural resources, (2) the measure is made effective "in conjunction with" the restrictions on domestic production or consumption, and (3) the measure does not constitute "a means of arbitrary or unjustifiable discrimination" and "a disguised restriction on international trade" under the chapeau of Article XX.

To meet the requirement of (1) "relating to" the conservation of exhaustible natural resources, according to the Appellate Body, in the light of the design and structure of the measure, a reasonable relationship between the means and the objectives must exist and such relationship must be "genuine and real".[7] The Appellate Body of the China - Raw Materials I case adhered to the same position.[8]

The Panel determined in its report that setting the objective of conservation of the environment to control the supply/use of resources was acceptable from the point of view of sovereignty over

[6] Appellate Body Report, Brazil – Retreaded Tyres (2007), para. 178.
[7] Appellate Body Report, US – Shrimp (1998), para. 141.
[8] Appellate Body Report, China – Raw Materials (2012), para. 355.

natural resources, and the objective of sustainable economic growth was also allowed. The Panel stated, however, that such rights did not give WTO Members unlimited discretion, but were subject to limitations of the clauses of GATT, etc., and the objective of "conservation" did not include the allocation and distribution of natural resources both domestically and overseas after the resources were mined.

The Panel then determined that, in the light of the design and structure of the measure, China's quantitative export restrictions and the objective of the conservation of natural resources were not in a substantial relationship. For instance, China claimed that the measure was "relating to" the conservation of natural resources because quantitative export restrictions contributed to the prevention of unlawful export and illegal mining and were effective in promoting the development of resources and alternative products in foreign countries for foreign users. However, the Panel concluded that even if the measures were effective in suppressing the demand for rare earths, etc. in relation to foreign users, it would give favorable allocation of resources to domestic users and create a reverse incentive to increase demand, not leading to the conservation of resources overall. The Appellate Body made the same judgment on this point.

According to the Appellate Body, for the restrictions on imported products to meet the requirement of (2) "relating to", the same or equal restrictions on domestic products need not exist[9], but restrictions on domestic products must exist to maintain even-handedness between imported and domestic products.[10] According to the Panel in China - Raw Materials I, this framework applies not only to import restrictions but also to export restrictions. The Appellate Body determined that the objective of regulations on foreign countries need not be the effective implementation of domestic regulations, but these regulations must work together to contribute to the objective of the conservation of resources.

China claimed that quantitative export restrictions on rare earths, etc. in this case met the requirement of "relating to" because they also regulated the production and consumption of rare earths, etc. for domestic use. However, the Panel determined that China's quantitative export restrictions did not meet the requirement of "even-handedness" because, due to the nature of quantitative export restrictions, domestic users were only constrained by their domestic regulations, whereas foreign users were constrained by their domestic regulations and additional quantitative export restrictions, thereby resulting in a regulatory/structural imbalance between domestic and foreign users. In addition, China claimed that in 2012 quantitative restrictions did not affect foreign users because the export quotas were unfulfilled. The Panel remarked that the market had already been distorted by the long-standing regulations and, even if the export quotas were unfulfilled, it would be inappropriate to justify the measure by such incidental/ex-post circumstances.

China appealed, claiming that the Panel's ruling was wrong because the Panel asked for "even-handedness" as a separate and independent requirement from the requirement of "relating to" and for burdens on domestic users and foreign users to be "evenly distributed". The Appellate Body confirmed the positions of the precedential cases that "even-handedness" and "relating to" were not independent requirements, and domestic and overseas burdens need not be "evenly distributed", but stated that domestic regulations under GATT XX(g) must be "real" restrictions on domestic producers/consumers and were required to be in the relationship to reinforce and complement regulations on foreign countries. It further stated that "it would be difficult to conceive" of a measure that would impose a significantly more onerous burden on foreign users and that could

[9] *Ibid*., 21
[10] Appellate Body Report, US – Gasoline, 20–1; Appellate Body Report, US – Shrimp, para. 144.

still be shown to satisfy all of the requirements of Article XX (g).[11] This deserves attention, as it can be interpreted as effectively denying the possibility of justifying a system that structurally imposes burdens on domestic and foreign users such as quantitative export restrictions under this clause.

Finally, with respect to (3), the requirements of the chapeau of Article XX, the Panel pointed out that China could have adopted other non-discriminatory, less trade-restrictive means for the conservation of resources, such as integration into domestic production volume restrictions, sales volume restrictions, measures to control illegal mining within the country, stronger surveillance at borders to prevent unlawful export, etc., and concluded that China's quantitative export restrictions could not be deemed as not constituting "a means of arbitrary or unjustifiable discrimination" and "a disguised restriction on international trade".

3) Significance of the Panel and the Appellate Body Reports

The Panel and the Appellate Body reports in this case have significance in applying the interpretations of justifiable reasons under GATT Articles XX(b) and (g), namely that, while following the rulings of the precedential cases, how these rules are applied in the context of export restrictions on resources was clarified.

First, as the Panel pointed out, there is no objection that the protection of the environment and conservation of natural resources itself are considered legitimate policy objectives, and countries have discretion in setting these policy objectives. In the case of rare earths, etc., serious problems, including depletion of resources due to overdevelopment of mines and water/air pollution, etc., are indeed occurring. It is therefore justifiable for the Chinese government to deal with these problems. When implementing sustainable resource development and environmental measures, however, regulation of mine development, environmental regulation, suppression of total domestic and international demand, etc. should initially be considered. Neglecting these measures and taking such means as trade-restrictive export restrictions to shift the burden only onto foreign users is an inappropriate solution to the issue. The Panel and the Appellate Body reports in this case clarified that, in light of the regulatory structure, which increases burdens and costs for procuring resources in foreign countries while increasing supply and reducing costs domestically, the policy means of export regulations (export duties and quantitative export restrictions) cannot be justified as a measure "necessary" to protect life or health (GATT Article XX(b)) or "relating to" the conservation of exhaustible natural resources (GATT Article XX(g)).

Second, from the point of view of sovereignty over natural resources, resource-producing countries have discretion in deciding whether to develop resources and how fast the development of natural resources should proceed. As the Panel report pointed out, however, policies such as resource-producing countries controlling the allocation and distribution of natural resources developed for use between domestic and foreign users and distributing resources to domestic users under favorable conditions, are irrelevant to the "conservation" of resources and are hardly justifiable under GATT Article XX(g).

Third, when making the above-mentioned determinations, the subjective claims of resource-producing countries or whether or not the distribution is made based on the current market share is not relevant; rather, the objective design and structure of the measures at issue are used as the primary consideration factors in examinations. The quantitative export restrictions on rare earths, etc. were introduced in 1999. Considering the fact that the competitive environment has been distorted and the demand of foreign users suppressed for such a long time, it is inappropriate

[11] Appellate Body Report, China – Rare Earths, paras. 5.132–136.

to make an ex-post justification that "there is no actual damage to foreign users" based on the current chance surplus being over the current export quotas.

As explained above, the Panel and the Appellate Body reports in this case reconfirmed that (a) the policy-setting of the protection of the environment and the conservation of resources, as well as the rights of countries over natural resources, are not unlimited, but are subject to reasonable limitations under international rules; and (b) resource-producing countries establishing the difference between domestic and foreign users by such means as export restrictions and controlling the allocation and distribution to domestic and foreign users cannot be justified as "protecting the environment" or "conserving resources". These rulings serve as a useful reference when considering the consistency with the rules of protectionist measures, which have been prevalent among resource producing countries in recent years.

4) Compliance Status of China

The Panel and the Appellate Body reports were adopted at the DSB meeting on August 29, 2014. As for the reasonable period of time (RPT) necessary for China to correct the measures at issue to comply with the WTO agreements based on these reports, Japan, the United States and the EU negotiated with China and agreed to set the ending date of the RPT to be May 2, 2015.

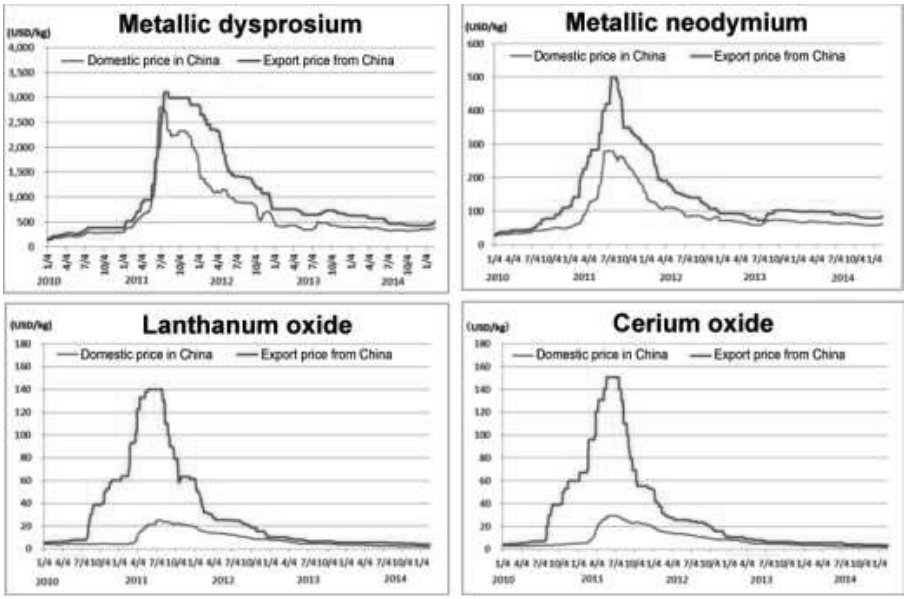
The Ministry of Commerce of China then made public in a the list of items subject to quantitative export restrictions published on December 31, 2014, that quantitative export restrictions on rare earths, tungsten, and molybdenum would be eliminated on January 1, 2015. The Ministry of Commerce of China also announced on April 23, 2015 on its website that China would abolish export duties on rare earths, tungsten, and molybdenum on May 1 of the same year. The export duties were indeed abolished on May 1.

5) Impacts of the Rare Earth Issue on Industries and Economy

Based on the ruling in the WTO dispute case on export regulations on rare earths, tungsten, and molybdenum fully in favor of Japan, the United States and the EU, China eliminated quantitative export restrictions and export duties. However, the impacts on industries and economy triggered by the reduction in export quotas and stagnant exports of rare earths caused by China in 2010 have not yet been completely erased.

As already described, China established its dominant position in the market through concerted low pricing in the 1990s, and now controls approximately 97% of rare earth production in the world. For this reason, reduction in export quotas, etc. by China forced companies in the respective countries to make urgent efforts to disperse suppliers, suppressing demand, and developing mines outside of China, etc.

Furthermore, due to the increase in the amount of rare earths procured by user companies after the resumption of rare earth exports in the fall of 2010, etc., the price of rare earths escalated abnormally. For instance, the price of cerium oxide rose by nearly 30 times from $5/kg in April 2010 to $141/kg in July 2011, and the price of metallic neodymium rose by more than 10 times from $42/kg to approximately $500/kg during the same period. The price of rare earths also rose in China, but relatively gradually when compared to foreign countries. This resulted in further price disparity between China and foreign countries (for instance, the price disparity of lanthanum oxide was approximately sevenfold in July 2011).



(Source: Asia Metal)

Here, the impacts on Japanese industries are examined. Japanese companies have advanced industrial technologies for high-tech products using rare earths and supply important products, including glass substrates of hard disk drives using cerium oxide, catalysts for automotive emissions using cerous carbonate, optical lenses for SLR cameras using lanthanum oxide, and neodymium magnets for motors of automobiles and air-conditioners using metallic dysprosium and metallic neodymium, etc. Japan relied on an overwhelmingly large part of its rare earth imports (approximately 85% as of 2009) from China, and therefore Japanese companies started taking measures such as purchasing raw materials from countries other than China and resource development[12], etc. to deal with the difficulty in procuring rare earth caused by China's measures in this case. In addition, there are sectors of products for which the amounts of rare earths used were reduced by technological innovations. In contrast, some companies decided to produce rare earth-related products in China because certain types of rare earths used for neodymium magnets, etc. are difficult to procure from countries other than China.

The price of rare earths peaked in August 2011, and then gradually dropped, to the pre-2010 level for cerium and lanthanum. However, due to significant changes in the procurement environment and wild fluctuations in the price for the past several years, companies in the respective countries were forced to reconsider suppliers and to readjust business/technology strategies within a short period of time, or were faced with changes in the profitability of investments made in the development of mines in other countries, etc. Even if export regulations were eliminated, it is difficult to recover from the impacts of such readjustments in business strategies, etc. in a short time. It must be noted that the impacts of the confusion caused by measures that are inconsistent with the international rules will continue to exist for some significant period of time.

Even in China, the price of rare earths rose significantly, though not as sharply as in foreign countries. For this reason, Chinese domestic companies could not escape from the impacts of this

[12] For instance, Japan Oil, Gas and Metals National Corporation (JOGMEC) and Sojitz Corporation invested approximately 2 billion yen in a company engaged in rare earth resource development in Australia in 2011.

issue. In addition, efforts made by the respective countries in dispersing suppliers for rare earths and reducing the demand through technological innovations resulted in the situation where the actual amounts exported were lower than the quotas for the last few years.

Meanwhile, no drastic improvements were made with respect to the problems claimed by China such as environmental destruction associated with the mining of rare earths, etc.; these problems remain to be addressed in the future.

6) Concluding Remarks

This case is an important one in which determinations were made on the relationship between the rights of the country regarding its industrial policies/natural resources and the WTO rules, especially as more and more trade-restrictive, protectionist policies based on industrial development objectives or resource nationalism are being introduced by some resource-producing countries. Above all, this case clarified that export regulations such as quantitative export restrictions and export duties (limited to export duties prohibited by the WTO Accession Protocol, etc.) could not be justified for reasons such as the protection of life and health or the conservation of natural resources in light of the structure of the regulation imposing the burden only on foreign users.

In addition, the situation could easily have triggered a heated conflict regarding the interests between resource-producing countries and importing countries. The fact that major countries such as Japan, the United States, the EU and China resolved the issue using transparent and rational WTO dispute settlement procedures and by objective/philosophical discussions based on the rules and not by power or bargaining adds significant value to this case. The WTO dispute settlement procedures have been used for nearly 500 cases for over 20 years since the establishment of WTO in 1995, and are highly reliability with an accumulation of high-quality precedents. This case also showed the effectiveness of this mechanism. China has been the respondent country in 32 cases by 2014, and is respecting the WTO rulings of violations of the WTO agreements.[13] For instance, in the preceding China – Raw Materials I case, China eliminated export duties and quantitative export restrictions for which violations were determined.

Finally, the rare earth issue serves as an example to show that some resource-producing countries imposing export regulations that are inconsistent with the international rules can actually distort the competitive environment and cause great confusion and adverse impacts to the world economy and industries. As some rules were clarified by the Panel and the Appellate Body reports in this case, invocation of arbitrary measures by resource producing countries is expected to decrease, enabling companies of the respective countries to act in a predictable environment.

[13] See “Column: WTO dispute settlement procedures and China's administrative response” in Chapter 1, Part I for details. The Ministry of Commerce of China released a comment concerning the elimination of the export quotas on rare earths, etc. on January 13, 2015: “As an important member of WTO, China has consistently respected the WTO rules and the rulings of the Dispute Settlement Body. China will continue to strengthen its regulation on resource products in a manner consistent with the WTO rules to protect resources and the environment, ensure fair competition, and promote sustainable development.”

C. VALIDITY OF CURRENT PROVISIONS, AND FUTURE RESPONSE

1. VALIDITY OF CURRENT PROVISIONS

The current WTO Agreement contains a certain level of provisions regarding export restrictions. However, it also contains a range of exceptional provisions; based on awareness that the provisions are not always valid with regard to various export restrictions currently in effect, a debate is underway regarding the strengthening of these provisions. Since there are so many complexities to formulate effective rules export restrictions valid among multiple states (such as individual state sovereignty, the retention of resources, environmental conservation, domestic industry protections, and fiscal aspects (generation of income through tariffs), etc.), interested states (usually importing countries) individually implement provisions (in addition to the WTO previsions) to regulate export restrictions by establishing specific rules (promises made on acceding to the WTO or bilateral agreements) in the existing circumstances.

2. THE IMPACT OF EXPORT LIMITS (INCLUDING ECONOMIC PERSPECTIVES)

Various countries' export limits have been relaxed in comparison with earlier times. The fact, however, that no valid provisions exist regarding export restrictions, means that restrictions are introduced and abolished in response to economic conditions, making it difficult for companies to forecast developments. This may, in some cases, be unavoidably restricting the further progress of free trade and investment.

In the first half of this chapter, which deals with quantitative restrictions, as stated in "(3) Economic Aspects and Significance", there is a strong possibility that quantitative restrictions (including those on exports) may in fact damage the long-term development and profitability of the industry in question. Furthermore, since export quantitative restrictions, as with those imposed on imports, specify in advance the quantity and type of exports, as well as the business or company involved, these decisions may become arbitrary and unclear.

In addition, export restrictions cause countries to hesitate regarding the specialization of industries in which they have high productivity, and to protect its own manufacturing industry. In particular, in recent years there has been a trend of resource nationalism mainly among emerging countries to take actions to retain their mineral resources. This trend will result in obstacles to free trade, which raises the standard of welfare throughout the world.

3. FUTURE RESPONSE

Japan emphasized the importance of the transparency of procedures relating to the setting of export limits for multilateral trade at the NAMA negotiations in the Doha Round of Negotiations (NAMA negotiations NTB Proposal: TN/MA/W/15/Add.4/Rev.5; joint proposers Taiwan, Korea, Ukraine, USA). Additionally, Japan has emphasized the need to strengthen regulations relating to export restrictions and limits, and export tariffs, which threaten the stability of food supplies, at agricultural negotiations. Furthermore, at OECD Trade Committee meetings, Japan has continually

emphasized the need for policy discussion regarding the "transparency of regulations relating to trade and investment". In addition, Japan will negotiate with each country to strengthen disciplines on export regulations in individual EPAs, etc.

As stated in the introduction to this report, "In cases where international law has not existed until now it is necessary to establish such", and that "this position is the basic one taken within this report". As was also discussed in the introduction, however, when considering models for new international laws, it is necessary to ensure that "socially beneficial systems are selected, based on an accurate view of the implications of alternative rules and mechanisms to the economic welfare of each state".

D. MAJOR CASES

(1) Japan – Semiconductors (minimum price) (BISD 35S/116)

During the 1980s, based on the Japan-USA Semiconductor Agreement, Japan implemented minimum price restrictions on semiconductors it exported to regions other than the USA. (The export permit system was based on its Foreign Exchange and Foreign Trade Law, introduced with the objective of implementing COCOM restrictions, having been used since November 1986 for the monitoring of semiconductor export prices. Furthermore, at the time, Japan had also implemented semiconductor export monitoring measures, in order to prevent dumping, and was repeatedly giving guidance to exporting businesses not to implement dumping). The EEC (as it was then) stated that Japan's minimum export pricing restrictions on semiconductors were equivalent to an export restriction defined in GATT Article XI. Japan pointed out that the price restriction on exports of semiconductors was not legally binding, and that its measures were not within the scope of GATT provisions, However, the Panel considered that even though the export restrictions were not implemented according to legally binding measures, but rather according to measures comprising unofficial guidance from government, they were within the scope of GATT Article XI: 1, and they were an infringement of GATT Article XI.

(2) Argentina - Leather (DS155)

Argentina's leather industry organization was granted pre-export customs agency rights over leather and other goods, and regulations were published regarding the procedures for leather and other products. According to these procedures, it was regulated that a domestic leather industry representative must accompany all pre-loading export inspections, and that the actual inspection must be implemented by a domestic leather industry representative.

The EU claimed that the presence of a domestic leather industry representative during export customs procedures was in fact equivalent to an export restriction, constituting an infringement of GATT Articles X: 3(a) and XI:1. The panel judged that the measure was an infringement of GATT Article X: 3(a), which requires that laws, regulations and other measures must be implemented fairly and rationally in respect to trade, and that the procedures that regulate the export restrictions were covered by GATT Article XI. (However, since the EU had not proven that the intervention of a domestic leather industry in customs procedures was an infringement of GATT Article XI, the claim that this infringed Article XI was denied). Furthermore, the Panel ruled that although the procedure itself was not a direct restriction of exports, it could have the indirect effect of restricting exports, and was therefore an infringement of GATT Article XI. It added that the fact that the domestic industry and the department responsible for export restrictions could be considered to be

in a "collusive relationship" meant that there were indeed problems in reconciling the situation to GATT.

(3) US – Measures that utilize export limits as subsidies (DS194)

Canada alleged that Section 771(5) of the 1930 Tariff Act (revised by the Uruguay Round Agreements Act (URAA)), as interpreted by the Statement of Administrative Action accompanying the URAA, the Commerce Department's explanation of final rules with regard to countervailing duties, and the US administration's handling of export controls were contributing financially to other countries' export limit measures, and were in infringement of the Agreement on Subsidies.

The Panel indicated that in an abstract way, export limits did not constitute subsidies as defined by the Agreement on Subsidies, and that in this case, the export controls did not meet the conditions given in Article 1.1(a)(1)(iv) of the Agreement on Subsidies of having been consigned or instructed by the government, and that for this reason they could not be considered financial contributions as defined by Article 1.1(a) of the Agreement on Subsidies.

(4) China – Measures relating to the export restrictions on nine raw materials (DS394, 395, 398)

The US/EU had continued discussions relating to the fact that US/EU manufacturers were finding it difficult to source raw materials, but failing to find a satisfactory solution, requested a consultation with China at the WTO in June 2009 regarding China's export limits on raw materials. (Mexico also requested a consultation in August of the same year). Subsequently, in November 2009, the US, EU and Mexico, having consulted with China in both July and September but not having come to a solution, trilaterally requested the formation of a WTO panel. The problem highlighted by the three countries was the quantitative restrictions and export tariffs levied by China on nine substances (bauxite, coke, fluorite, magnesium, manganese, silicon carbide, silicon metal, white phosphorus and lead), and on processed or semi-processed products that incorporated these raw materials. They claimed that the measures infringed the general prohibitions on quantitative restrictions contained in GATT Article XI, and of China's accession agreement with the WTO (which contained promises to abolish export tariffs and establish an upper limit on export tariff rates). In response to this, China claimed that the measures were intended to protect the environment and conserve exhaustible natural resources, and were therefore consistent with WTO rules. In July 2011, the panel report ruled that China's export restrictions and export duties were not consistent with the WTO agreement. Although China appealed in August of the same year, the Appellate Body report, issued at the end of January 2012, overall supports the panel's decision.

The RPT (reasonable period of time) set for this case was December 31, 2012, and since January 2013, the export tax on 7 items -- bauxite, coke, fluorspar, magnesium, manganese, silicon metal, zinc -- was eliminated. Also, the tax rate on yellow phosphorus was changed to fall within the scope set forth in the Accession Protocol. In addition, the export quota for bauxite, coke, fluorspar, silicon carbide and zinc were removed.

(5) China – Measures relating to the export restrictions on three items including rare earths (DS431, 432, 433)

Japan had requested China to remove its export restrictions (export duties, quantitative export restrictions and restrictions on rights to trade) on rare earths, tungsten, and molybdenum through bilateral and multilateral consultations, but the issue had not been resolved. Therefore, together with the US and the EU, Japan requested WTO consultations in March 2012. However, no agreement was reached in the consultations, and thus three countries requested the establishment of

a panel in June of the same year. The panels were established (DS431, 432, 433) on July 23 of the same year. In the panel examinations, Japan, the US, and the EU claimed that (1) China's imposition of export tariffs on rare earths, tungsten, and molybdenum violated Article 11.3 of the WTO Accession Protocol of China; and (2) China's export licensing system (restrictions on rights to trade) violated Article 5 of the Accession Protocol and Accession Working Group Report. China claimed that the measure was justifiable under subparagraphs (b) and (g) of GATT Article XX. On March 26, 2014, the Panel report fully accepting the claim of Japan, the US, and the EU was published. The report concluded that China's export restrictions (export duties, quantitative export restrictions, and restrictions on rights to trade) on rare earths, tungsten, and molybdenum violated GATT and the WTO Accession Protocol of China. China appealed the Panel's ruling in April of the same year. In August the Appellate Body report fully supported the Panel's ruling that (1) provisions of China's Accession Protocol with respect to export duties imposed by China could not be justified by invoking GATT Article XX(b), which provided for the exceptions to the obligations under GATT for a measure necessary to protect environment ; and (2) quantitative export restrictions implemented by China were not a measure "relating to the conservation of exhaustible natural resources" provided for in GATT Article XX(g), and therefore could not be justified by invoking that Article. (See the above column for the detailed content of this report).

The parties agreed to set the reasonable period of time (RPT) for complying with the report as May 2, 2015, and notified to DSB of this agreement on December 8, 2014. China made public, by the list of items subject to quantitative export restrictions published on December 31, 2014, that quantitative export restrictions on rare earths, tungsten, and molybdenum would be eliminated after January 1, 2015. In addition, China announced on April 23, 2015 that it would abolish export duties on rare earths, tungsten, and molybdenum on May 1. It did abolish the export duties on rare earths, tungsten, and molybdenum on May 1 as announced.

COLUMN: RESOURCES/ENERGY AND WTO RULES

1) INTRODUCTION

With the economic development of emerging market countries, demand for resources/energy is expanding and consequently so is trade in resources/energy. Resources/energy is essential for economic growth in each country, and therefore the degree of government intervention is high. Domestic subsidy policies and trade-restrictive measures on them have become global issues. The following facts add complexity to this sector: (1) resources/energy are limited and thus likely to lead to resource nationalism, (2) as large investments sufficient to match expanded demand will be necessary in the future, incentives to promote global fund transfers will be needed, and (3) resources/energy are closely related to climate change issues. Under such circumstances, efforts toward international policy harmonization are being made in the resources/energy sector at international organizations such as IEA.

The GATT/WTO framework advocates non-discriminatory trade liberalization as a means to avoid a scramble for markets and resources. Therefore, the primary objectives of the WTO include trade liberalization of such resources, but in the past resources/energy issues were not discussed in any depth at the WTO.

However, discussions on the resources/energy sector have begun to take place, including the

"Workshop on the Role of Intergovernmental Agreements in Energy Policy"[14] held in 2013. The facts that (1) accessions to WTO are growing among resource/energy producing countries, and (2) dispute cases concerning resources/energy have been increasing in recent years also contributed to the growing interest in this issue at the WTO.[15]

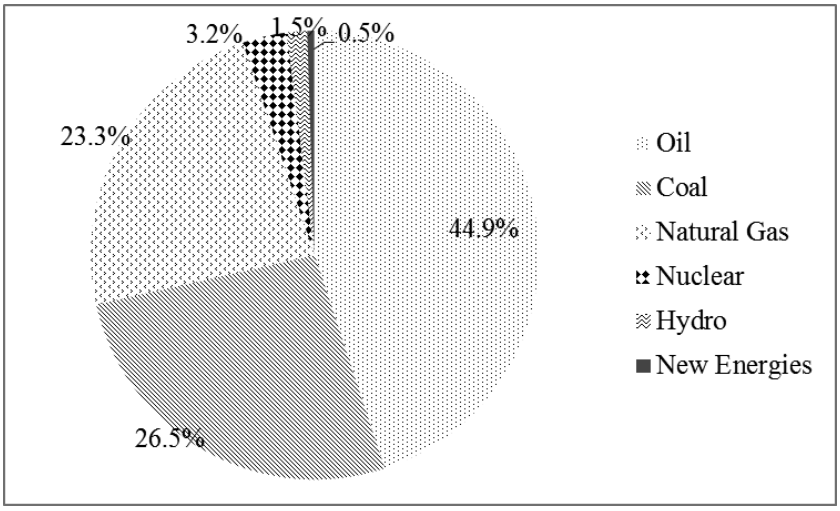
For Japan, a large-scale importing country of resources/energy, the countries of origin of imports are mostly WTO member countries. While resources/energy demand is expected to expand mainly in emerging market countries in the future, Japan needs to secure a certain volume of resources/energy. Therefore, the potential impacts of resources/energy producing countries being bound by international laws such as the WTO agreements are quite significant.

This Column first gives outlines of the situations with Japan, an importing country, in the resources[16]/energy sector and then summarizes what is and what is not regulated under the WTO agreements.

2) Japan as a Large-Scale Importing Country of Resources/Energy

Oil accounts for more than 40% of primary energy supply in Japan, coal for more than 20%, natural gas for more than 20%, and hydro, new energy, geothermal heat and nuclear for the remainder.[17] Japan's energy self-sufficiency rate is only 6% (2013)[18], meaning that it depends on imports for 94% of resources and energy supply.

Figure II-3-4(Ref) Ratios of primary energy supply in Japan



Source: Prepared based on the "2015 Annual Report on Energy", Ministry of Economy, Trade and Industry

[14] Lamy calls for dialogue on trade and energy in the WTO", 29 April 2013. http://www.wto.org/english/news_e/sppl_e/sppl279_e.htm

[15] Saudi Arabia (2005), Ukraine (2008), and Russia (2012) have already acceded to the WTO. At present resource producing countries such as Algeria, Iran, Iraq, Kazakhstan, Libya and Sudan have applied for the accession.

[16] Although it is an important issue to determine the scope of "resources", this Column covers only mineral resources and fossil fuels and does not consider genetic resources, etc.

[17] Chapter 2, Part 2 of "2015 Annual Report on Energy", Ministry of Economy, Trade and Industry

[18] Page 110 of "2015 Annual Report on Energy", Ministry of Economy, Trade and Industry

The countries of origin of imports are, in the order of highest to the lowest, Saudi Arabia (31%), the United Arab Emirates (23%), and Qatar (13%) for crude oil; Australia (21%), Qatar (18%), and Malaysia (17%) for natural gas; and Australia (65%), Indonesia (19%), and Russia (6%) for coal. These countries are all WTO member countries.

Figure II-3-5(Ref) Major countries of origin of imports for Japan (crude oil and natural gas for FY2013, coal for FY2014)

Rank	Imports of Oil			Natural Gas			Coal		
	Country	Share	WTO accession	Country	Share	WTO accession	Country	Share	WTO accession
1	Saudi Arabia	30.7	○	Australia	20.9	○	Australia	64.6	○
2	UAE	22.7	○	Qatar	18.4	○	Indonesia	19.3	○
3	Qatar	13.0	○	Malaysia	17.1	○	Russia	6.0	○
4	Kuwait	7.2	○	Russia	9.8	○	Canada	5.6	○
5	Russia	7.2	○	Indonesia	7.5	○	US	3.4	○
6	Iran	4.6	△	UAE	6.0	○	China	0.6	○
7	Indonesia	3.2	○	Brunei	5.4	○			
8	Oman	2.1	○	Oman	4.8	○			
9	Iraq	1.6	△	Nigeria	4.4	○			
10	Viet Nam	1.5	○	Equatorial Guinea	2.0	△			
	Subtotal	93.8		Subtotal	96.3		Subtotal	99.5	

WTO accession: ○ indicates member countries, △ indicates countries applying

Source: Prepared based on the “2015 Annual Report on Energy”, Ministry of Economy, Trade and Industry

For importing countries of resources/energy, securing stable supplies of resources/energy is the most important issue. If supply of resources/energy is stopped, economic activities as well as normal life cannot continue. Many energy-consuming countries therefore conduct diplomatic activities for securing resources through unified efforts by the government and private companies. Japan has actively been conducting diplomatic activities for securing resources, including a visit to the United Arab Emirates by the Minster of Economic, Trade and Industry and a round of visits to African countries by the Prime Minister in January 2014. In order to secure stable resources/energy supply from other countries, these diplomatic activities are very important. In addition, in parallel with these diplomatic activities for securing resources, understanding the relevance of international rules is similarly important. In particular, expanding energy demand of emerging market countries is expected to change the balance in global demand in the future. Therefore, how the WTO, in which many resources/energy producing countries participate, deals with the resources/energy sector is extremely important.

3) Resources/Energy and WTO Rules

Rising nationalism concerning resources in recent years has resulted in increased interest in an international resources/energy framework. While referring to a Report compiled by the WTO

Secretariat and deliberations from workshops[19], the relationship between resources/energy and WTO rules will therefore be discussed below mainly from the point of view of countries which import resources/energy.

(1) What is Regulated?

Although some WTO agreements, for example the Agreement on Agriculture and GATS, concern specific sectors, no agreement exists that specifically concerns resources/energy. General WTO rules, however, are applicable in the resources/energy sector.

a) Rules that regulate discrimination and export restrictions by exporting countries

First, the rules important to countries importing resources/energy concern those that regulate discrimination and export restrictions by resource/energy producing countries. Natural resources are unevenly distributed globally, and thus the policies and measures of the exporting countries that are resource producers significantly affect both the industrial economy and people's lives in resource consuming countries. This raises the question of whether resource-producing countries can freely decide on import volumes and select the countries to which they will export.

Explicit rules are in place under the WTO agreements concerning this point. Resource/energy-producing countries are generally prohibited from limiting the countries to which they export resources/energy or imposing export restrictions for the purpose of increasing their own domestic supply (GATT Articles I and III, principle of non-discriminatory treatment under GATS Article II, and the general elimination of quantitative restrictions under GATT Article XI). Discrimination and export restrictions by resources/energy producing countries are not acceptable in principle.

The WTO Dispute Settlement Body has already made decisions concerning export restrictions imposed by China on nine raw materials, including bauxite and coke, and on rare earths, tungsten and molybdenum, and China has repealed quantitative restrictions and export tariff in compliance with WTO recommendations.[20]

b) Should the conservation of limited natural resources be considered a justifiable reason?

The conservation of limited natural resources is sometimes provided as the reason for export restrictions regarding natural resources. The claim is typically that exporting resources without any limitation could result in their exhaustion, and thus quantitative restrictions on their export are necessary. The conservation of natural resources was in fact claimed to be the reason for export restrictions regarding raw materials being produced by China.

GATT Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources". This provision lists measures "relating to the conservation of exhaustible natural resources" as being exceptions to the principle of non-discriminatory treatment and quantitative restrictions regarding exports. Merely stating the objective to be "conserving

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[19] The WTO Secretariat selects a specific topic every year and compiles the "World Trade Report". The topic of the "World Trade Report 2011" was "Trade in natural resources". The Report analyzed five characteristics of trade in natural resources and markets and presented relevant WTO rules. World Trade Organization, World Trade Report 2010, Trade in Natural Resources, (WTO Publications, 2010). In addition, the WTO Secretariat held a "Workshop on the Role of Intergovernmental Agreements in Energy Policy" in April 2013 that discussed existing international rules on trade and investment in energy. Discussions at the Workshop are available to the public on the website of the WTO Secretariat (as of February 2014).
http://www.wto.org/english/tratop_e/envir_e/wksp_envir_apr13_e/wksp_envir_apr13_e.htm

[20] China – Measures Related to the Exportation of Various Raw Materials (DS394, DS395, DS398) and Measures Related to the Exportation of Rare Earths, etc. (DS431, 432, 433)

natural resources", however, does not suffice when invoking this provision. Meeting the requirements of GATT Article XX(g) necessitates that (1) the policy objectives of the concerned measure must be the "conservation of limited natural resources", (2) the measure must be a measure "relating" to the conservation of limited natural resources, and (3) the measure must be implemented alongside limitations on domestic production or consumption.[21].

In the case of export restrictions on raw materials by China, China's measure was first examined in detail and its justification under GATT Article XX(g) was then denied. From the point of view of resource conservation, any export regulation that discriminates between a Chinese and foreign technology transfer is considered unnecessary, and the objectives are achievable via (non-discriminatory) mining regulation instead. In the case of the export restrictions on raw materials by China, a mining regulation was not implemented within China, and in fact the volume of the concerned resources mined actually increased after implementation of the export regulation measure. The policies and measures of resource producing countries cannot thus always be justified even with the objective of "resource conservation".

c) Rules for regulating discrimination and restrictions during transportation

Once exports from resource/energy producing countries have been ensured, the next concern regards whether or not they can be safely transported to consuming countries. A similar problem to that which arose in the gas dispute between Russia and the Ukraine that took place in 2006 and 2009 can occur when transporting resources/energy. The above-mentioned dispute involved Russia ceasing to supply natural gas to the Ukraine, which reduced the supply of natural gas flowing through pipelines from Russia to the EU (which passed through Ukrainian territory).[22] This then resulted in a situation where resource/energy consuming countries of the EU were faced with difficulties in supplying heat in the middle of winter.

The gas dispute between Russia and the Ukraine described above was not addressed as an issue by the WTO Dispute Settlement Body because it took place before Russia's accession to the WTO. If the same situation were to occur today, however, could it be raised as an issue under the WTO agreements? Should resource/energy consuming countries also aim to eliminate any discrimination and restrictions during transportation?

With regard to this point, GATT Article V provides for "freedom of transit". WTO member countries are prohibited from practicing any discriminatory treatment based on the country of origin or destination, or imposing any unnecessary delays or restrictions. The provisions of this Article generally assume transportation via railway or ship, but there is no explicit wording or precedent that excludes pipelines. Any discrimination, delay, or restrictions in the course of transporting resources/energy could therefore be raised as an issue under the WTO agreements.

d) Should the activities of state-owned enterprises be regulated?

In many cases, businesses in the resources/energy sector are managed/operated by state-owned enterprises. In fact, according to some statistics, approximately 70% of oil deposits and approximately 50% of natural gas deposits are owned by state-owned enterprises.[23] There is a general misunderstanding that WTO Agreement obligations are imposed on the governments of member countries, while discrimination and restrictions made through state-owned enterprises are not covered by the WTO agreements.

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[21] See Chapter 4 "Justifiable Reasons", Part II for details of this exception.

[22] "Ukraine gas row hits EU supplies". BBC. 1 January 2006. http://news.bbc.co.uk/2/hi/europe/4573572.stm

[23] 2013 Survey on International Demand and Supply System of Oil (survey on the energy policy trends, etc. of various countries)

However, GATT Article XVII stipulates that state trading enterprises may not practice any discriminatory treatment regarding imports and exports relating to the country concerned or impose any quantitative restrictions on exports and imports.[24] Certain trade and investment rules also exist for state-owned enterprises other than state trading enterprises, and WTO member countries have certain obligations regarding their respective state-owned enterprises.

WTO member countries are obligated to ensure that their state-owned enterprises "act in a manner that is consistent with the general principles of non-discriminatory treatment".

e) Exports not reflecting the cost of their production as an act resulting in a monopoly

Should the case where a resource/energy producing country maintaining its exports at a low price that does not reflect their cost of production be considered an attempt to monopolize the resources/energy, and thus be raised as an issue concerning the WTO agreements? For instance, if a country continues to supply mineral resources to the global market at a low price, the mines of other countries may not be cost competitive and thus forced to close. Should this be challengeable as an unfair practice at the WTO?

The WTO agreements have provisions that allow for anti-dumping (AD) measures.[25]. An importing country is permitted to impose AD duties where it is demonstrated that the export price of a product is less than its selling price destined for consumption in the exporting country and this harms competing industries in the importing country. There is no rule that is consistently useable against low-priced exports because the comparison is made with the domestic selling price. Dumped imports, however, can be counteracted using anti-dumping duties. If no domestic industry exists in the importing country, however, utilization of the AD remedy can be difficult, and thus the utilization of extraterritorial application of competition laws needs to be discussed.[26]

f) Industrial policies regarding new energy sources

Finally, industrial policies with respect to new energy sources will be considered. In order to counter climate changes and provide a more diverse range of energy sources many countries are promoting new types of energy sources, including solar and wind power, etc. The promotional measures involved tend to take the form of subsidies, with some of the subsidies requiring the use of domestically-produced goods. The Feed-in Tariff (FIT) System for Electricity implemented by the Province of Ontario in Canada actually required the use of photovoltaic or wind power generation equipment in which at least a specific percentage (including the assembly and procurement of raw materials) had to be value-added within the province.[27]

The WTO agreements prohibit local content requirements (requiring locally-produced goods to be purchased or used) that thereby enforce discriminatory treatment between imported and domestic products (GATT Article III, TRIMs Article 2). In the above-mentioned Province of Ontario case, the issue of exports of solar panels from Japan being unfavorably treated arose because electricity producers were required to use power generation equipment procured by the Province of Ontario to a specific extent to enable their electricity to be purchased. In this case, Canada was determined to have violated the WTO agreements.

It should also be pointed out that any such local content requirements could result in more expensive electricity and negatively affect countering climate change. In addition, the issue of a

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[24] See Column "Rules for the realization of fair competition concerning state-owned enterprises" in Chapter 7, Part II for regulations on state-owned enterprises.
[25] See Chapter 6 "Anti-Dumping Measures", Part II for anti-dumping (AD) measures.
[26] "International Economic Activities and Competition Laws" are described in Addendum-2 of Part II.
[27] See Chapter 10 "Canada", Part I.

lack of accountability exists because of vagueness regarding the support for the industries concerned resulting from local content requirements, and the degree to which subsidies actually reach the relevant producers.

(2) What is Not Regulated?

What is regulated by WTO rules with respect to resources/energy is as outlined above. However, this only covers a portion of resource/energy issues. What is not regulated is described below.[28]

a) Ownership of natural resources

No provision of the WTO agreements concerns the ownership of natural resources. The ownership of natural resources is stipulated in various conventions and customary international laws as an issue of territorial sovereignty. The respective nations have exclusive jurisdiction over lands, waters, and continental shelves within their regions.

The issue of the ownership of natural resources, in relation to the interests of resource-producing countries and foreign investors, has also been discussed at the United Nations (UN). In 1962, the UN General Assembly adopted "Permanent Sovereignty over Natural Resources". For example, cases of nationalization by resource-producing countries and protection of international investments are challenged not at the WTO but at the International Court of Justice (ICJ) or the International Center for Settlement of Investment Disputes (ICSID), etc.[29]

Therefore, the extent to which resources are mined has not been challenged in WTO disputes. WTO rules do not concern mining restrictions on resources by resource-producing countries, but do concern discriminatory distribution of mined resources. One may argue that resource-producing countries have the right to consume all of their resources domestically. However, upon accession to WTO, each country agrees to the general principle of non-discrimination and, because of the principle of "pacta sunt servanda (binding agreement)", the non-discrimination principle applies to WTO member countries.

b) Prices of resources/energy

The WTO agreements do not provide rules regarding the prices of resources/energy. An example of an international framework on prices of specific products, etc. is the International Commodities Agreement.[30] It aims to stabilize the prices of primary commodities, etc. through the participation of producing countries and consumer countries. Under the WTO agreements, this is considered to fall under the exception of GATT Article XX(h).

On the other hand, a dual pricing system that sets different prices between domestic markets and export markets has been discussed at the WTO. In the WTO accession negotiations of Russia, the dual pricing system of natural gas was discussed.[31] It was also pointed out in the negotiations of rules on subsides that if domestic prices of resources are lower than export prices, unreasonable benefits are granted to downstream industries using those resources when compared to foreign

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[28] Indication of not being regulated by WTO rules in this Report does not establish any position as to whether WTO rules should be established or not.

[29] For example, pages 717-718, Chapter 5 "Investment", Part III of the "2013 Report on Compliance by Major Trading Partners with Trade Agreements", Mobil Corporation, Venezuela Holdings, B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27.

[30] See "Column: International Commodities Agreements" in Chapter 3, Part II of the "2013 Report on Compliance by Major Trading Partners with Trade Agreements" for the International Commodities Agreements.

[31] Russia committed with regard to pricing of energy that "producers and distributors of natural gas in the Russian Federation would operate on the basis of normal commercial considerations, based on recovery of costs and profit".

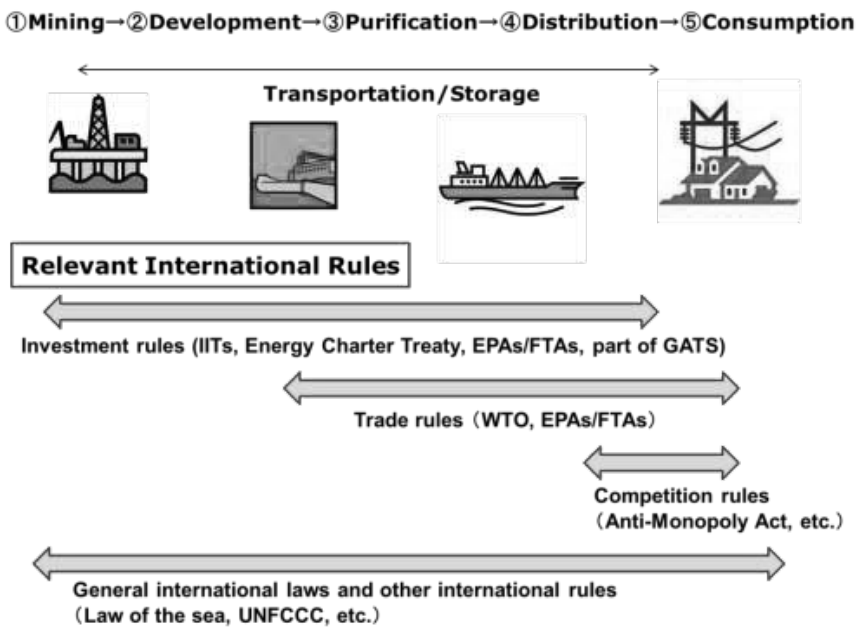
competitors. Although rules on dual pricing systems may be established in the future, at present no WTO rule exists that focuses on dual pricing systems.

c) Others (Economic Partnership Agreements, Bilateral Investment Treaties, Energy Charter Treaty)

International laws that regulate what is beyond the content of WTO rules concerning resources/energy include multilateral Economic Partnership Agreements (EPAs) and Bilateral Investment Treaties (BITs), and Energy Charter Treaty (ECT). Some EPAs provide elimination of export duties.[32] In addition, while no rules concerning comprehensive international investments exist in the WTO agreements, provisions concerning the protection of international investments exist in BITs and the ECT. The amount of international investments on resources/energy is extremely large, and thus the significance of the provisions that protect such international investments is large.

The relationships between the resources/energy sector and WTO rules are as outlined above. Simplified relationships of the portions regulated by WTO rules and portions regulated by other international rules, using the flow of resources/energy as an example, are given in the Figure below. The upstream portions concern the ownership of resources/energy and are thus regulated by general international laws such as law of the sea. Investment rules of BITs, ECT, and EPAs/FTAs, etc. concern a broad range of processes from mining to distribution. Trade rules such as the WTO agreements and EPAs/FTAs concern cross-border exports. Downstream activities such as distribution of resources/energy relates to competition law (the Anti-Monopoly Act of each of the respective countries). Finally, consumption of resources/energy relates to other international rules such as the United Nations Framework Convention on Climate Change (UNFCCC), etc.

Figure II-3-6(Ref) Flow of resources/energy (an example) and related international rules



[32] The WTO does not require elimination of export duties; however, some newly acceded member countries, including China, are committed to eliminate export duties.

(3) Effectiveness of the WTO dispute settlement procedures

The areas to which WTO rules are applicable are outlined above. However, challenging violations to the WTO agreements requires utilization of the WTO dispute settlement procedures. Seeking problem resolutions through the WTO Dispute Settlement Body in Geneva based on WTO rules has the effect of avoiding trade issues developing into political issues. In addition, in the WTO dispute settlement procedures, if recommendations are not implemented, the complainant country may take countermeasures such as terminating tariff concessions (raising tariffs), etc. to promote implementation. WTO rules have a system to ensure the effectiveness, and this is the reason that they are actively utilized.

However, the WTO dispute settlement procedures take time, approximately two years from the occurrence of the problem to the resolution.[33] Considering this, it is not practical to seek resolution through the WTO in cases where the imports of resources/energy have been stopped, for example. Further, recommendations of the WTO dispute settlement procedures concern future activities. Monetary compensation for past injuries does not exist. WTO member countries are obligated to eliminate the measures that are determined to violate the WTO agreements, but they are not liable for the injury.

These limitations do not nullify the effectiveness of WTO rules, though. Once a problem occurs, negotiations must take place between the parties, and the existence of the WTO rules makes a big difference in such cases. In addition, even if it takes time to obtain a resolution through WTO, it is still better than not being able to reach any agreement between two parties. Furthermore, utilization of the WTO dispute settlement procedures will clarify the relationships between WTO rules and trade in resources, and this is expected to inhibit similar actions from occurring in the future.[34]. The case of China's export restrictions on raw materials was a good example where the WTO dispute settlement procedures were used to resolve the problem for this reason.

4) Efforts of International Organizations – Less Strict Frameworks without Legal Binding

Finally, international frameworks that are considered to have impacts on actions of the respective countries in the resources/energy sector despite having no legal binding power.

(1) G-20 Monitoring Report on Fossil Fuel Subsidies

The first example is an agreement to phase out fossil fuel subsidies over time by the G-20 countries. To date many countries have provided a large amount of subsidies for fossil fuels such as coal and oil, etc. However, this practice is now being recognized as undesirable both from the environmental and economic/financial points of view. This issue was first raised in the G-20 Leaders' Declaration of 2009, and a statement "We reaffirm our commitment to rationalize and phase out inefficient fossil fuel subsidies"[35] was included in the G-20 Leaders' Declaration of 2013. In addition, with regard to this Declaration, monitoring reports are compiled based on data provided by international organizations such as IEA, etc. These high-level political declarations have no legal binding power, but are considered to have impacts on the policies of the respective countries.

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[33] See Figure II-17 in Chapter 17, Part II for the flow of the WTO dispute settlement procedures.
[34] For WTO member countries, being recognized as a country not complying with international rules is undesirable.
[35] Saint Petersburg G-20 Leaders Declaration (provisional translation) September 6, 2013 (website of the Ministry of Foreign Affairs)
http://www.mofa.go.jp/mofaj/gaiko/page3_000373.html

(2) Country Reviews on Energy Policy by IEA

The International Energy Agency (IEA) reviews energy policies mainly of IEA member countries and publishes proposals that are compiled every four to five years. This is intended to provide advice regarding such actions as improving energy efficiency or increasing the percentage of reusable energy, etc. Proposals by international organizations such as IEA have the effect of helping concerned countries carry out domestic reforms more smoothly and are considered to have certain impacts in the formulation of energy policies by member countries.

(3) Other International Consultation Frameworks

International consultation frameworks on resources/energy other than the International Energy Agency (IEA) include the International Energy Forum (IEF) and the International Renewable Energy Agency (IRENA). The United Nations Framework Convention on Climate Change (UNFCCC) deals with environmental issues that are closely related to resources/energy issues. Agreements through these international consultation frameworks have no strict legal binding power, but are considered to have certain impacts on the actions of the respective countries.

5) CONCLUSION

The relationships between the resources/energy sector and WTO rules have not been discussed in the past, but such discussions are expected to increase in the future in such areas as export restrictions by resource producing countries and measures to give priority to domestic use of usable energy, etc.

The WTO dispute settlement procedures are the system used for resolving problems in an objective manner based on internationally agreed-upon rules. In this Column, the areas in which WTO rules can be used as an alternative resolution method are discussed. Although the WTO dispute settlement procedures have some limitations, understanding WTO rules is necessary in determining how to proceed with diplomatic negotiations.

In addition, in areas in which general international rules do not exist, less strict frameworks that have a certain degree of impact exist. Fully utilizing these international consultation frameworks in combination with the existing international rules is considered important.

References: Descriptions Related to Resources/Energy in the Report on Compliance by Major Trading Partners with Trade Agreements

(Individual Measures)		
Part I	China	Export Restrictions on Raw Material
	Indonesia	Export Restrictions on Mineral Resources and Local Content Issue
	The United States	Regulation on Corporate Average Fuel Economy (CAFE)
	European Union	Framework Directive on Eco-Design Requirements for Energy-using Products (EuP)
	Canada	Local Content Requirement Concerning the Feed-in Tariff System for Electricity
	India	Local content requirements (domestic-product preferential subsidies) on solar power electricity facilities
(Individual Sectors)		
Part II	Addendum-1	Trade and Environment
Part III	Chapter 5	Investment (The Energy Charter Treaty)

	Chapter 7	Descriptions of the energy sector in the Economic Partnership Agreements
(Feature Article)		
Part II	Chapter 6	Subsidies (Rules concerning state-owned enterprises)