CHAPTER 6

ANTI-DUMPING MEASURES

A. OVERVIEW OF RULES

1. BACKGROUND OF RULES - WHAT IS ANTI-DUMPING?

"Dumping" in the WTO Agreements is defined as a situation in which the export price of a product is less than its "normal price" (which usually represents the price for domestic sale in the exporting country). A discount sale, in the ordinary course of trade, is not dumping. Where it is demonstrated that the dumped imports are causing injury to the competing industry in the importing country within the meaning of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement"), based on the investigation conducted by the importing country under AD Agreement, the importing country can impose anti-dumping (AD) measures to provide relief to domestic industries injured[1] by dumped imports.

The amount of AD duty is determined by the margin of dumping (the difference between the export price of the product and the domestic selling price of the like product in the exporting country (normal value)) as the upper limit. By adding the margin of dumping to the export price, the dumped price can be rendered a normal value.

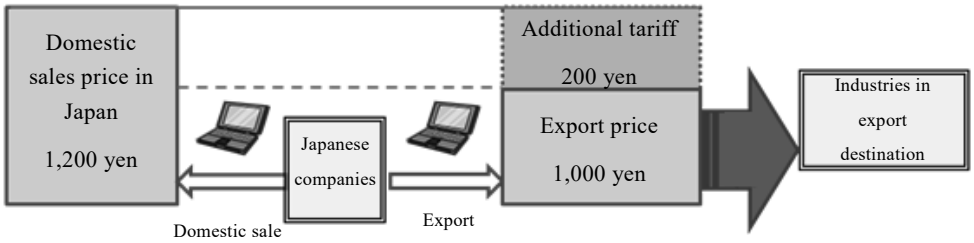
When there are no sales in the domestic market (for example, the like product is sold to companies with capital ties at a special price, or exporting countries are under the control of the government of the exporting country, etc.) or when, because of the low volume of sales in the domestic market, etc., such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country or a "constructed normal value" as a normal price (Article 2.2 of the AD Agreement). A "constructed normal value" is the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Because AD measures are one of exceptions to the MFN treatment rule (see Chapter 1, Part II), the utmost care must be taken when applying them. However, unlike safeguard measures (*see* Chapter 8), which are also instruments for the protection of domestic industries, the application of AD measures does not require the government to provide offsetting concessions as compensation or otherwise consent to countermeasures taken by the trading partner. This has increasingly led to the abuse of AD mechanisms in foreign countries. For example, AD investigations are often initiated based on insufficient evidence and AD duties may be continued without meeting the requirements for the continued imposition.

In light of this situation, one of the focal points of the Uruguay Round negotiations was to establish disciplines to rein in the abuse of AD measures as tools for protectionism and import

[1] "Injury" exists where there is either: (1) material injury to a domestic industry; (2) threat of material injury to a domestic industry; or (3) material retardation of the establishment of such an industry (Article 3 of the AD Agreement).

restriction, which go beyond the definite purpose of "removing the injury effect of the dumped imports to the domestic industry". Although considerable progress was achieved during the Uruguay Round and Doha Round negotiations, many countries still express concern over abusive practices.



2. *Overview of Legal Framework*

1) Overview of International Rules

The international AD rules are provided under: (1) GATT Article VI and (2) the AD Agreement. Under the Uruguay Round negotiations, the Tokyo Round Anti-Dumping Code was revised to become the new AD Agreement.

The following section summarizes the WTO Agreement regarding AD measures.

(1) GATT Article VI

The General Agreement on Tariff and Trade (GATT) 1947, Article VI (Anti-dumping and Countervailing Duties) defines AD duty as follows:

Article VI

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

   (*a)* is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

   (*b*) in the absence of such domestic price, is less than either

      (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

      (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

   Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

(2) AD Agreements

Initially established as a result of the Kennedy Round (signed in 1967, effective in 1968), the AD Agreement has undergone several revisions, including during the Tokyo Round (signed in 1979, effective in 1980) and the Uruguay Round (signed in 1994, effective in 1995).

The current AD Agreement covers the full spectrum of AD investigations, from the initiation of an investigation to the application of measures. The following summarizes some of the key elements of an AD investigation:

Figure II-6-2 Flow of AD Investigations

Application for AD Investigation

- An application must be submitted on behalf of a representative portion of the domestic industry (the domestic producers whose collective output constitutes 25 per cent or more of the total domestic production of the like product produced by that portion of the domestic industry that expresses support for the application, and at the same time whose collective output exceeds that of the domestic producers expressing opposition to the application.)
- An application must include evidence of facts regarding the dumped imports and the injury to the domestic industry.

Decision to Initiate AD Investigation

- Determination of dumping (compare net prices between "export prices" and "normal values" (domestic selling prices, third country prices or constructed normal values))
- Determination of injury (imported volume of dumped products, price changes, effects on domestic prices, and injury to domestic industries)
- Causal relationship (consider the causal relationship between injury and dumped import and factors other than the dumped imports causing injury)

Preliminary Determination ..... Provisional Measures

Provisional measures may be applied only if there is:

- Proper initiation and public notice of investigation (providing adequate opportunities for interested parties to submit information and make comments).
- Preliminary determination on dumping and injury to a domestic industry.
- Determination that provisional measures are necessary.
- Application no sooner than 60 days from the date of initiation.
- Generally no application in excess of four months (six months if requested by exporters or six - nine months when authorities, in the course of investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury.)

..... Disclosure of Essential Facts

- Authorities shall inform the interested parties of the essential facts under consideration which form the basis for the decision whether or not to apply definitive measures.

..... Price Undertaking

- After a preliminary determination is made, a price undertaking can be accepted from exporters, thereby suspending or terminating the investigation.

Final Determination

- Authorities shall publish a determination on imposing AD duties and detail the amount of the duties.
- Authorities must provide reasons and facts supporting a determination of dumping margin and injury
- Authorities must provide responses to comments submitted by interested parties.

REFERENCE: POINTS OF ATTENTION IN RESPONDING TO AD INVESTIGATION PROCEDURES OF OTHER COUNTRIES

1. INTRODUCTION

AD investigations must be concluded within one year after their initiation (Article 5.10 of the AD Agreement). One year may seem a long time, but the amount of work that needs to be done by exporters or producers in exporting countries subject to investigation (hereinafter referred to as "companies subject to investigation") is quite large, and in actuality companies subject to investigation are pressed for time in many cases. In order to assist Japanese companies that become subject to investigation in making decisions, how they should respond at each stage of investigation is summarized below.

Under international law, WTO member countries need to conduct AD investigations in conformity with obligations/procedures set forth in the WTO AD Agreement. However, AD measures/investigations conform to and are conducted based on domestic laws. Therefore, responding to AD investigations requires knowledge of domestic laws of countries concerned, and companies may need to have local lawyers to represent and advise them.

In addition, some points that they need to pay attention to as exporters or producers in exporting countries in responding to AD investigation procedures of other countries are described below. The basic procedural flow of AD investigations is based on the AD Agreement, but usually more detailed procedures, etc. are provided in domestic laws of the respective countries, investigations follow the domestic laws.

2. OVERALL RESPONSE BY COMPANIES SUBJECT TO INVESTIGATION

Under the AD Agreement, the investigating authorities collect necessary information from companies subject to investigation and other interested parties through questionnaires and on-the-spot inspections, and interested parties are given opportunities to present evidence and express their opinions to defend their interests. As a general rule under the AD Agreement that all interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and opportunity to present in writing all evidence (Article 6.1 of the AD Agreement), opportunity for the defense of their interests (Article 6.2 of the AD Agreement), and opportunities to see all information that is used by the authorities and to prepare presentations on the basis of this information (Article 6.4 of the AD Agreement). AD measures are conducted based on the information (general information about the company concerned, information on export transactions and domestic sales transactions, etc.) regarding the transactions oft interested parties actually exporting the products subject to investigation. Thus, the responses by the companies subject to investigation will initially be the basis for responding to AD investigations. Companies subject to investigation can utilize these provisions to actively make claims or present evidence to defend their interests in AD investigations/measures. However, companies subject to investigation are not obliged to respond to investigations. They have the option not to respond to investigations in consideration of the costs/burdens required for responding to investigations. In this case, however, as described below, they may suffer disadvantages with determination being made on the basis of the "facts available", etc. Companies subject to investigation must consider such disadvantages and burdens/costs required for responding to investigations, and then make decisions whether or not to respond, or the extent to which they respond, to AD investigations.

Although procedures of AD investigations are based on domestic laws, WTO member countries are at the same time obligated to conduct investigations in accordance with the provisions of the AD

Agreement. Therefore, in making claims or presenting evidence in the process of investigations, claiming that procedures and decisions of the investigating authorities are inconsistent not only with domestic laws but also with the AD Agreement may be effective. Thus, whether or not claims based on the AD Agreement are possible may discussed in the course of investigation procedures. In particular, if companies subject to investigation intend to request the Japanese government to settle the issue in a WTO dispute settlement proceeding, they should decide how to respond to investigations from the point of view of making the proof of such issue easier ((see 4. 2) "Utilization of WTO dispute settlement procedures" for details).

In addition, if more than one Japanese company is subjected to investigation, the requirements regarding the injury to domestic industry in the country subject to investigation and causal link are discussed/determined, not based on the dumping margins calculated for each company, but based on the overall exports from Japan. Therefore, when making a claim such that factors other than dumping exports are the actual causes of injury to the domestic industry, for example, if the contents of the claims are different from company to company, they will not be effective.

3. Response in Each Stage of Procedures

1) Before the Decision to Initiate Investigation

AD investigations are generally initiated upon a written application by the domestic industry (Article 5.1 of the AD Agreement). An application for initiating an AD investigation requires submission of an application form that includes evidence of dumping, injury, and a causal link (Article 5.2 of the AD Agreement). The authorities that receive the application shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation (Article 5.3 of the AD Agreement).

The authorities are not allowed to publicize the receipt of the application or whether or not an investigation can be initiated until a decision has been made to initiate an investigation (Article 5.5 of the AD Agreement). However, information on the application for the initiation of an investigation may sometimes leak, and some companies (usually competitors) are eager to obtain such information.

2) After the Decision to Initiate Investigation

A notice is published in the initiating country's official gazette (such as the Federal Register in the US) when a decision is made to initiate an investigation (and an announcement commonly is posted on the website of the investigating authorities). In addition, notifications are made to interested parties, including exporters, producers, importers, etc., that are known to the government of the exporting country (usually by the embassy in the exporting company) or the investigating authorities. At this time, responses by companies subject to investigation officially begin. Typical work to be done after the decision to initiate investigation is as follows:

(1) Close examination and discussion of the content of the application form and attached evidence

As described above, the application form contains the details of AD duty requirements, and evidence is attached. Companies subject to investigation can therefore understand the content of, and reasons for, the application by closely examining the content of the application form and evidence received from the domestic industry requesting initiation of an AD investigation, and make objections as required.

(2) Verification of Scope of Products Subject to Investigation

The scope of products subject to investigation can be identified by referring to the determination

to initiate the investigation and the application form. Accordingly, the scope of products equivalent to domestic products can also be identified. Companies subject to investigation need first to precisely understand which products are subject to investigation and to collect basic information on these products. In the subsequent responses to the investigation, in particular, information on export price, export volume, and market share in the importing country, etc. will be important.

Sometimes the scope of products subject to investigation is misstated (for example: HS codes (tariff schedule) of the products that are not subject to investigation are included as the HS codes of the products subject to investigation). In case of such misstatement, immediately pointing this out to the investigating authorities and requesting the exclusion of the products that should not be included in the scope of investigation, etc. is important.

In many cases, high performance or high value added products that cannot be manufactured by the domestic industry in the importing country are exported from Japan, and even if dumping is determined to exist, no injury is actually caused to the domestic industry. What is normally done in such cases is to present the evidence to show that no competition with domestic products actually exists and to make a request to exclude the products concerned from the scope of products subject to investigation. Furthermore, in cases where the scope of products subject to investigation is wide, product categories that are not in mutually competitive relationships are sometimes included. In such cases, it is also important to discuss whether or not to make a request for the use of analysis that takes into consideration a mutual competitive relationship between products in determining injury; for example, determining injury to the domestic industry for each of the respective product categories in mutually competitive relationships, etc.

When a company has concerns about products subject to investigation, (1) it may check the notice of a decision to initiate investigation and an application form to confirm what products are subject to investigation and point to any unclear scope of products subject to investigation. If its product is included in the scope of products subject to investigation and amounts to a high performance, high value added product that the importing country's domestic industry cannot make, the company may (2) request to exclude the product from investigation (however, the authorities have broad discretion over such scope) or (3) request to make an analysis based on competitive relations between products in line with precedents given in the WTO DS cases in which injury is determined (*see* "5. Issues/Efforts under International Rules (1) Abuse of AD/SG Measures, etc. in "Column: Issues of Excessive Production Capacity in the Steel Industry, etc." at the end of this chapter for details).

3) Answering Questionnaires and On-the-Spot Investigation

(1) Answering questionnaires

After the decision to initiate an investigation, questionnaires are sent to companies subject to investigation, etc. from the investigating authorities in order to determine the existence of dumping and injury, and companies subject to investigation answer the questionnaires (see Article 6.1 of the AD Agreement). If a company subject to investigation does not reply within the specified period (at least 30 days after receiving the questionnaires (Article 6.1.1 of the AD Agreement)), determinations may be made on the basis of the "facts available" by the investigating authorities as described below. An extension of the time-limit for reply may be requested, and the authorities should give due consideration to any such request and an extension should be granted whenever practicable.

AD investigations are generally divided into a "dumping investigation" and an "injury investigation" (see Figure II-6-2). In dumping investigations, general information such as the organizational structure of the company, including affiliates, and characteristics of the products

subject to investigation, etc. as well as detailed data on individual transactions, production costs, and relevant expenses, etc. will be involved. In injury investigation, in addition to the general information set out above, operational and financial information, including production capacity, inventories, production volume, export volume, and average export price, etc., will be subject to investigation. In most cases, the coverage of the questionnaires is for the past one year in dumping investigations and for the past three years including the year subject to the dumping investigation in injury investigations.

The extent to which companies subject to investigation answer these questionnaires should basically be decided in consideration of the costs and benefits associated with responding to the investigation. Answering the questionnaires in a dumping investigation, in particular, requires examination, collection, and verification of enormous volumes of data, including data of transaction partners, etc., and sometimes data is required to be submitted in categories that are different from items managed by the companies. Therefore, the burden of this work is quite large. In addition, calculating the dumping margin sometimes requires submission of highly confidential information, including the data on expenses related to production and sales of the products, etc., to investigating authorities. In contrast, if companies subject to investigation do not respond to the questionnaires (including cases where contents of the answers are insufficient, only parts of questions were answered, or either questions on dumping or questions on injury are answered), "facts available" (see (1. 5) (1) below) are used for the portions not answered, in accordance with Article 6.8 of the AD Agreement. As a result, for example, claims of the domestic industry (data on the application form, etc.) may be used, possibly leading to disadvantageous determinations made against companies subject to investigation (use of "facts available" limited to the portions not answered in the above context). Companies subject to investigation must consider such advantages and disadvantages and then decide the extent to which they should respond, with the importance of the products subject to investigation also taken into consideration.

Recent anti-dumping investigations frequently have based their decisions on samples (Article 6.10 of the AD Agreement). Since the authorities shall, as a rule, determine an individual margin of dumping for each known company (the first sentence of Article 6.10 of the AD Agreement), the exceptional use of a sampling investigation is appropriate only "in cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination [of an individual margin of dumping for each known company] impracticable" (the second sentence of Article 6.10 of the AD Agreement). The authorities shall determine an individual margin of dumping even for a company left out of a sampling investigation if the company submits the necessary information (including contents of a questionnaire) in time for that information to be considered during the course of the investigation (the first sentence of Article 6.10.2 of the AD Agreement). However, if the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation, the authorities are not required to determine individual margins of dumping for companies submitting the necessary information (the first sentence of Article 6.10.2 of the AD Agreement).) Sampling investigations inconsistent with the AD Agreement occasionally have been seen (for details, see Chapter 1 China "Anti-dumping and Countervailing Measures," Part I). Therefore, if a company suspects that a sampling investigation is defective and disadvantages those subject to the investigation, the company should submit comments to the authorities as early as possible.

(2) On-the-Spot investigation

In order to verify information provided or to obtain further details, the investigating authorities may carry out on-the-spot investigations at head offices and/or factories, etc. of the companies that

answered the questionnaires (Article 6.7 of the AD Agreement). Although implementation of on-the-spot investigations may vary between countries, several investigation officers spend a few days at each company examining/viewing accounts and vouchers, etc. and verifying the completeness/accuracy of data on sales/costs submitted as answers to the questionnaires. On-the-spot investigations may require gathering large volumes of accounts, etc., which are usually maintained separately at a number of business locations, and explaining in detail about concrete sales related information and financial/accounting systems through interpreters. This imposes a heavy burden on companies. However, if companies do not respond to on-the-spot investigations, accuracy, etc. of the answers will not be verified, and thus "facts available" may be used, possibly leading to disadvantageous determinations. Whether on-the-spot investigations take place before or after the preliminary determination depends on the country.

In addition, many countries hold public hearings (see Article 6.2 of the AD Agreement). In public hearings, in addition to companies subject to investigation and domestic industries, participation of user industries of the importing country may be permitted in many cases. They are given opportunities to express their opinions on the actual conditions with regard to the AD duty requirements (product substitutability, etc.) and the impacts of the imposition of AD measures (procurement of raw materials within the importing country may become difficult due to due to stagnation in export, etc.). However, considering users' opinions in determining the AD duty requirements is not required under the AD Agreement. Since public hearings are conducted by the investigating authorities, it may provide a good opportunity to understand from the questions they ask the participants what their concerns are. As with on-site-investigations, the timing of conducting public hearings depends on the country.

4) Preliminary Determination

Under the AD Agreement, the investigating authorities are not required to make preliminary determinations, but many countries do so to give interested parties opportunities for rebuttal. When a preliminary determination is made, the investigating authorities shall give public notice of such determination (Articles 12.2 and 12.2.1 of the AD Agreement). Preliminary determinations are very important because the investigating authorities' judgments on the AD duty requirements will be made public for the first time through these determinations. Companies subject to investigation are given opportunities to analyze the content of determinations and to closely examine whether or not any unreasonable findings have been made, or whether or not any inconsistencies with domestic laws of the country where investigations are conducted or with the AD Agreements exist, and then to submit rebuttal arguments.

If a preliminary affirmative determination has been made (of all dumping, injury, and causal links are determined to exist), the investigating authorities may take provisional measures (provisionally impose AD duties or request the deposit of a substantial amount of securities) and initiate imposition of antidumping duties (Article 7.1 of the AD Agreement).

5) Informing of Essential Facts and Final Determination

Before making a final determination, the investigating authorities shall inform all interested parties of the essential facts and give them opportunities to offer rebuttal arguments (Articles 6.2 and 6.9 of the AD Agreement). Essential facts that were disclosed should be assumed to be used in the final determination, and this will be the last opportunity that interested parties are given to offer any rebuttal arguments. In particular, special attention should be paid to the portions that are changed from the preliminary determination or the portions against which rebuttal arguments are submitted to examine whether or not changes are inconsistent with the AD Agreements, and whether or not any unreasonable findings have been made regarding the rebuttal arguments from

interested parties.

After providing essential facts and receiving rebuttal arguments from interested parties, the investigating authorities make a final determination. As with the preliminary determinations, public notice of final determinations shall be given (Articles 12.2 and 12.2.2 of the AD Agreement). If a final affirmative determination has been made, companies subject to investigation need to analyze/discuss the content of the final determination, and decide whether to take the matter to judicial proceedings in the importing country or request the Japanese government to use the WHO dispute settlement procedures, etc.

4. Involvement of the Government in the Responses to Investigations

As described above, companies subject to investigation take the major part in responding to AD investigations. However, when the protection of companies' rights under AD investigations or AD measures is deemed insufficient in light of the AD Agreement, the government of the exporting country supports companies subject to investigation in responding to investigations from the point of view of protecting the interests of domestic companies or industries and securing the enforcement of trade rules.

1) Support for Investigation Procedures

In AD investigation procedures, the government may submit comments as an interested party or government officials such as embassy staff may participate in public hearings, etc. and offer opinions to support the claims of companies subject to investigation (see Article 6.11 (ii) of the AD Agreement). The WTO Anti-Dumping Committee meets twice a year and provides an opportunity to point out inconsistencies of anti-dumping investigation problems with WTO rules.

WTO member countries can utilize such measure if the requirements of the WTO Agreements are met; they are an accepted policy measure under the WTO Agreements. Therefore, how the government of the exporting country can support the companies should be decided with due consideration of the consistency of the measure of the investigating authorities with the AD Agreement.

2) Utilization of WTO dispute settlement procedures

After the imposition of AD duties (or provisional imposition of AD duties), the consistency of the measure or procedures with the WTO Agreements may be challenged in a WTO dispute settlement proceeding (see Chapter 17, Part II). In utilizing these procedures, companies subject to investigation need to note the following points:

(1) When cases of AD measures are brought under the WTO dispute settlement procedures, special rules apply. First, the Panel and Appellate Body can only use the evidence submitted during the investigation procedures and cannot determine that the AD measures are inconsistent with the WTO Agreements based on evidence submitted for the first time at the stage of the dispute settlement proceeding. Second, the Panel and Appellate Body shall determine whether the investigating authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective (Article 17.6 (i) of the AD Agreement). The two above restrictions mean that in order to determine that the measure to impose AD duties is inconsistent with the WTO Agreements in a WTO dispute settlement proceeding, the investigating authorities' determinations need to be determined unreasonable in light of the evidence and facts presented to the investigating authorities during the investigation procedures. In WTO dispute settlement proceedings, consistency with the WTO Agreements is determined on this basis.

Therefore, companies subject to investigation intending to utilize the WTO dispute settlement provisions need to respond to the investigations with consideration given to the above restrictions. More concretely, important evidence must be submitted during the investigation procedures. In addition, all necessary claims need to be made explicitly in writing to be recorded in the investigation record. According to WTO case precedent, information requested to be submitted in the questionnaires, etc. is not the only important information, and thus taking the opportunities described in 3. above and voluntarily submitting necessary evidence should be considered. For example, in some previous cases the investigating authorities did not actively collect information on the competitive relationship between the products subject to investigation and the products equivalent to domestic products, but such evidence turned out to be important in the determination of injury/causal link.

(2) The WTO dispute settlement procedures are used by the government. Therefore, where the utilization of the WTO dispute settlement procedures is likely, cooperating with the government, including the Ministry of Economy, Trade and Industry, in the investigation process is important.

More concretely, sharing relevant documents, including the written decision on the initiation of an investigation by the investigating authorities and the evidence, etc., from the early stage of the investigation as well as responding to the investigation in anticipation of the dispute settlement procedures while exchanging information on legal issues in investigation/examination and how to respond, etc. as needed is considered effective.

When the government discusses the utilization of WTO dispute settlement procedures, it must consider the benefits to the overall industry that exports the products concerned in addition to the benefits to the individual companies that were investigated. It is therefore desirable that support from the overall industry is obtained in cases where the WTO dispute settlement procedures will be used.

2) WTO/THE ANTI-DUMPING COMMITTEE

The WTO holds two meetings of the Anti-Dumping Committee (AD Committee) each year to provide a forum for discussing anti-dumping measures. The AD Committee reviews: (i) AD implementing laws of WTO Members to determine conformity with the WTO Agreement; and (ii) reports by Members on AD measures.

The AD Committee has also organized two *ad hoc* forums for discussing specific points of contention. The first is the meeting of the Informal Group on Anti-Circumvention. Circumvention was an issue that was referred to the AD Committee for further study because no conclusions could be reached during the Uruguay Round negotiations. (*See* "Anti-Circumvention Issues" below.) The second is the Working Group on Implementation, which discusses ways to harmonize national discretion in the agreement where the interpretation is or could be vague. (However, these fora are now characterized as providing opportunities for national anti-dumping authorities to have active discussions and share practices.) Japan must use these kinds of forums to ensure that the domestic laws of other Members are written and applied in conformity with the AD Agreement. Should legislation or discretion contravene the Agreement, Japan should report it immediately to the AD Committee and other GATT/WTO forums to seek appropriate remedies.

Therefore, if an anti-dumping measure is suspected of violating GATT and/or the AD Agreement, Japan should seek resolution through the WTO in dealing with the increased abuse of AD measures by certain countries; if resolution cannot be reached through bilateral consultations, the abuses

should be referred to WTO panels and the Appellate Body.

3) ANTI-CIRCUMVENTION ISSUES

"Circumvention" generally refers to an attempt by parties subject to anti-dumping measures to avoid paying the duties by "formally" moving outside the range of the anti-dumping duty order while "substantially" engaging in the same commercial activities as before. However, this has not yet been confirmed by any official decision of the General Agreement on Tariffs and Trade (GATT) or the WTO.

Informal discussions began (in October 1998) during meetings of the Informal Group on Anti-Circumvention of the AD Committee (held twice a year) (see 3) below), on "what constitutes circumvention", which was the first topic on the agenda. However, no agreement has been reached. Discussion began in May 2000 on "what is being done by Members confronted with what they consider to be circumvention," and in October 2001 discussions began on "to what extent can circumvention be dealt with under the relevant WTO rules," but there have been no conclusion so far.[2.] Simultaneously, in the Negotiating Group on Rules, proposals on anti-circumvention have been submitted by the US, etc.[3] The text by Chair Valles released in December 2008 and April 2011 only included the item names and did not incorporate proposals regarding the provision.

All member countries recognize that circumvention is an issue of concern. There are sharp differences of opinion on this issue, and no agreement is in sight. Currently, the Informal Group on Anti-Circumvention does not meet unless any WTO member country requests a meeting by a specific deadline before a meeting of the AD Committee.

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[2] Informal Group on Anti-Circumvention of the AD Committee (developments):

The number of proposals submitted by Member countries to the Informal Group on Anti-Circumvention of the AD Committee was 15 in 2001, but, following the start of rules negotiations in the Doha Round, the number dwindled to 6 in 2002, 3 in 2003 and 1 in 2004. Although there was only one proposal submitted in 2005, an agreement was reached to continue discussions.

5 Discussions on establishment of a discipline on anti-circumvention during the rules negotiations (developments):

In the rules negotiations so far, the US has submitted proposals for establishing discipline on circumvention, but received criticism for the overly broad discretion of the authority and for a lack of precision and predictability. As with the discussions held during meetings of the Informal Group on Anti-Circumvention of the AD Committee, the difference of opinions among the Member countries regarding the modalities of specific rules remains great.

Anti-circumvention provisions are also included in the Chair's Text released on November 30, 2007. According to the provisions, existing AD measures could be extensively applied to cases suspected as importing country circumvention, third country circumvention, or slightly modified product circumvention when substitution for products subject to AD is confirmed as a result of review. Further, numeric criteria (safe harbor where circumvention is not determined as long as the criteria are met) concerning the ratio of imported parts and added value in importing countries or third countries are defined to be 60% or more and 25% or less, respectively.

In subsequent rules negotiations, while several countries claimed the necessity of some provisions about circumvention since some Member countries like the EU and the United States have already implement measures to prevent circumvention based on their domestic rules, other Members stated that such provisions should not be included in the Chair's text since there was still disagreement in the rules negotiations and several matters including the definition of circumvention were unclear. In February 2008, China, Hong Kong and Pakistan published a statement requesting deleting the provision of circumvention in the Chair's Text. In the revised Chair's Text circulated in December 2008, the provisions on circumvention were not included and only the title was inserted along with the opinions of Member countries (as was done for other items such as zeroing and sunset).

3. Negotiation Progress on the Revision of the AD Agreement in Doha Development Agenda

1) Background of Discussions

The current AD Agreement was revised under the Uruguay Round negotiations that concluded in 1994 (see 2), "Overview of International Rules", (B) above). However, amidst the rising number of cases and countries imposing AD measures, differences in interpretation of the rules and implementing methods became significant and abuse of AD measures became apparent. The abuse of AD measures ruins the effects of improvement in market access (reduction or elimination of tariff and non-tariff barriers) achieved by the Uruguay Round negotiations. Imposing AD measures on imports from developing countries could impair their economic development; also among developing countries there exists a tendency to impose AD measures on each other.

With awareness of this issue, Japan considered that it is necessary to implement strengthened AD disciplines to prevent abuse of AD measures in order to maintain trade liberalization and promote development of the world economy. In particular, in October 2000, Japan established a group that places a special emphasis on the strengthening of AD disciplines (AD Friends; see “Positions of Major Countries Rules Negotiations” (a) below) and strongly supported the revision of the AD Agreement. However, the United States, for which AD measures were politically important in relation to its domestic iron and steel industry, strongly opposed to strengthening AD disciplines. As a result of a number of consultations held among the concerned countries, holding AD negotiations was included in the Ministerial Declaration of the Doha Ministerial Conference.

2) Negotiation Process

(1) Process from the first negotiation meeting until the publication of the Chair’s Text (March 2002 to November 2007)

The WTO Rules Negotiations Group (entitled to negotiate on AD, subsidies, countervailing duty measures and Regional Trade Agreements) was established under the Trade Negotiations Committee after the Doha Ministerial Conference. It held 55 negotiation meetings between its first meeting in March 2002 and March 31, 2011. The “AD friends” (see "Positions of Major Countries Rules Negotiations" (a) below) including Japan have led negotiations by presenting the issue of AD disciplines to be strengthen as well as submitting a series of detailed proposals of revised rules. Since April 2005, in addition to the general meetings held by the Chair of WTO Rules Negotiating Group (hereinafter referred to as “Rules Chair”) meetings composed of about ten countries were held as one of the means to accelerate the negotiations. Further progress has been made since the meeting in September 2005, including the assignment of a “friend of the Chair (facilitator)” for each individual issue, and since the meeting of March 2006, the Chair was authorized to set agendas and the facilitator to issue notes to facilitate negotiations.

During the Hong Kong Ministerial Meeting in 2005, taking into account the progress of discussions of other sectors, the Chair was given authority to present a comprehensive revised provisional draft (the Chair’s Text).

(2) Issuance of Rules Committee Chair’s Text *(November 2007 to May 2008)*

The Rules Chair released “a Chair’s Text” on November 30, 2007. In the area of AD, in

consideration of Japan's proposal regarding the sunset review[4], it contained some appreciable proposals such as strengthening of disciplines[5], but further strengthening of disciplines was required.[6] However, with regard to the total prohibition of zeroing methodology that Japan had requested and a vast majority of the Members had supported at the negotiation meeting held in April 2006, the United States made a proposal to fully accept its use in July 2007; a provision to accept the use of zeroing methodology[7] was included in the Chair's Text. For such reasons, the text in general lacked overall balance and raised severe concerns.

At the negotiation meeting held in December 2007, Japan together with 20 nations including Brazil, China, and India released a joint statement expressing strong concerns about the Chair's text lack of balance and approval of the zeroing method. At the negotiation meeting held in January 2008, an alternative suggestion to completely prohibit the zeroing method was submitted as a joint proposal of 20 nations. A vast majority of Members agreed to this and also claimed the content of the Chair's Text was not acceptable. Furthermore, Japan made a proposal to further strengthen the sunset review disciplines[8] at the negotiation meeting held in March 2008.

Since then, many nations including Japan have continued to seek "revision of Chair's text" to prohibit the zeroing method and strengthen the sunset review disciplines.

(3) Issuance of the Rules Chair's Working Document (May to July 2008)

In response to the growing demand from the Member countries for early issue of a revised Chair's text, in May 2008, the Chair issued a "working document", not a revised text. In the cover letter the Chair, while expressing the will to revise the Chair's text of November 2007, explained that there was not a sufficient basis for preparing a revised text, and therefore an "interim" working document was being issued. The AD part in the Chair's working document overviewed the negotiation from the time of issuing the Chair's text until the issue of the Chair's working document. It also included Member countries' response to each issue in the Chair's text and proposals from Member countries after issuance of the Chair's text.

Responding to the issuance of the Chair's working document, Japan released a statement of the Minister of Economy, Trade and Industry. In his comment, the Minister stated Japan's disappointed

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[4] The proposals included the following: (1) sunset review (investigation to determine whether or not to accept "sunset" -- expiration of AD measures --) normally shall be completed within a 5-year period, and in all instances the measure shall be eliminated after X years from the imposition of AD duties (X is an arbitrary number); (2) continuation or recurrence of dumping shall be determined on a company-specific basis; and (3) initiation of sunset review through an executive decision by the investigating authorities shall be prohibited.

[5] (1) AD measures shall expire after 10 years from the imposition of AD duties even in cases where the period of duty imposition was extended from the initial five years; (2) the application eligibility provisions equivalent to those used for the initiation of investigation (Article 5.4 of the AD Agreement) shall be applied to sunset reviews; and (3) initiation of sunset review through an executive decision by the investigating authorities shall be an exception, etc.

[6] Provisions to weaken the disciplines such as the following are also included: (1) If the investigating authorities initiated the investigation within two years after the expiration of the measure, accelerating the investigation through the application of a provisional measure based on the best information available (Article 6.8 and Annex II of the AD Agreement) shall be enabled; and (2) the existing measures shall be regarded as being initiated on the effective date of the new Agreement regardless of the actual number of years of imposition and may be extended for up to 10 years from that date.

[7] While the use of zeroing methodology is prohibited only in the method of comparing a weighted average normal value with a weighted average export price in the original investigations, the use of zeroing methodology is allowed in the methods of comparing individual normal values with individual export prices and comparing a weighted-average normal value with individual export prices in the original investigations, and is also allowed in administrative reviews.

[8] (1) AD measures shall expire after eight years from the imposition of the AD duties; (2) the disciplines of investigation procedures of sunset review shall be strengthened; and (3) AD measures continued for at least five years shall expire at the appropriate time with provisional measures, etc.

that the provisions were not revised at all and urge the Chair to issue a revised text at the earliest time. In July 2008 Japan and 19 other countries (including AD friends and China) released a joint statement following the above-mentioned Minister's comment.

(4) Issuance of the Revised Chair's Text and replacement of the Rules Chair (December 2008 to May 2010)

No Rules Negotiations Meeting had been held since issuance of the Chair's working document, and Member countries' requests for early issue of revised Chair's text and restart of negotiations grew stronger. Later, the "Revised Text of the Rules Chair" was issued at the end of December 2008. As regards AD, a revised text was proposed only on the points which had convergence to some extent among Member countries. However, the revised text did not include 12 items including "zeroing" and "sunset" on which respective Member countries have conflicting points of view; the text simply listed the issues and positions of Member countries in brackets (symbols ("[ ]") used to indicate points at issue or wording for which a marked difference in opinions between Member countries exists).

Responding to the issuance of the revised Chair's text, Japan released a statement of the Minister of Economy, Trade and Industry expressing that (1) issuance of the new text would restart the rules negotiations as well as make the discussion move forward for early conclusion of Doha Development Agenda; (2) many other critical issues are also not addressed; and (3) there should be best efforts in negotiations to achieve a well-disciplined final result.

Parallel discussions have been held at the negotiation meetings since May 2009 on three issues based on the revised Chair's text: (1) bracketed issues with item names only; (2) issues with revised texts; and (3) issues that were not reflected in the revised Chair's text. The initial reading of the issues of (2) was completed by the negotiation meeting in December 2009 and that of the issues of (1) was finished by the negotiation meeting in March 2010.

(5) After Replacement of the Chair and Publication of Chair's Text (May 2010-November 2014)

With the resignation of the Chair in May 2010, a new Chair was appointed in July the same year. Small negotiation meetings composed of about 15 to 20 countries had been held every month since November the same year. Constructive discussions had been held based on the revised Chair's text regarding the bracketed issues and issues with new provisions. The Chair's text was discussed at the negotiation meeting held in March 2011.

However, considering it was the first reading by the new Rules Chair, and taking into account the status of negotiations in other areas, including the negotiations on agriculture and Non-Agricultural Market Access (NAMA), Members did not make a big change in their stances on major issues. This made the discussions technically oriented, similar to the reading of the revised Chair's Text made under the former Chair. Thus, although a new Chair's text was proposed in April 2011, significant progress was not made from the former text either on the bracketed issues or other provisions.

A new Rules Chair was elected at the official Rules Negotiations Group Meeting held at the end of February 2012. No negotiation meetings have been held since issue of the Chair's text in April 2011, but an Experts Meeting was held twice in 2013 and in 2014, at which concerned countries exchanged technical opinions regarding the actual practice of AD investigations to enable prompt action upon resumption of negotiation meetings.

(6) WTO Informal Ministerial Gathering in Davos to 10th WTO Ministerial Council Meeting (MC10)

The General Council at its meeting in November 2014 decided to draft a post-Bali work program by the end of July 2015. The WTO Informal Ministerial Gathering hosted by Switzerland in Davos dealt with how to proceed with negotiations for drafting the work program and agreed to accelerate discussions. As for the rules negotiations, Japan tried to incorporate the continuation of discussions and the objectives of negotiations on enhancing the AD disciplines into the work program in July and finally get successful conclusion of negotiations on AD discipline enhancement at the MC10 in December.

First, in April Japan and other AD friends proposed to resume discussions focusing on issues related to transparency and due process for anti-dumping investigation. As specific issues to be taken into account in the drafting of the work program, Japan proposed transparency and due process issues (classified into three elements -- (1) transparency between WTO member countries, (2) transparency of AD investigation procedures and (3) due process) among the un-bracketed issues of the 2011 Chair's text in June, and issues other than transparency and due process in July. While Japan contributed to invigorating discussions on the rules negotiations through these proposals, discussions on the other issues failed to make progress, leading to failure of the adoption of the post-Bali work program at the end of July.

While negotiation targets decreased later, discussions on "transparency" of rules and other areas possibly could become an achievement at the MC10. In consideration of this possibility, in October Japan proposed a narrowed list of issues regarding transparency and due process for the rules negotiations.

Finally, however, a ministerial declaration at the MC10 in Nairobi, Kenya, in December failed to discuss the rules area due to little progress in negotiations on other areas. After Japan continued to emphasize the importance of the transparency and due process for AD investigation in rules negotiation meetings and written proposals, many other WTO member countries supported and cooperated with the Japanese approach. Therefore, discussions on AD discipline enhancement are expected to continue, irrespective of whether they are in the context of the Doha Round.

3) Positions of Major Countries in Rules Negotiations

(1) AD Friends (15 countries and regions including: Japan, Brazil, Chile, Republic of Korea, Norway, Switzerland, Colombia, Costa Rica, Hong Kong, Israel, Mexico, Singapore, Thailand, Turkey and Chinese Taipei)

This is a wide group of countries organized to strengthen and clarify the AD disciplines in order to prevent abuse of AD measures. Among them, some have exporting industries that have been targets of AD measures (Hong Kong and Norway, etc.) and some are increasingly imposing AD measures themselves (Brazil, etc.). Japan actively participates in the AD negotiations as a leader of AD friends. At the past negation meetings, AD friends proposed the total prohibition of zeroing methodology and introduction of the "lesser duty rule" (restraining AD duty rates to the lowest possible level adequate to remove injury). Not all but most AD friends countries jointly proposed strengthening of the disciplines, including introduction of automatic sunset (automatic expiration of measures to impose AD duties after a certain period of time) and clarification of the requirements for initiating investigations. However, at the MC10, Brazil, Turkey, and Mexico, which have been major countries imposing AD measures recently, substantively withdrew from the group.

(2) The United States

Almost half of the dispute settlement cases relating to AD under the WTO were AD's imposed by the United States (Byrd Amendment, Sunset, Zeroing, etc.). The government of the United States, in the wake of strong requests for imposing AD measures from Congress and domestic industries (iron and steel industries, etc.), emphasized the need for the investigating authority to maintain the maximum discretion, and has been passive about strengthening AD discipline. However, the United States has taken a positive position on issues such as anti-circumvention measures and improvement of transparency of procedures to prevent abuse of AD measures by the developing countries. The United States has strongly criticized the judgment of the Appellate Body which argued that zeroing is inconsistent with WTO Agreements. The United States has continued to demand strongly at negotiations meetings that allowance of zeroing be included in the agreements. On the other hand, the United States had traditionally indicated a positive attitude toward transparency and fair procedures. At the MC10, the United States was interested in a new approach on rules and other areas that would replace the Doha Round.

(3) The EU

The EU basically supports strengthening AD discipline. The EU, however, actively imposes AD measures mainly against developing countries, and takes an intermediate position between the US and AD friends. The EU has shown strong interest in improving the transparency of the investigation process. The EU and Japan cooperated and submitted a joint "Proposal for reduction in investigation costs of AD procedures" in July 2003. At the MC10, the EU alone made a proposal on cross-sectoral transparency improvement covering not only AD procedures but also subsidies and regional trade agreements

(4) India

India has made proposals for prevention of abuse of AD measures, which partly correspond to the proposals of AD friends. India along with Brazil and Hong Kong submitted a joint proposal to make the Lesser Duty Rule obligatory at the rules negotiations meeting in March 2006. As regards the zeroing issue, like Japan, India also demands total prohibition. On the other hand, India imposes the most AD measures among WTO Member countries, and many countries have criticized India for lack of transparency in the procedures. India also asserts that Special and Differential treatment (S&D) for developing countries should be introduced. At the MC10, India expressed concern about overburdening anti-dumping authorities in developing countries regarding transparency and due process, and urged that progress in the transparency and due process negotiations be balanced with that in talks on agriculture and other areas of interest to the country.

(5) China

While China has been increasing the number of domestic AD measures it takes, it has also been a target of AD measures, e.g. by the United States, and has already become the country against which the most AD measures are imposed. Consequently, China has been supportive of strengthening AD discipline. China has demanded prohibition of zeroing and introduction of "automatic sunset" discipline in 10 years (provision requiring AD measures to be terminated within 10 years without exception). China strongly seeks strengthening of AD discipline and improved transparency.

4. RECENT DEVELOPMENTS

Traditionally, the majority of AD measures are imposed by the United States, the European Union, Canada and Australia. This, in part, reflects the fact that developed countries have been quicker to implement AD regimes. However, in recent years, India and some developing countries have also begun to apply AD measures, including Brazil, China, and South Africa (*see* Figure II-5-3). At present, a number of AD measures have been taken against Japan by developing countries such as China and India (*see* Figure II-6-4). There are many issues related to impositions by these countries, such as: 1) the lack of transparency of the AD investigation procedures; 2) insufficient explanation of the determination by investigation authorities; and 3) the lack of sufficient opportunities to present opinions by interested parties.

It is important to monitor the increased use of AD measures, as well as Members' application of AD measures to ensure that their procedures and methods comply with the AD Agreement. In addition, we should pay attention to those developing countries, while the decreasing tendency to bring AD cases before the WTO Dispute Settlement Body.

Figure II-6-3 Number of Anti-Dumping Investigations by WTO Members

Members	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	Total (1995-2014)
USA	14	22	15	36	47	47	77	35	37	26	12	8	28	16	20	3	15	11	39	19	527
EU	33	25	41	22	65	32	28	20	7	30	24	35	9	19	15	15	17	13	4	14	468
Canada	11	5	14	8	18	21	25	5	15	11	1	7	1	3	6	2	2	11	17	13	196
Australia	5	17	44	13	24	15	24	16	8	9	7	11	2	6	9	7	18	12	20	22	289
India	6	21	13	28	64	41	79	81	46	21	28	31	47	55	31	41	19	21	29	38	740
China	0	0	0	3	2	11	14	30	22	27	24	10	4	14	17	8	5	9	11	7	218
Republic of Korea	4	13	15	3	6	2	4	9	18	3	4	7	15	5	0	3	0	2	8	6	127
Chinese Taipei	0	0	1	6	0	4	3	0	2	0	0	5	0	0	1	2	0	9	3	0	36
Indonesia	0	11	5	8	8	3	4	4	12	5	0	5	1	7	7	3	6	7	14	12	122
Pakistan	0	0	0	0	0	0	0	1	3	3	13	4	0	3	26	11	7	5	6	0	82
Turkey	0	0	4	1	8	7	15	18	11	25	12	8	6	23	6	2	2	14	6	12	180
Mexico	4	4	6	12	11	6	6	10	14	6	6	6	3	1	2	2	6	4	6	14	129
Brazil	5	18	11	18	16	11	17	8	4	8	6	12	13	24	9	37	16	47	54	35	369
Argentina	27	22	14	6	24	41	28	10	1	12	9	10	8	19	28	14	7	13	19	6	318
South Africa	16	34	23	41	16	21	6	4	8	6	23	3	5	3	3	0	4	1	10	2	229
Japan	0	0	0	0	0	0	2	0	0	0	0	0	4	0	0	0	0	1	0	1	8
Others	32	34	40	59	50	34	40	60	26	28	31	41	20	20	37	23	41	29	41	35	721
Total	157	226	246	264	359	296	372	311	234	220	200	203	166	218	217	173	165	209	287	236	4759

Source: WTO Semi-annual Report Unit: Case

(* AD investigations against the same items from multiple countries have been calculated as one case each).

Figure II-6-4 Number of Anti-Dumping Measures against Japan Continued (As of February 29, 2016)

US	EU	Australia	Republic of Korea	China	India	Thailand	Indonesia	Mexico	Total
15	1	5	6	18	7	2	1	1	56

Unit: Case Note: Figures include price undertakings.

5. *ECONOMIC ASPECTS AND SIGNIFICANCE*

Anti-dumping measures are considered special measures within the GATT/WTO framework. They enable the selective imposition of duties, and therefore, have the potential of being used as discriminatory trade policies. With respect to tariff rates, multiple rounds of trade negotiations have reduced average tariff rates on industrial goods in the United States, the European Union, Canada, Japan and other leading countries to below 5 percent. One backlash from this reduction has been that some of average AD duties over 100 percent. For this reason, once an anti-dumping measure is applied, the volume of imports to the countries imposing AD measures drops dramatically and, in some cases, ceases altogether (trade chilling effect). The impact on companies subject to investigation and the relevant industries (including domestic industries in the importing country that uses the products of these companies) is enormous.

1) THE INFLUENCE OF INITIATING INVESTIGATIONS

The mere initiation of an AD investigation will have a vast impact on exporters. When an AD investigation is initiated, products under consideration may become far less attractive to exporters already leery of having to potentially pay extra duties.

Initiation of an AD investigation also places significant burdens on the companies being investigated. They must answer numerous questions from the authorities in a short period of time and spend enormous amounts of labor, time and money to defend themselves. Such burdens obviously have the potential to impair ordinary business activities. Thus, regardless of their findings, the mere initiation of an investigation is in itself a large threat to companies exporting products. We note that there are many cases where companies subject to investigation decline partially to respond to the questionnaires from the authorities because of the enormous burdens involved. In such cases, the rule of "facts available" applies. The AD Agreement provides that the investigating authorities can make determinations on the basis of the "facts available" (Article 6.8 of the AD Agreement). "Facts available" means the investigating authority may make their determinations solely on the material that the authority was able to collect in situations in which any company subject to investigation does not provide necessary information within a reasonable period or submitted information that could not be verified

2) EFFECTS ON TECHNOLOGY TRANSFERS (UNFAIR EXPANSION OF THE PRODUCT SCOPE SUBJECT TO ANTI-DUMPING DUTIES)

Anti-dumping (AD) duties are imposed on "products" of which the existence of dumping and injury caused by them was determined by the investigating authorities. In the determination of AD duties, the scope of products subject to investigation and possible precedent must be clearly set out.

In cases where new products developed after the AD duty determinations (post-determination developed products) are also deemed to be included in the scope of the products subject to duty imposition, AD duties will also be imposed on these products. There are some cases where the definition of the products subject to investigation is broadly interpreted and the scope of products

subject to duty imposition is actually expanded. In addition, as a measure to prevent circumvention in some cases, the authorities impose AD duties on post-determination developed products of the same kind as the products subject to investigation. Furthermore, in some cases, the scope of products subject to investigation is broadly set at the initial stage to prevent circumvention. However, in cases where the types and characteristics of the post-determination developed products and the products subject to duty imposition differ significantly, the authorities should investigate whether or not the new products, in view of the differences in technology used and markets targeted, are having a detrimental impact on the domestic markets initially investigated before considering imposition of AD duties on them. There are obvious problems in expanding the application of existing AD measures without conducting such an investigation. We have strong expectations for more appropriate administration in this regard.

As described above, if the scope of duty imposition is unfairly expanded by reason of a "like product" definition, it would have an adverse influence on new product development, consumer choice and, ultimately, technological advancement. In contrast, if the post-determination developed products conceptually equivalent to the products subject to investigation are excluded from the subjects of duty imposition, circumvention will arise after imposing measures, which could impair effectiveness of the AD measures for domestic-industry protection. With consideration to the adverse effect of limiting the scope of an investigation, suffice it to note here that all such cases demonstrate the potential impediment to technological progress that comes from facile expansions of the coverage of "like product" in AD proceedings.

3) Retarding the Benefits of Globalization of Production

As the economy becomes more global in scope, companies are transferring their production overseas to their export markets or to developing countries where costs are lower. However, when such transfers take place for products that are subject to AD duties, they are often assumed to be attempts at circumvention. Anti-circumvention measures that inadequately distinguish between production-shifting for legitimate commercial reasons and for circumvention purposes risk not only distorting trade but also shrinking investment.

Furthermore, as Japanese companies transfer their production overseas, or outsource to overseas companies in developing countries, cases are arising where third party countries begin to implement anti-dumping measures against the countries in question, targeting the products manufactured in such ways. Care must be taken in relation to this issue, which is one of the risks of the globalization of manufacturing. In this instance, since Japan is not the subject of the investigation, it is difficult for the Japanese government to respond. It is necessary for Japanese companies when they expand their operations overseas to sufficiently ensure that AD measures are imposed proactively by countries such as China and India.

4) Conclusion

As the above discussion indicates, AD measures are usable by Member countries against unfair trade practices under GATT and other WTO Agreements, but once taken, they have significant impacts on export transactions. Therefore, arbitrarily taking AD measures could adversely affect trade and are critical to a wide range of business activities. It should also be noted that the consumers and user industries in the importing country may also suffer disadvantages when AD measures are abused. Therefore, care must be taken so that the AD system is properly utilized in order to provide relief to domestic industries of importing countries that are injured by unfair trade, without causing the adverse effects that may be caused by arbitrarily taking measures.

6. JAPAN'S ANTI-DUMPING ACTIONS

Japan's companion law and regulation to the AD Agreement is Article 8 of the Customs Tariff Law, the Cabinet Order on Anti-Dumping Duties and the Guidelines on Procedures for Countervailing and Anti-Dumping Duties. A complaint is made by Japanese industries, claiming that they are suffering injury caused by dumped imports will be strictly dealt with based on these laws and regulations. The investigating authorities will respond to questions and consultations as needed, including questions on trade remedy measures, application procedures, etc.[9]

From the establishment of the WTO in 1995 to the end of February 2015, Japan initiated five AD investigation; three were subject to anti-dumping duties (including two for continued anti-dumping duty imposition) and one still is under investigation. Japan, which has traditionally seen itself as a trading nation, has been negative about using anti-dumping and other trade remedy measures. Particularly since 2000, however, the number of cases of AD investigations in Asian countries has been increasing, in part because of the establishment of WTO dispute settlement rules. See the following for details about the cases of AD since 2000.

In February 2001, an application for AD investigation was filed against imports of certain polyester staple fibers from Korea and Chinese Taipei. An investigation was initiated in April 2001. After a 15-month fair and impartial investigation, the authority concluded that dumping and injury were occurring. AD duties were imposed for the five-year period starting from July 200. As for this measure, on June 30, 2006, an application for extension of the period for continued imposition (an application for sunset review) of the AD duties was filed by domestic industry and an investigation was started on August 31 of the same year. As a result, it was confirmed that injury might continue or recur and extension of the period for imposition of the AD duties, five years starting from July 1, 2007, was determined. Later, this measure was terminated as of 28 June 2012.

In January 2007, an application for AD investigation was filed against imports of electrolytic manganese dioxide from South Africa, Australia, China and Spain, and investigation was initiated in April. It was found that dumped imports had in fact caused material injury to the domestic industry, and an AD duty with the five-year period starting from September 2008 was determined. For this measure, an application for extension of the period for continued imposition (an application for sunset review) of the AD duties was filed by domestic industry in August 2012, and an investigation was initiated in October of the same year. The investigation period was extended for five months in October 2013, and then the period of duty imposition was extended in June 3, 2014 (see Figure II-6-5).

In May 2012, an application for AD investigation was filed against imports of cut-sheet papers from Indonesia, and an investigation was initiated in June of the same year (Figure 5-5). As a result of the investigation, the existence of dumping was not found, and it was determined not to impose AD duties (see Figure II-6-6).

In December 2013, an application for the imposition of AD duties on imports of toluene diisocyanate from China was filed, and an investigation was initiated in February 2014. As a result of the investigation, injury caused by dumping was identified, leading to a decision to impose AD duties on the product for five years from April 17, 2013 (see Figure II-6-7).

In April 2015, an application for the imposition of AD duties on potassium hydrate imports from

[9] See the following website for the flow of procedures from application to duty imposition:
http://www.meti.go.jp/policy/external_economy/trade_control/boekikanri/trade-remedy/taxation.html

the Republic of Korea and China was filed. An investigation was initiated in May 2015 and is still underway (see Figure II-6-8).

Figure II-6-5 Anti-dumping Investigation on Electrolytic Manganese Dioxide from Australia, Spain, China and South Africa

History	
31 January 2007:	Complaint (from two Japanese companies) to impose antidumping duties was accepted
27 April 2007:	Investigation was initiated
14 June 2008:	Provisional Antidumping duties were imposed
1 September 2008:	Antidumping duties were imposed
30 August 2012:	Complaint (from two Japanese companies) to extend anti-dumping duties was accepted Australia was excluded due to withdrawal of production
30 October 2012:	Investigation was initiated on the extension of imposition period Investigation on the extension of imposition period was extended
15 October 2013:	Period of AD duty imposition was extended
6 March 2014:	**<Anti-dumping duty rates** **Australia:** All companies: 29.3% **Spain:** All companies: 14.0% **China:** All companies: 46.5%; One company: 34.3%; **South Africa:** All companies: 14.5%

Figure II-6-6 Anti-dumping Investigation on Cut-sheet Paper from Indonesia

History	
10 May 2011	Complaint (from eight Japanese companies) to impose antidumping duties was accepted
29 June 2011	Investigation was initiated
26 June 2013	Determination was made not to impose Anti-dumping duties

Figure II-6-7 Anti-dumping Investigation on Toluene Diisocyanate from China

History	
17 December 2013	Complaint (from one Japanese company) to impose antidumping duties was accepted
14 February 2014	Investigation was initiated
4 December 2014	Preliminary determination was made
25 December 2014	Provisional AD duties were imposed
12 February 2015	The investigation period was extended
17 April 2015	AD duties were imposed
AD rate China: 69.4%	

Figure II-6-8 Anti-dumping Investigation on Potassium from the Republic of Korea and China

History	
3 April 2015	Complaint (from one Japanese company) to impose antidumping duties was accepted
26 May 2015	Investigation was initiated Determination was made not to impose Anti-dumping duties

7. ANTI-DUMPING CASES IN THE WTO DISPUTE SETTLEMENT PROCESS

From the establishment of the WTO to the end of December 2015, there were 501 consultation requests under the WTO dispute settlement procedures, including 112 cases involving anti-dumping measures. Of the 112 AD measure cases, five cases were brought by Japan (DS162 (US – 1916 AD Act), DS184 (US – Hot-Rolled Steel), DS244 (US – Corrosion Resistant Steel Sunset Review), DS322 (US – Zeroing and Sunset Review), and DS454 (China – HP-SSST)).

Reference

List of continued AD measure cases against Japanese products (total of 56 cases) (as of January 30, 2016)

United States (15 cases)		
Product	**(top) initiation (bottom)imposition**	**Developments**
PC Steel Wire Strand	1977.11.23 1978.12.08	1999.02.03 continuance *a 2004.06.25 continuance *b 2009.12.11 continuance *c 2015.04.23 continuance *c
Carbon Steel Butt-Weld Pipe Fittings	1986.03.24 1987.02.10	2000.01.06 continuance *a 2005.11.21 continuance *b 2011.04.15 continuance *c
Brass Sheet & Strip	1987.08.14 1988.08.12	2000.05.01 continuance *a 2006.04.03 continuance *b 2012.04.26 continuance *c
Gray Portland Cement & Clinker	1990.06.15 1991.05.10	2000.11.15 continuance *a 2006.06.16 continuance *b 2011.12.16 continuance *c
Stainless Steel Bar	1994.01.27 1995.02.21	2001.04.18 continuance *a 2007.01.23 continuance *b 2012.08.09 continuance *c
Clad Steel Plate	1995.10.25 1996.07.02	2001.11.16 continuance *a 2007.03.22 continuance *b 2013.02.11 continuance *c

United States (15 cases)		
Product	**(top) initiation (bottom)imposition**	**Developments**
Stainless Steel Wire Rod	1997.08.26 1998.09.15	2004.08.13 continuance *a 2010.06.17 continuance *b (2015.05.14 Start of third “sunset review”)
Stainless Steel Sheets	1998.07.13 1999.07.27	2005.07.25 continuance *a 2011.08.11 continuance *b
Small Diameter Seamless Pipe	1999.07.28 2000.06.26	2006.05.08 continuance *a 2011.10.11 continuance *b
large Diameter Seamless Pipe	1999.07.28 2000.06.26	2006.05.08 continuance *a 2011.10.11 continuance *b
Tin mill products	1999.11.30 2000.08.28	2006.07.21 continuance *a 2012.06.12 continuance *b
Welded Large Diameter Line Pipe	2001.02.23 2001.12.06	2007.11.05 continuance *a 2013.10.29 continuance *b
Polyvinyl Alcohol	2002.10.01 2003.07.02	2009.04.13 continuance *a 2015.05.27 continuance *b
Thermal diffusion nickel-plated hot-rolled flat steel products	2013.04.16 2014.05.02	
Non oriented electromagnetic steel sheet	2013.11.07 2014.11.06	

China (18 cases)		
Product	**(top) initiation (bottom)imposition**	**Developments**
Polyvinyl Chloride (PVC)	2002.03.29 2003.09.29	2009.09.28 continuance *a 2015.10.08 continuance (three-year duration)*b
Optical Fiber	2003.07.01 2005.01.01	2011.01.01 continuance *a (2016.01.01 start of second “sunset review”)
Chloroprene Rubber	2003.11.10 2005.05.10	2011.05.10 continuance *a
Hydrazine Hydrate	2003.12.17 2005.06.17	2011.06.17 continuance *a
Trichloroethylene	2004.04.16 2005.07.22	2011.07.22 continuance *a
Epichlorohydrin	2004.12.28 2006.06.28	2012.06.28 continuance *a
Spandex	2005.04.13 2006.10.13	2012.10.13 continuance *a
Catechol	2005.05.31 2006.05.22	2012.05.22 continuance *a
Electrolytic Capacitor Paper	2006.04.18 2007.04.17	2013.04.18 continuance *a
Bisphenol A (BPA)	2006.08.30 2007.08.29	2013.08.30 continuance *a
Methyl Ethyl Ketone	2006.11.22 2007.11.21	2013.11.20 continuance*a

China (18 cases)		
Product	**(top) initiation (bottom)imposition**	**Developments**
Acetone	2007.03.09 2008.06.08	2014.06.08 continuance *a
Photographic Paper and Photo Board	2010.12.23 2012.03.22	
Stainless Welded Seamless Steel Tubes	2011.09.08 2012.11.08	
Resorcinol (Resorcin)	2012.03.23 2013.03.22	
Pyridine	2012.09.21 2013.11.20	
Optical Fiber Preform	2014.03.19 2015.08.19	
Methyl Methacrylate	2014.08.08 2015.12.01	

Thailand (two cases)		
Product	**(top) initiation (bottom) imposition**	**Developments**
Cold Rolled Stainless Sheets	2002.02.15 2003.03.13	2009.03.19 continuance *a 2015.02.25 continuance *b
Hot Rolled Steel Sheets	2002.07.08 2003.05.27	2009.05.21 continuance *a 2015.05.21 continuance *b

Republic of Korea (six cases)		
Product	**(top) initiation (bottom)imposition**	**Developments**
Stainless Rods and Section Steel	2003.07.05 2004.07.30 (Partial price undertakings	2010.02.24 continuance (three-year duration) *a 2013.10.01 continuance (three-year duration) *b
Ethyl Acetate	2007.09.17 2008.08.2 (three-year duration)	2012.03.27 continuance (three-year duration) *a 2015.12.16 continuance (three-year duration) *b
Stainless Steel Plate	2010.04.28 2011.04.21	
Polyethylene-telephthalate Film	2013.12.02 2014.09.05	
Ethanolamine	2013.12.23 2014.12.30	
Pneumatic Transmission Valve	2014.02.21 2015.08.19	

Australia (five cases)		
Product	**(top) initiation (bottom) imposition**	**Developments**
Polyvinyl Chloride (PVC)	1992.02.05	1997.10.22 continuance *a

	1992.10.22	2002.10.22 continuance *b 2007.10.22 continuance *c 2012.10.21 continuance *d
Hot Rolled Steel Sheets	2012.06.14 2012.12.20	
Steel Plates	2013.02.12 2013.12.19	
Hot alloy/non-alloy shaped steel	2013.10.24 2014.11.20	
Alloy thick steel plate	2014.01.08 2014.11.05	

India (seven cases)		
Product	**(top) initiation (bottom)imposition**	**Developments**
Acrylic fiber	1998.01.07 1998.11.17	2004.12.21 continuance *a 2010.08.30 continuance *b
Polyvinyl Chloride (PVC)	2006.06.28 2008.01.23	2014.06.13 continuance *a
Peroxosulfates	2006.07.28 2007.03.19	2013.05.16 continuance *a
Phenol	2009.08.11 2010.12.01	
Acetone	2009.09.03 2011.04.18	
Melamine	2010.12.07 2012.10.08	
Acid Phthalic Anhydride	2014.05.09 2015.12.04	

Indonesia (one case)		
Product	**(top) initiation (bottom) imposition**	**Developments**
Cold Rolled Steel Sheets	2011.06.24 2013.03.19 (three-year duration)	(2015.09.04 start of “sunset review)

Mexico (one case)		
Product	**(top) initiation (bottom)imposition**	**Developments**
Seamless Steel Tubes	1999.05.13 2000.11.10	2005.11.11 continuance *a 2010.11.11 continuance *b (2015.11.06 start of third “sunset review”)

(Note)
*a – Continuance from first “sunset review
*b – Continuance from second “sunset review
*c – Continuance from third “sunset review
*d – Continuance from forth “sunset review

Source: Data of Fair Trade Center

B. MAJOR CASES

* See Part I for other major cases (in respect to WTO dispute cases in which Japan became a claimant country, see Part, I, Chapter 3 “United States”)

(1) US Antidumping Act of 1916

<Outline>

Article 801 of the Revenue Act of 1916 stipulates that an importer that has engaged in price discrimination with specific intent, including the intent of destroying or injuring an industry in the US, may be subject to criminal punishment, including fines and imprisonment. The Act also grants plaintiffs treble damages. (This law is commonly called “the Antidumping Act of 1916.”)

<Problems under international rules>

In 1999, Japan and the EU requested bilateral consultations with the United States pursuant to the WTO dispute settlement procedures with regard to the US Antidumping Act of 1916 (1916 AD Act), arguing that this Act was inconsistent with WTO Agreements in that it allows the imposition of criminal penalties and damages for a private complainant as AD relief measures, instead of the imposition of AD duties allowed under GATT, and that procedures concerning the initiation of investigations are inconsistent with the AD Agreements. In September 2000, Panel and Appellate Body reports that almost totally accepted the claims of Japan and the EU were adopted at a session of the WTO Dispute Settlement Body (DSB). As a result, the decision that the 1916 AD Act violates the WTO Agreements became final (WT/DS162).

Despite the recommendations of the WTO Panel and the Appellate Body, the US let the implementation deadline pass without taking any corrective measures such as amending or repealing the 1916 AD Act. Therefore, Japan and the EU requested authorization for countermeasures at a meeting of the DSB. In December 2003, the EU formulated European Council Regulation No. 2238/2003, which enabled European companies to recover damages incurred under the 1916 Act lawsuits.

A lawsuit based on the 1916 AD Act was brought against imports of large newspaper printing presses and components from Japan. The US Federal District Court of Iowa ordered a Japanese company to pay damages of approximately four billion yen. Because of this, Japan a law (“Japan’s Special Measures Law Concerning the Obligation of Return of Benefits and the Like Under the US Antidumping Act of 1916”) to enable Japanese companies to recover damages caused by lawsuits filed against them under the 1916 Act was established and enforce.

Meanwhile, in October 2004, a bill was submitted to the US Congress adding an article repealing the 1916 AD Act) to the Omnibus Tariff Bill. Following approval by the House of Representatives and the Senate, the bill was signed into law by the President on December 3, 2004, thereby repealing the 1916 AD Act. However, this law included a grandfather clause to the effect that the repeal did not extend to court cases pending on the day of repeal.

<Japan’s action>

The damages lawsuit filed regarding imports of large newspaper printing presses and components from Japan was allowed to continue under the grandfather clause of the 1916 AD Act. As a result, in June 2006 the Japanese company lost the case and was forced to pay a large amount of damages. In order to preserve the profits obtained through winning the lawsuit, the US company filed with the US District Court a countersuit asking for an injunction to prevent the Japanese company from filing suit under the Special Measures Law in Japan. In response, the District Court issued a preliminary injunction prohibiting the Japanese company from filing a suit in Japan to obtain relief under Japan's Special Measures Law. The Japanese company submitted an appeal to the US Federal Court of Appeals for the Eighth Circuit protesting the injunction. In August 2006, the Government of Japan submitted an amicus brief to the US Court of Appeals, arguing that the preliminary injunction should be vacated on the grounds that it invalidated remedy measures provided by Japan relating to damages incurred by private individuals through measures in violation of international law, and thus should be voided from the viewpoint of international comity.

In June 2007, the US Court of Appeals upheld the position taken by the Government of Japan in its amicus brief and issued a decision that the preliminary anti-suit injunction should be vacated. The US companies that had lost the case were dissatisfied with the appeals court's decision and lodged an appeal with the US Supreme Court in October 2007 (resubmitted in November 2007), but in June 2008 the US Supreme Court rejected these companies' motion for appeal, thereby upholding the decision by the US federal appeals court that annulled the interim injunction in the litigation.

In August 2007, in response to the US Court of Appeals' dismissal of the US company's claim, the Japanese company filed a suit against the US company with the Tokyo District Court based on the Special Measures Law. However, it was announced in August 2009 that the Japanese company and the US company had reached an amicable settlement and all the disputes under the 1916 AD Act were terminated.

References:

European Council Regulation

In December 2003, the EU enacted "European Council Regulation No. 2238/2003," enabling European companies to recover damages incurred under the 1916 Act lawsuits, which mainly consists of the following two points:

(i) European companies damaged under the 1916 Act lawsuits may make claims against the US company that filed the lawsuit for compensation; and

(ii) The acceptance and execution of US court decisions under the 1916 Act shall be rejected.

Japan's Special Measures Law

The need for the legislation

As mentioned above: (i) the US did not comply with its obligation to amend or repeal the 1916 AD Act by the designated date, despite the fact that it was determined that the Act violates the WTO Agreements; (ii) during that time, a court judgment was issued ordering a Japanese company to pay damages; and (iii) since the EU already had implemented its Council Regulation related to the 1916 AD Act, it was more probable that US companies would target Japanese companies for compensation. As such, it became necessary for Japan to enact its own set of laws similar to the European Council Regulation. As a result, "Japan's Special Measures Law Concerning the Obligation of Return of Benefits and the Like under the US Antidumping Act of 1916" was enacted in 2004.

Outline of the Act

This Act consists of the following two points:

(i) Creation of the right to claim damage recovery

The Act stipulates that persons in Japan (including enterprises and organizations established under acts of Japan and other Japanese nationals) who have suffered damages arising from a court judgment pursuant to the 1916 AD Act may seek recovery of the damages from US enterprises and others. This right is subject to a three-year statute of limitations. Further, courts with the jurisdiction to accept such claims are designated.

(ii) Negation of acceptance and execution of judgment made pursuant to the 1916 AD Act

Furthermore, judgments made under the 1916 AD Act by any court outside Japan shall not be effective.

Applicability of the Damage Recovery Act

The Special Measures Law passed by the 161st Extraordinary Diet on November 30, 2004 was made public and took effect on December 8, 2004. Around the same time, the move to repeal the 1916 AD Act gained momentum in the US, and on November 19 of that year, legislation to repeal the Act was passed. However, the amendment included a grandfather clause, which stated that the repeal of the 1916 AD Act is not retroactive with respect to pending cases as of the repeal date. Because the effect of the repeal does not apply to Japanese companies defending lawsuits regarding the 1916 AD Act that were pending when the Act was repealed, such pending cases continue to be subject to the Special Measures Law for remedy.

(2) Changed circumstances review and sunset review on large newspaper printing presses

<Outline>

In May 2005, the US Department of Commerce (DOC) announced the initiation of a changed circumstances review with regard to AD measures for large newspaper printing presses and components originating in Japan.

Measures against a Japanese company were revoked as a result of an administrative review in January 2002, and in February 2002 all the AD measures for large newspaper printing presses were terminated pursuant to sunset reviews. The revocation of measures against the Japanese company was due to the fact that, for the past three years in administrative reviews, margins had been zero, and the termination of all the measures for large newspaper printing presses through sunset reviews was due to withdrawal of participation in the review by the only producer in the US.

With regard to the administrative review in 1997 and 1998 (which were used to determine the revocation against a certain Japanese company), the DOC self-initiated a changed circumstances review because it was alleged that in a lawsuit regarding the 1916 AD Act, that the Japanese company under the AD measures had not provided accurate information.

In March 2006, the DOC made a final decision to: (1) review the dumping margin of 59.67% against the Japanese company between 1997 and 1998; (2) rescind the decision to revoke AD measures against the Japanese company made in January 2002; and (3) reconsider the sunset review made in February 2002.

In April 2006, the DOC (Department of Commerce) started reconsideration of the sunset reviews

of 2002, and, on November 6, 2006, issued a preliminary decision to affirm the likelihood of continuation or recurrence of the dumping.

<Problems under international rules>

In the sunset review of 2002, the AD measure was repealed because the US manufacturer that was the applicant in the case withdrew its participation in the review, and the termination provided no basis to change the rate of the AD duty against the Japanese company. Therefore, if the DOC reconsiders the sunset review, restores and continues the AD measures, and makes them retroactively applicable, such action lacks reasonable grounds and harms legal stability.

Furthermore, the preliminary decision applied to all large newspaper printing presses and components originating in Japan, and unreasonably resulted in restoring AD measures against companies not subject to the changed circumstances review. Therefore, this decision seriously harmed not only legal stability, but also predictability for companies.

< Japan's action>

Two Japanese companies filed a complaint with the US Court of International Trade (CIT) against the decision of the changed circumstances review made by the DOC, and this court issued a decision on January 24, 2007. The key points of the decision are below:

(i) The initiation of the reconsideration of the sunset review is ripe for judicial review prior to the final determination.

(ii) Even if the alleged fraud in the 1997-98 administrative reviews covered by the changed circumstances review caused the US manufacturer to withdraw from the sunset review in 2002, the final decision of the sunset review cannot be changed. Regardless of the reason for the US manufacturer's withdrawal, the relevant AD measure should be terminated because there was no domestic manufacturer of large newspaper printing presses and components in the US at the time of the review.

In response to the decision, the DOC announced that it was discontinuing its reconsideration of the sunset review on February 24, 2007. However, DOC and the US manufacturer appealed to the US Court of Appeals on March 20, 2007, and this Court issued a decision on June 2008.

The key points of the decision are:

(i) DOC intrinsically has the authority to re-examine administrative reviews.

(ii) Having done nothing more than to decide to initiate a re-examination of sunset reviews, the DOC cannot be said to have taken final agency action and thus judicial examination would not yet be appropriate. The CIT ruling that this decision would be subject to judicial examination was in error.

Based on these results, the DOC launched its re-examination of the sunset reviews in October 2008, and in November 2008 it presented a final decision in its re-examination of the 2002 sunset review that acknowledged the possibility of continued/resumed dumping. The Japanese Government had continuously kept watch on the trends of this case so as to ensure that the abolished AD measure would not be restored. This case was terminated without the abolished AD measure being restored since the US manufacturer withdrew from the sunset review in August 2009.

(3) Byrd Amendment (DS217/DS234)

(Refer to Part I, Chapter 3 "The United States", Anti-Dumping Measures (1))

(4) Calculation of the margin of dumping via the zeroing procedure (DS322)

(Refer to Part I, Chapter 3 "The United States", Anti-Dumping Measures (2))

(5) Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (DS184)

(Refer to Part I, Chapter 3 "The United States", Anti-Dumping Measures (3))

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

(Refer to Part I, Chapter 3 "The United States", Anti-Dumping Measures (4))

(7) Anti-Dumping Measures on High-performance Stainless Steel Seamless Tubes from Japan (DS184)

(Refer to Part I, Chapter 1 "China", Anti-Dumping and Countervailing Measures [Individual Measures] (2))

COLUMN: CONSIDERATION OF COMPETITIVE OR SUBSTITUTABLE RELATIONSHIP BETWEEN PRODUCTS IN AN AD INVESTIGATION - ENHANCING DISCIPLINES FOR INJURY ANALYSIS THROUGH WTO DISPUTE SETTLEMENT PROCEDURES

1. NEED FOR CONSIDERING COMPETITIVE OR SUBSTITUTABLE RELATIONSHIP IN AN AD INVESTIGATION

1) Injury requirement for anti-dumping measures

Under Paragraph 1 of GATT Article VI and the Anti-Dumping (AD) Agreement, dumping is defined as exporting products at less than the "normal value" (which usually refers to the domestic price in the exporting country). When dumping causes material injury to producers of like products in the importing country (hereinafter referred to as the "domestic industry"), the importing country is allowed to levy on a dumped product an anti-dumping duty not greater in amount than the margin of dumping.

In short, in order to impose AD measures, two requirements—(i) the existence of dumping and (ii) injury caused thereby to the domestic industry of the importing country—must be met. Even if a product is imported at a dumped price, the investigating authority of the importing country cannot impose an AD measure unless it conducts an analysis and determines that injury has been caused to a domestic industry by dumped imports.

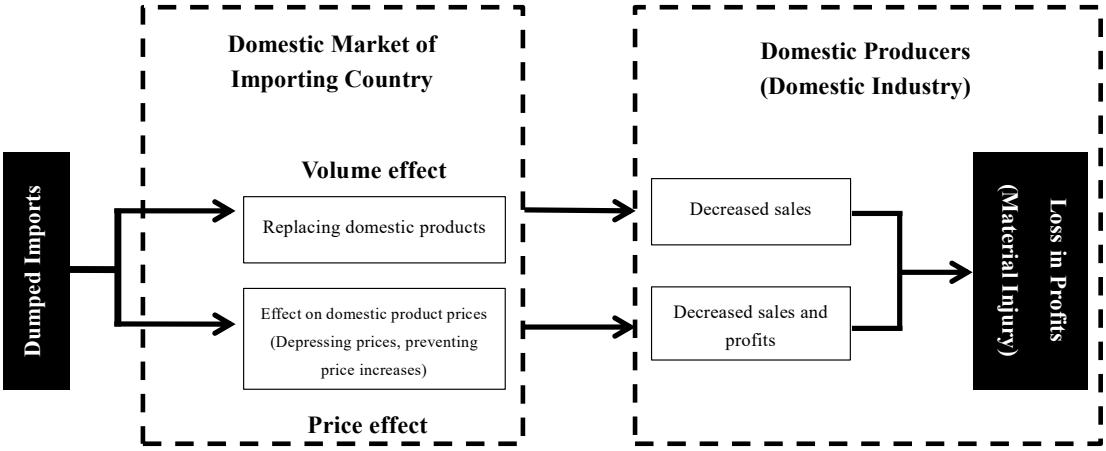
2) Mechanism of dumped imports causing injury, and competitive or substitutable relationship

Therefore, the issue is how to analyze injury caused by dumped imports. What is the mechanism whereby dumped imports cause injury to a domestic industry?

First, there are cases in which domestic producers suffer the deterioration of their business results because of a sales decline due to a drop in the sales volume of domestic products in the market caused by the substitution of the products by cheap imports flowing into the importing country

(hereinafter referred to as the "volume effect" for the purpose of this report). There are also cases in which domestic producers lower the sales price of domestic products in order to prevent the substitution of the products by imported products (stealing of market share) (hereinafter referred to as the "price effect"), resulting in the deterioration of business results due to pressure on profits. In principle, injury caused by dumping can presumably be explained by either of these two effects. Of course, in some cases, both the volume effect and the price effect may arise simultaneously.

Figure 1 Mechanism of dumped imports causing injury



As is clear from the above, the existence of a competitive or substitutable relationship in the market between imported products and domestic like products is the prerequisite for the determination of injury to be caused by dumped imports. This is because injury due to the volume effect is caused by the substitution of domestic products by imported products, while injury due to the price effect also requires a competitive or substitutable relationship, given that a decline in prices of domestic products occurs against the backdrop of the possibility of domestic products being substituted by imported products. Therefore, in order to appropriately determine injury in AD investigations, it is important to give due consideration to the existence or absence of, and the degree of, any competitive or substitutable relationship between imported products and domestic products in the market.

Indeed, in many AD investigations, the imported products and domestic products are apparently similar to each other but belong to different model categories which are not necessarily competitive with each other in the market. For example, in the case of the AD measure imposed by China on US-made automobiles, which will be mentioned later, while imported automobiles are mainly high-end models, domestic manufacturers are primarily manufacturing entry-level models, which are different from high-end models in terms of the price range and the base of purchasers. In such cases, if the consideration given to the difference in the specific model category - in other words, the consideration given to the existence or absence of and the degree of any competitive or substitutable relationship in the market - is insufficient, even deterioration of business results due to circumstances not related to dumped imports may be determined to be injury caused by dumped imports, improperly analyzing the injury requirement.

In a case where imported and domestic products are models which are not competitive with each other, as in the case above, from the viewpoint of the exporting company it should normally be desirable that such models are excluded from AD investigation before the case proceeds to the stage

of determination of dumping or injury. In reality, exporting companies request such a process in some cases. However, under the AD Agreement and according to precedents, authorities are granted broad discretion in determining the subjects of investigation, and it is difficult to contest such decisions on an ex-post basis. Therefore, it is important to clarify rules concerning the consideration of competitive or substitutable relationships in the context of analysis of injury.

Consideration of competitive or substitutable relationships in the analysis of injury conducted during an AD investigation has been growing in importance in recent years in line with industrialization and economic development of emerging countries. In particular, while there is an increasing number of cases where emerging countries conduct AD investigations on industrial products from developed countries, including Japan, AD measures are imposed in some such cases even though emerging countries are still manufacturing only lower-range models compared with high-performance, high value added products manufactured by developed countries and there is no sufficient competitive or substitutable relationship between these categories. In order to prevent the involvement of Japanese industries, which are striving to strengthen their competitiveness by creating high-quality products, in unjust AD investigations, it is important to establish rules that ensure consideration of competitive or substitutable relationships.

2. Interpretation of AD Agreement Article 3 – Two approaches

1) AD Agreement Article 3 provisions

Specific injury analysis methods in AD investigation are provided in the paragraphs of AD Agreement Article 3. However, the article fails to explicitly provide for consideration of a competitive or substitutable relationship. The discipline in this regard is left to interpretation. First, Article 3.1 provides that a determination of injury shall be based on "positive evidence" and involve an "objective examination" of both (a) the volume of the dumped imports (volume effect) and the effect of the dumped imports on prices (price effect) and (b) the "consequent impact" of these imports on domestic producers of such products.

Next, regarding the volume effect of (a), Article 3.2 provides that the investigating authorities shall consider whether there has been a significant increase in dumped imports. Regarding the price effect of (a), it provides that the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports or whether the effect of such imports is to depress prices or prevent price increases. Regarding (b), Article 3.4 provides that the examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of indices having a bearing on the state of the industry, including sales, profits, output, and market share. Furthermore, Article 3.5 provides that the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on consideration results under Article 3.2 and 3.4 and an examination of all relevant evidence including any known factors other than the dumped imports that are injuring the domestic industry.

In this way, AD Agreement Article 3 calls for considering injury based on consideration of the volume and price effects, apparently indicating a framework that takes the above-mentioned mechanism into account. In the absence of any explicit provision regarding the competitive or substitutable relationship, however, the problem is how to take that consideration into the interpretation of the provisions.

2) Traditional interpretation approach (bifurcated approach)

The traditionally dominant injury analysis approach based on AD Agreement Article 3 has divided the injury determination process into the consideration of injury and that of causal

relationship. It tried to understand the roles of Articles 3.2, 3.4 and 3.5 based on the division. As injury is separated from causal relationship, it is called the bifurcated approach.

In response to the division between the two concepts of injury and causal relationship, this approach usually considers that Article 3.4 is specialized for injury and Article 3.5 for causal relationship. In other words, Article 3.4 calls for using sales, profits, market share and other indices for deciding whether there is injury or earnings deterioration for domestic producers. Article 3.5, on the other hand, calls for considering whether the injury is attributable to dumped imports (a causal relationship) (Figure 2). The position of Article 3.2 (volume effect and price effect) is rather vague. Given the basic idea that causal relationship is considered under Article 3.5, Article 3.2 tends to be interpreted as calling for formally considering whether increases in imports or decreases in domestic product prices are identified. Any impact or effect of dumped imports on volume and prices does not have to be considered under Article 3.2, according to the bifurcated approach.

Though the bifurcated approach is easy for the investigation authorities to use, it has some problems from the viewpoint of a strict injury analysis that takes a competitive or substitutable relationship into account. This is because the relationship between dumped imports and domestic industry conditions (changes in prices of domestic products and domestic industry earnings), or a competitive or substitutable relationship between domestic products and imports, does not matter under Article 3.2 or 3.4, as the consideration of a causal relationship is done only under Article 3.5. A competitive or substitutable relationship can and should be considered as a matter of course when causal relationship is considered under Article 3.5. Given that the article does not provide for specific matters for consideration by the authorities, however, they have great discretion and they can identify a causal relationship without reasonable explanations.

3) Unitary approach

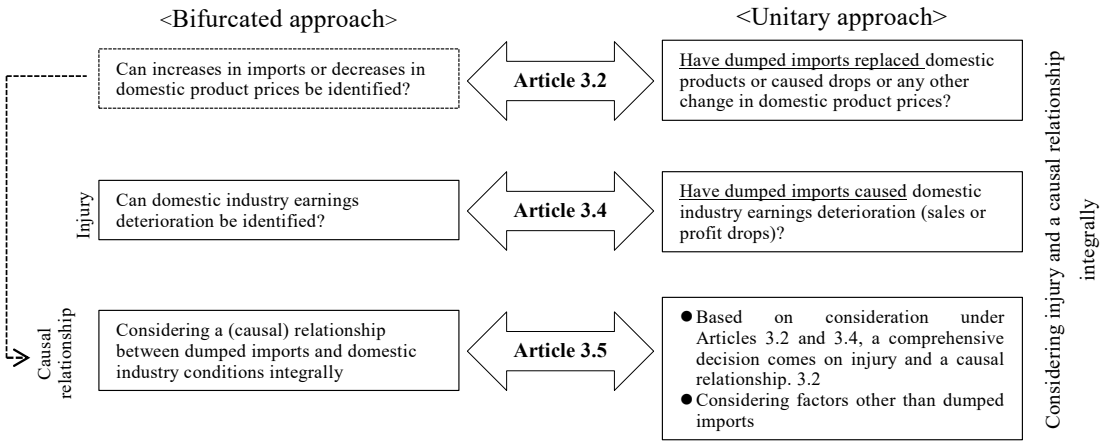
The second approach is an interpretation theory called the unitary approach. Without separating injury from causal relationship, this approach considers injury and causal relationship integrally and in stages under Articles 3.2, 3.4 and 3.5. Called the “but for” approach, it basically seeks to detect domestic industry earnings changes (injury) by comparing earnings with cases where there are no dumped imports.

The unitary approach considers causal relationship factors or relevance between dumped imports and the importing country’s domestic conditions (domestic product prices and domestic industry earnings) not only under Article 3.5 but also Articles 3.2 and 3.4 (Figure 2). When the price effect is considered under Article 3.2, for example, the problem is not whether domestic product price drops or any other changes have emerged but whether dumped imports have caused domestic product price drops or any other change. Similarly, the consideration of the effect on domestic industry earnings under Article 3.4 covers the presence or absence and the degree of earnings changes caused by dumped imports. Under Article 3.5, the authorities make a final decision on injury and causal relationship based on the above consideration. As causal relationship factors have already been considered under Articles 3.2 and 3.4, however, the weight of Article 3.5 would become relatively lighter, allowing the authorities to focus on confirming the contributions of factors other than dumped import at the end of the analysis, rather than considering causal relationship from the beginning.

Since the unitary approach considers the effect of dumped imports on domestic industry earnings based on the earlier consideration of the volume and price effects of dumped imports, the approach supports the understanding of the mechanism in which injury emerges through the analysis of volume or price effects. Additionally, the approach considers the relevance between dumped imports and domestic industry conditions (domestic product prices and domestic industry earnings)

in each injury analysis phase, it has the advantage of allowing a competitive or substitutable relationship between imports and domestic products to be considered in each phase. In order to consider the effect of dumped imports on domestic product prices under Article 3.2, for example, the authorities are required to explain how dumped imports threatened domestic products in the market and brought about domestic product price declines or any other change. As a result, they are required to consider model configuration differences between imports and domestic products. As for Article 3.4, in order to identify the effect of dumped imports on domestic industry earnings, the authorities are required to consider whether there were any changes in earnings indices (including sales and profits) responding to the volume or price effect identified under Article 3.2, for example. In this process, the authorities may have to consider sales and profits on a model-by-model basis.

Figure 2 Bifurcated and unitary approaches



3. ENHANCING INJURY ANALYSIS DISCIPLINES THROUGH WTO PRECEDENTS

As noted above, the bifurcated approach had been dominant in traditional injury examination practices. As products from Japan and other developed countries have been involved in unjustifiable AD measures with injury identified without sufficient consideration of competitive or substitutable relationship mainly in AD investigation in emerging countries in recent years, however, problems with the bifurcated approach have been recognized.

In recent years Japan has cooperated with the United States and the EU in enhancing the disciplines for injury analysis through precedents in WTO dispute settlement procedures. As a result, WTO Panels and the Appellate Body have made progress in enhancing the disciplines for injury analysis through decisions calling for strict injury analysis that gave consideration to a competitive or substitutable relationship over the past years. In the case Japan filed regarding China's AD measures on high-performance stainless steel seamless tubes from Japan (hereinafter referred to as stainless steel tubes), the Appellate Body made an important decision, requesting China to conduct injury analysis giving consideration to a competitive or substitutable relationship based on model configuration differences between imports and domestic products.

1) A leading case for interpreting AD Agreement Article 3

A leading case for the Appellate Body's interpretation of AD Agreement Article 3 involved Chinese AD measures on grain oriented flat-rolled electrical steel (GOES) from the United States (China -- GOES, DS414, with Japan participating as a third party).

In this case, the Appellate Body indicated that the different paragraphs of AD Agreement Article 3 contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination and that the examination under Articles 3.2 and 3.3 must form a meaningful basis for the overall causation analysis contemplated in Article 3.5. Based on this basic understanding, the Appellate Body found that an investigating authority's price effect analysis under Article 3.2 must include the consideration not only of the existence of price suppression or depression for domestic products but also of the "explanatory force" of dumped imports causing the price change. Similarly, it found that the examination under Article 3.4 must include the consideration not only of the existence of domestic industry earnings deterioration but also of the "explanatory force" of dumped imports causing the deterioration. The finding is consistent with the above-mentioned mechanism understanding, in that injury analysis is based on the consideration of volume and price effects. At the same time, it requires the consideration of causal relationship factors under Articles 3.2 and 3.4, supporting the unitary approach direction by giving priority to a competitive or substitutable relationship between imports and domestic products.

2) Panel findings for ensuing cases

In ensuing cases in which Chinese AD measures were pending (with Japan participating as a third party), based on the framework of findings by the Appellate Body in the GOES case, WTO Panels issued findings requiring AD investigation authorities to consider a competitive or substitutable relationship when examining the relationship between dumped imports and domestic product price changes mainly under Article 3.2.

In a case of Chinese AD measures on automobiles from the United States (China - Autos (US), DS440), for example, the Panel dealt with the fact that the Chinese authorities simply compared the average unit prices of domestic autos and imports from the United States and determined the price effect (depressing domestic prices) based on the leveling-off trend for domestic product prices, despite grade configuration and sales target differences between imports from the United States and China's domestic products. The Panel then found that China's analysis and determination violated Article 3.2, concluding that the consideration of the explanatory force of the price effect was insufficient. For example, the Panel pointed out that grade configuration differences between imports and domestic products should be taken into account for price comparison and that the fact that the average unit price of imports was far higher than that of domestic products should be considered as a factor to deny the explanatory force. The Panel thus emphasized the importance of a competitive or substitutable relationship.

In a case of Chinese AD measures on X-ray security inspection equipment from the EU (China - X-Ray Equipment, DS425), the Panel dealt with the fact that although products subject to investigation included low-output equipment for hand baggage inspection at airports and high-output inspection equipment for rail cargoes and trucks that did not compete with any Chinese products in the market, the Chinese authorities determined there was a price effect by simply comparing the average unit prices of imports and domestic products without classifying products by model. The Panel then found that China's analysis and determination violated AD Agreement Article 3.2 because the comparability of prices failed to be taken into account.

In the GOES case's compliance verification Panel procedure (China - GOES (21.5)), in 2015 the Panel found that volume and market share increases for imports or a leveling-off trend of prices for imports and domestic products alone lacked the sufficient explanatory force of any price effect of dumped imports and that more specific evidence is required regarding the effect of dumped imports on prices of domestic products.

3) Appellate Body findings in the stainless steel tube case

In parallel to these developments, Japan filed a WTO dispute settlement case in 2012 regarding China's AD measures on stainless steel tubes from Japan, squarely taking up the issue of a competitive or substitutable relationship.

The product subject to this case was a high-performance special stainless steel tube for boilers at coal-fired power plants. Japan exported high-performance models (Grade B and C) for ultra-supercritical boilers for highly efficient, high-performance power plants to China, while Chinese producers mainly produced a dissemination model (Grade A) for less efficient supercritical boilers. Grade B costs about two times more than Grade A. Grade C costs about three times more than Grade A. Therefore, imports from Japan did not compete with Chinese products in the market.

However, the Chinese authorities found (1) that prices of imports (Grades B and C) undercut those of domestic high-level models (Grades B and C) that existed in small volume during some part of the investigation period, (2) prices of overall domestic products (Grades A, B, and C) were falling during the investigation period, and (3) domestic producers' sales and before-tax profits (for Grades A, B, and C) were generally decreasing. They then concluded that the undercutting (for Grades B and C) in (1) brought about price drops (for Grades A, B, and C) in (2) and caused the earnings deterioration in (3), determining injury and a causal relationship.

In response, Japan asserted (1) that the price effect analysis was insufficient and violated AD Agreement Article 3.2 because of its failure to explain how the undercutting for high-performance models (Grades B and C) accounting for a small part of domestic products affected prices of all domestic products (Grades A, B, and C) including the dissemination model (Grade A);, (2) that the consideration of "explanatory force" was defective and violated Article 3.4 because the consideration of domestic industry earnings cover sales and profits for all domestic products (Grades A, B, and C) including the dissemination model (Grade A) for which any price effect was not expected to be found; and (3) that the determination of injury and causal relationship based on such defective analysis violated Article 3.5.

A Panel report published in February 2015 supported ting Japan's assertion and found that the determination of injury came without consideration given to model configuration differences between imports and domestic products and violated AD Agreement Article 3. However, the Panel noted that the model configuration differences and competitive or substitutable relationship must be considered under Article 3.5 alone and would not have to be considered under Article 3.2 or 3.4, an interpretation that used the old bifurcated approach. Japan appealed the Panel finding, calling for the Appellate Body to confirm the unitary approach it had used in earlier cases and specify further the requirement of considering a competitive or substitutable relationship.

The Appellate Body report, published in October 2015, upheld Japan's assertion totally, making it clear that model configuration differences and a competitive or substitutable relationship must be taken into account not only under Article 3.5 but also under Articles 3.2 and 3.4.

The Appellate Body found that a dynamic assessment of relations between prices of imports and domestic products is required for considering the effect of dumped imports on domestic product prices (price effect) under Article 3.2 and that the formal consideration of whether "price undercutting" for some models can be found would be insufficient. Then, the Appellate Body said that in cases in which model configuration differences between imports and domestic products were very wide, the authorities should take into account shares of undercutting-related models (Grades B and C) in imports and domestic products and the duration and degree of the undercutting. As for the Article 3.4 analysis, the Appellate Body confirmed the finding in the GOES case that a specific relationship (explanatory force) between dumped imports and domestic industry conditions should

be considered and found that undercutting-related models' shares of imports and domestic products and the duration and degree of the price effect (undercutting, depression or suppression) should be considered as specific factors. These findings are worthy of attention since (1) they clarify the necessity of taking into account model configuration differences and a competitive or substitutable relationship under both Articles 3.2 and 3.4 and (2) they indicate specifics of the "logical progression of inquiry" by noting that the price effect analysis under Article 3.2 should become the base for the consideration of any effect on domestic industry conditions under Article 3.4.

Furthermore, the Appellate Body noted that the absence or presence, and the degree of substitutability, between imports and domestic products should be considered in the determination of injury and causal relationship under Article 3.5 and that the substitutability in this respect is the substitutability in the market instead of the physical substitutability between imports (high-grade products) and domestic products (low-grade products) and must be based on price differences between high- and low-grade products and user preferences based on such differences. These findings are important in that they clarified the necessity of considering a competitive relationship in the market and confirmed that a competitive or substitutable relationship is not merely a qualitative issue of the presence or absence but includes quantitative issue of "degree."

4. SIGNIFICANCE OF PRECEDENTS AND FUTURE ISSUES

As explained in detail above, the disciplines for injury analysis in AD investigation have been enhanced through the development of WTO dispute settlement precedents. The development is practically significant for forestalling Japanese industries' involvement in unjustifiable AD measures and reaffirms the significance of dispute settlement procedures by demonstrating their function of clarifying rules. The stainless steel tube case attracts attention as a case in which though Japan, won in the Panel phase, it appealed the Panel ruling seeking (successfully) findings from the Appellate Body's that further clarified the rules.

On the other hand, there are unsolved issues regarding the Appellate Body's findings in the stainless steel tube case, including how far these findings could be applied to cases in which model configuration differences between imports and domestic products are not as clear as in the stainless steel tube case and whether similar rules could be applied to the volume effect. As these issues are left for future consideration, additional dispute cases may be required to accumulate further findings.

COLUMN: ISSUE OF EXCESSIVE PRODUCTION CAPACITY IN THE STEEL INDUSTRY, ETC.

1. INTRODUCTION

While global economic growth has been slowing down in recent years, continued expansion of production capacity with little consideration given to economic efficiency in some major industries, mainly in emerging countries, is causing serious excessive supply. The resulting weak market conditions have led to deterioration of profitability, causing frequent trade friction all over the world. This column uses the steel industry as a representative example of an industry having the problem of excessive production capacity, and provides an overview of the current situation and issues in that industry.

2. ROLES OF THE STEEL INDUSTRY

Steel is a raw material fundamental to many industries, and is used in products such as automobiles/electric home appliances, transportation infrastructure such as railways and expressways, resource infrastructure such as oil fields and pipelines, and many buildings.

Therefore, each country aims to secure its own stable supply. In Japan, government-controlled Yawata steel works commenced operations more than 100 years ago in 1901. The steel industry has been expanding in many countries as their economies grow and develop. Japan in particular has been producing high quality steel, even after economic maturity was reached, based on the accumulation of technologies and experiences.

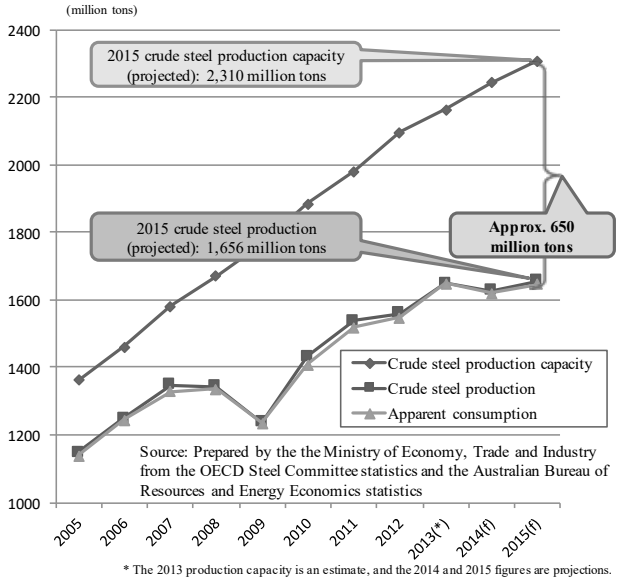
3. SITUATION OF EXCESSIVE PRODUCTION CAPACITY OF STEEL

Global steel demand significantly decreased in 2009 due to recession, but has been on a recovering trend since 2010. However, due to a rapid increase in production capacity of crude steel that is faster than the increase in demand, the demand-supply gap is increasing, causing excessive supply. According to projections made by the OECD, whereas the annual apparent world consumption[10] in 2015 was approximately 1,650 million tons, the annual excessive production capacity was approximately 650 million tons (the annual crude steel production capacity was approximately 2,300 million tons). (See Figure 1)

10 Apparent consumption refers to the volume calculated by subtracting the export volume from the sum of the production and import volumes in the country/region.

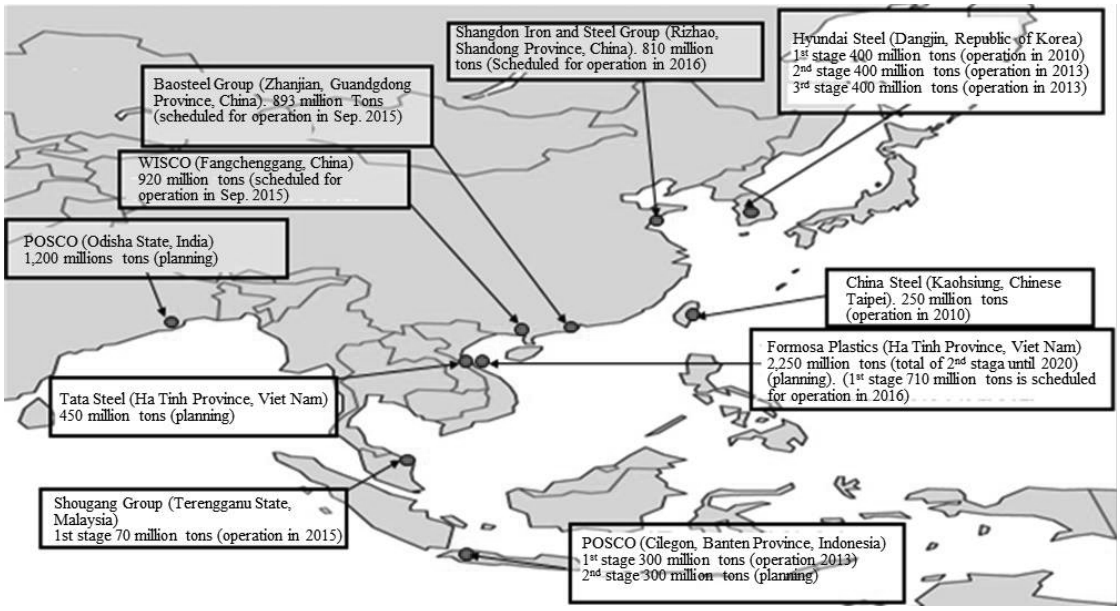
(Figure 1)

[Demand-Supply Gap in the World Steel Market]



China, which has achieved rapid economic growth in the 21st century, significantly increased its steel production. The Republic of Korea also sharply increased its steel production. Other Asian countries are also planning to construct/expand many steelworks. (See Figure 2)

(Figure 2) Successive Construction of Large-scale Steelworks in Asia

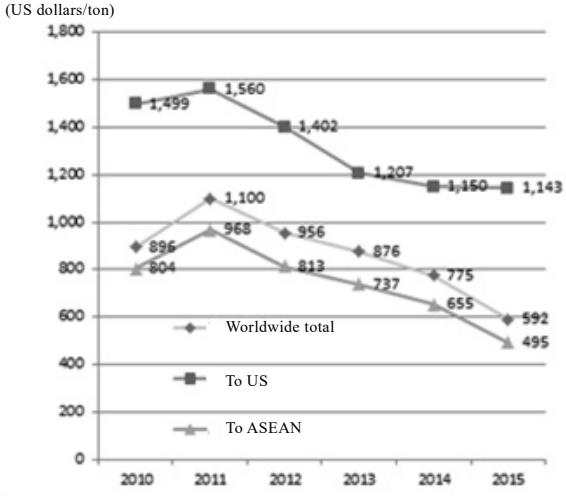


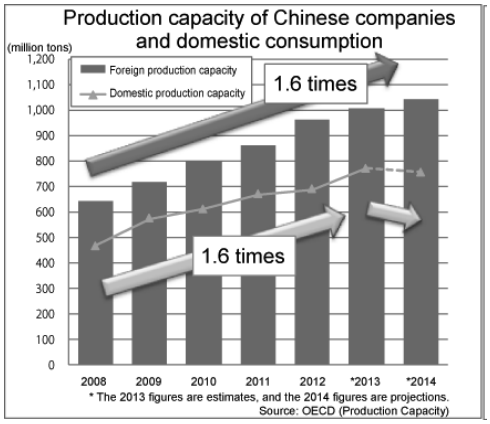
Crude steel production capacity in 2014 is projected to be approximately 1.6 times larger than in 2008, and during this period the GDP (on a local currency basis) and apparent crude steel consumption both increased approximately 1.6 times. Production capacity in 2014 increased by 3.4% from the previous year and the GDP by 7.3% while apparent consumption decreased by 3.8%. Due to these domestic situations, the export volume of China in 2014 sharply increased to

approximately 1.5 times that in 2013 (approximately 1.6 times that in 2008). On the other hand, prices of Chinese steel exports have declined year by year (the price for the representative product of hot-rolled coil in February 2016 dropped by about 20% from a year earlier), leading countries around the world to take remedial measures, including anti-dumping (AD) measures and safeguard (SG) measures, etc. (see Figure 3).

(Figure 3)

[Changes in China's export prices (average for total steel)]



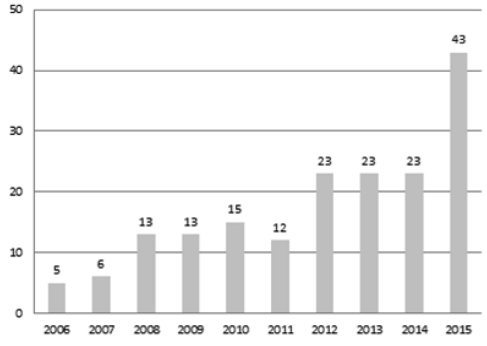


4. Impact of Excessive Production (Increased Imposition of Trade Remedy Measures)

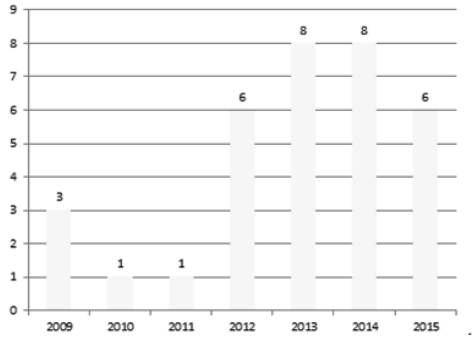
Steel produced in excess of demand is traded at low prices in the domestic/export market, eventually leading to decreased profitability in the entire steel industry. In addition, as an abundance of low-priced steel flows into importing countries, imposition of trade remedy measures has been increasing all over the world, as described above. The number of AD/CVD (countervailing duties) investigations initiated rapidly increased from 14 in 2011 to 43 in 2015, and that of SG investigations from 2 in 2011 to 6 in 2015. Of the trade remedy investigations conducted worldwide in 2014, approximately 25% of AD measures, approximately 40% of CVD measures, and approximately 17% of SG measures were steel-related. These measures created the situation where Japanese companies that are mainly exporting high quality steel suffer increased export costs, and Japanese companies in foreign countries, etc. suffer obstructions in stable supply of steel materials.

(Figure 4)

[Changes in number of steel-related cases for which AD investigations were initiated]



[Changes in number of steel-related cases for which SG investigations were initiated]



(Reference) Cases of AD/SG measures for which the investigation was initiated in 2011 or later

* Other than those determined not to be violations

AD investigating country	Investigated country (Asia)
Thailand	China: 7, Chinese Taipei: 3
	Korea: 2, Viet Nam: 1
Malaysia	China, Korea: 4,
	Indonesia: 2, Chinese Taipei: 1
Indonesia	China: 4, Korea, Chinese Taipei: 3,
	Japan, Viet Nam, Thailand, Malaysia: 1
Viet Nam	China, Chinese Taipei, Indonesia, Malaysia: 1
India	China, Korea: 3, Malaysia: 1
China	Japan: 1
Chinese Taipei	China, Republic of Korea: 1
The United States	China: 5,
	Korea: 4, Chinese Taipei: 3,
	India, Japan: 2, Thailand: 1
Canada	Korea: 5
	China, India: 4, Thailand, Indonesia: 3,
	Chinese Taipei, Philippines, Viet Nam: 2, Japan 1
Mexico	China: 6, Korea: 1
Colombia	China: 2
Peru	China: 1
Brazil	China: 7,
	Korea, Chinese Taipei: 3, Viet Nam: 1
Australia	China, Korea, Chinese Taipei: 6
	Japan, Thailand: 4
	Malaysia: 3, Indonesia: 2
	India, Viet Nam: 1
EU	China: 6, India: 4
	Chinese Taipei: 2, Korea, Japan: 1
Russian	China: 3
Turkey	China, Chinese Taipei, Malaysia, Viet Nam: 1

SG investigating country	
Indonesia	5
India	2
Thailand	2
Colombia	2
Malaysia	1
Philippines	1
Egypt	1
Jordan	1
Morocco	1

Note) SG investigations are global; the investigations cover all countries/regions
Note) As of February 2015

5. ISSUES/EFFORTS UNDER INTERNATIONAL RULES

1) Abuse of AD/SG Measures, etc.

Many Japanese steel companies export high quality steel that does not compete with products manufactured in importing countries. However, they are often subject to AD/SG measures that are originally intended to target the import of low-priced, excessively-produced products Once AD/SG investigations are initiated, exporters suffer a significant burden (See "5) Economic Aspects and Significance" of this Chapter). In these investigations, Japanese steel companies have repeatedly claimed that exported products from Japan did not compete with products in the importing country, and therefore there was no injury caused by the imports from Japan. However, such arguments were not always properly considered by the investigating authorities of the importing countries. If a trade remedy measures were invoked as a result of the arguments not being accepted, it would not only impose significant restrictions on businesses of the exporters, but also cause the disadvantage of passing on additional costs to the consumers of steel products, etc.

Since the WTO Agreements provide that AD/SG measures cannot be invoked without the existence of a causal relationship between the increase in imports and the injury to the domestic industry, invoking these measures without sufficient determination of the causal relationship is likely to violate the AD/SG Agreements, etc.

A determination on the point at issue (injury and a causal relationship with respect to AD measures) can be found in the case of China-Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan (DS454/460; see Chapter 6). The Chinese authorities determined that most Chinese products were of lower grades than the imported products from Japan. Nevertheless, the Chinese authorities determined that there was injury to the domestic industry and a causal relationship between the imports and the injury. On this point, the WTO Appellate Body concluded that a dynamic assessment of the relationship between prices for imports and domestic products in China is required for considering any effect of dumped imports on domestic product prices (AD Agreement Article 3.2: price effect) and that when models or grades for imports and domestic products are different, such differences must be taken into account. As for consideration of domestic industry conditions (under AD Agreement Articles 3.1 and 3.4), it found that the authorities should consider not only whether domestic industry earnings deteriorated but also the relationship between earnings changes and dumped imports while taking into account differences in grades between imports and domestic products.

In addition, according to precedent, the impacts on the domestic industry caused by factors other than increased imports must be separated when examining the requirements of injury and a causal relationship with respect to SG measures (US-Definitive Safeguard Measures on Imports of Certain Steel Products (DS248, etc.)). Invocation of SG measures requires that the increased imports and the injury to the domestic industry occur as "a result of unforeseen developments" and of "the effect of the obligations incurred …" under the GATT, including tariff concessions, etc., (GATT Article XIX: 1(a)). Therefore, SG measures are not allowed simply because the business performance of the domestic industry is worsening and at the same time the imports are increasing (for recent findings, see Ukraine - Cars (DS468) (Chapter 8)).

2) Regulations Other than the WTO Agreements on the Maintenance/Expansion of Excessive Capacity Supported by the Government

The OECD Steel Committee restarted discussions on the handling of the excessive production capacity issues in 2012, and, in addition to Japan, the United States, the EU, and the Latin American Steel Association, etc. have expressed strong interest regarding this issue. China, the world's largest steel producing country, also participates in the discussions at the OECD Steel Committee as it relates to the domestic excessive competition and environmental issues. This issue was also addressed at the OECD Ministerial Council meeting in May 2014, and the need for responding to the issue of excessive capacity was emphasized. In response to this, at the OECD Steel Committee meetings in the same year (June and December), concerns were expressed about governmental subsidies, abuse of measures taken at borders, and support from government-affiliated financial institutions. (*See* 2.4.3 of the report of the survey project funded by METI

(http://www.meti.go.jp/policy/mono_info_service/mono/iron_and_steel/downloadfiles/H26asankyou.pdf) for the funding sources for the major projects in Asian countries.)

Taking into consideration these discussions, the OECD published a report on the issue of excessive capacity on its website in February 2015. In addition to providing analysis on the current situations and impacts of excessive capacity, this report points out market interventions by

governments. The report also provides a list of projects for new construction/expansion of steelworks in the respective countries/regions, and states its intention to continue various efforts to resolve the issue of excessive capacity, including analysis of the impacts of government measures on excessive capacity, maintenance of an investment case database (including funding sources and support measures by the government), and discussions on the issue of excessive capacity at the government level, etc.

<OECD report on the excessive capacity issue: "Excess Capacity in the Global Steel Industry and the Implications of New Investment Projects">

http://www.oecd-ilibrary.org/science-and-technology/excess-capacity-in-the-global-steel-industry-and-the-implications-of-new-investment-projects_5js65x46nxhj-en%3bjsessionid=4cs3r2sgdgq81.x-oecd-live-01

6. Conclusion

The issue of excessive production capacity exists not only in the steel industry but also in the shipbuilding industry and the chemical fiber industry, etc. In the future the same issue may also occur in other industries due to additional economic growth in emerging countries. How the issue has been handled in the WTO and international fora such OECD, etc. with respect of steel can be a good reference for other industries. In addition, this issue needs to continue to be handled from the point of view of facilitating sound and sustainable development of industries by making market mechanisms function appropriately.