CHAPTER 6

ANTI-DUMPING MEASURES

OVERVIEW OF RULES

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

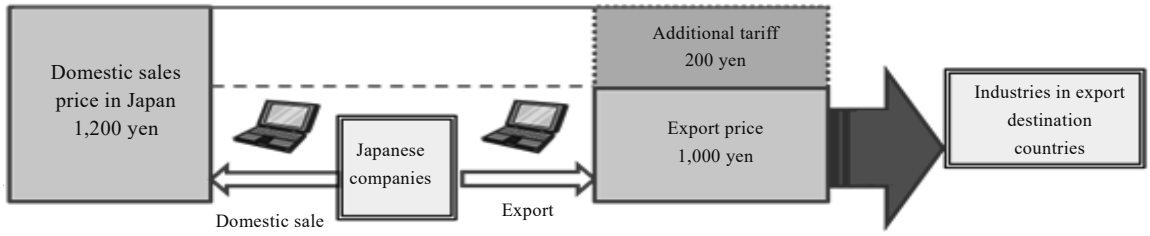
"Dumping" in the WTO Agreements is defined as a situation in which a product is exported to other countries at a price less than its "normal value." "Normal value" usually represents the price for domestic sale in the exporting country. If the export of dumped products does or may cause material injury to the industry of the importing country, the importing country may levy on any dumped product an anti-dumping duty in the amount of the dumping in order to offset or prevent dumping. That is to say, 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 duties 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 restriction. Although considerable progress was achieved during the Uruguay Round and Doha Round negotiations, many countries still express concern over abusive practices.

Figure II-6-1 Example of Dumping



(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.

(a) 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.

(b) 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.

(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 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. 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.

Furthermore, 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.

That being said, this has not yet been confirmed by any official decision of the WTO nor the General Agreement on Tariffs and Trade (GATT) before it. There are differences of opinion on the issue of circumvention among member countries, and no agreement on the necessity and content of regulations under the agreement is in sight. As for circumvention prevention measures (which generally involves imposing AD duties on imports that are deemed as circumvention practices based on the results of an investigation that is simpler than general AD investigations), AD measures may be expanded unreasonably without implementing an appropriate examination, and Japan will need to continue to monitor the laws, regulations and measures of each country. (For details, see Column below in this Chapter.)

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

(Please see pages 385-389 in the 2016 Report on Compliance by Major Trading Partners with Trade Agreements –WTO, FTA/EPA and IIA-)

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, some emerging countries have also begun to apply AD measures, including China, India, the Republic of Korea, and Brazil (see Figure II-6-3). At present, a number of AD measures have been taken against Japan by emerging countries. (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

	1995-1999	2000-2004	2005-2009	2010-2014	2015	2016	Total (1995-2016)
US	134	222	84	87	42	37	606
EU	186	117	102	63	11	14	493
Canada	56	77	18	45	3	14	213
India	132	268	192	148	30	69	839
China	5	104	69	40	11	5	234
Rep. of Korea	41	36	31	19	4	4	135
Indonesia	32	28	20	42	6	7	135
Turkey	13	76	55	36	16	17	213
Mexico	37	42	18	32	9	6	144
Brazil	68	48	64	189	23	11	403
Argentina	93	92	73	59	6	25	348
Japan	0	2	4	2	2	1	11
Others	455	322	272	307	66	90	1,423
Total	1,252	1,434	1,002	1,069	229	300	5,286

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 List of continued AD measure cases against Japanese products (56 cases) (as of June 30, 2017)

China (18 cases)		
Product	**Date of Imposition**	**Developments**
Polyvinyl Chloride (PVC)	2003.09.29	2015.09.28 continuance
Optical Fiber	2005.01.01	2017.01.1 continuance *a
Chloroprene Rubber	2005.05.10	2017.05.09 continuance *a
Spandex	2006.10.13	2012.10.12 continuance *a
Electrolytic Capacitor Paper	2007.04.18	2013.04.18 continuance *a
Bisphenol A (BPA)	2007.08.30	2013.08.29 continuance
Methyl Ethyl Ketone	2007.11.22	2013.11.20 continuance
Acetone	2008.06.09	2014.06.06 continuance
Photographic Paper and Photo Board	2012.03.22	
Resorcinol (Resorcin)	2013.03.23	
Pyridine	2013.11.20	
Optical Fiber Preform	2015.08.19	
Methyl Methacrylate	2015.12.01	
Unbleached Sack Paper	2016.04.10	

China (18 cases)		
Product	**Date of Imposition**	**Developments**
Polyacrylonitrile Fiber	2016.07.14	
Oriented Magnetic Steel Sheet	2016.07.23	
Fe-Based Amorphous Alloy Ribbon	2016.11.18	
Vinylidene Chloride-Vinyl Chloride Copolymers	2017.04.20	

Source: WTO Statistics (G/ADP/N/300/CHN) *Based on the left material with necessary adjustment

United States (18 cases)		
Product	**Date of Imposition**	**Developments**
PC Steel Wire Strand	1978.12.08	2015.04.23 continuance
Carbon Steel Butt-Weld Pipe Fittings	1987.02.10	2016.08.23 continuance
Brass Sheet & Strip	1988.08.12	2012.04.26 continuance
Gray Portland Cement & Clinker	1991.05.10	2016.12.11 continuance
Stainless Steel Bar	1995.02.21	2012.08.09 continuance
Clad Steel Plate	1996.07.02	2013.02.11 continuance
Stainless Steel Wire Rod	1998.09.15	2016.08.15 continuance
Stainless Steel Sheets	1999.07.27	2011.08.11 continuance
Small Diameter Seamless Pipe	2000.06.26	2011.10.11 continuance
Large Diameter Seamless Pipe	2000.06.26	2011.10.11 continuance
Tin mill products	2000.08.28	2012.06.12 continuance
Welded Large Diameter Line Pipe	2001.12.06	2013.10.29 continuance
Polyvinyl Alcohol	2003.07.02	2015.05.27 continuance
Thermal diffusion nickel-plated hot-rolled flat steel products	2014.05.29	
Non oriented electromagnetic steel sheet	2014.12.03	
Cold-Rolled Steel Sheet	2016.07.14	
Hot-Rolled Steel Sheet	2016.10.03	
Thick Plate	2017.05.25	

Source: WTO Statistics (G/ADP/N/300/USA) *Based on the left material with necessary adjustment

India (7 cases)		
Product	**Date of Imposition**	**Developments**
Acrylic fiber	1998.11.17	2010.08.30 continuance
Peroxosulfates	2007.03.19	2013.05.16 continuance
Polyvinyl Chloride (PVC)	2008.01.23	2014.06.13 continuance
Melamine	2012.10.08	

India (7 cases)		
Product	**Date of Imposition**	**Developments**
Acid Phthalic Anhydride	2015.12.04	
Hot-Rolled Steel Sheet, Thick Plate	2017.05.11	
Cold-Rolled Steel Sheet	2017.05.12	

Source: WTO Statistics (G/ADP/N/300/IND) *Based on the left material with necessary adjustment

Republic of Korea (6 cases)		
Product	**Date of Imposition**	**Developments**
Stainless Rods and Section Steel	2004.07.30 (Partial price undertakings)	2017.06.02 continuance (three-year duration)
Ethyl Acetate	2008.08.25	2015.11.19 continuance
Stainless Steel Plate	2011.04.21	2016.12.06 continuance
Polyethylene-telephthalate Film	2014.12.30	
Ethanolamine	2014.12.30	
Pneumatic Transmission Valve	2015.08.19	

Source: WTO Statistics (G/ADP/N/300/KOR)

Australia (4 cases)		
Product	**Date of Imposition**	**Developments**
Hot Rolled Steel Sheets	2012.12.20	
Steel Plates	2013.12.19	
Alloy thick steel plate	2014.11.15	
Hot alloy/non-alloy shaped steel	2014.11.20	

Source: WTO Statistics (G/ADP/N/300/AUS)

Canada (3 cases)		
Product	**Date of Imposition**	**Developments**
Certain steel plate	2014.5.20	
Large-Diameter Welded Line Pipe	2016.10.20	
Reinforcing Steel Bar	2017.05.03	

Source: WTO Statistics (G/ADP/N/300/CAN)

Thailand (2 cases)		
Product	**Date of Imposition**	**Developments**
Cold Rolled Stainless Sheets	2003.03.13	2015.02.25 continuance
Hot Rolled Steel Sheets	2003.05.27	2015.05.21 continuance

Source: WTO Statistics (G/ADP/N/300/THA)

Brazil (1 case)		
Product	**Date of Imposition**	**Developments**
Radial tyres	2014.11.24	

Source: WTO Statistics (G/ADP/N/300/BRA)

EU (1 case)		
Product	**Date of Imposition**	**Developments**
Grain-oriented flat-rolled products of electrical steel (GOES)	2015.10.30	

Source: WTO Statistics (G/ADP/N/300/EU)

Mexico (1 case)		
Product	**Date of Imposition**	**Developments**
Seamless Steel Tubes	2000.11.11	2010.11.11 continuance

Source: WTO Statistics (G/ADP/N/300/MEX)

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

There are three companion law and regulation to the AD Agreement in Japan: 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. The authority is required to take action based on these laws and regulations when a complaint is made by Japanese industries, claiming that they are suffering injury caused by dumped imports.[1] The investigating authorities will respond to questions and consultations as needed, including questions on trade remedy measures, application procedures, etc.[2] The overview of recent investigations is shown in Figures II-6-5 to II-6-8 below.

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
15 October 2013:	Investigation on the extension of imposition period was extended
6 March 2014:	Period of AD duty imposition was extended **<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%

[1] These laws and regulations are to be reviewed as necessary to maintain consistency with the WTO agreements. In April 2017, Japan amended the Cabinet Order on Anti-Dumping Duties and the Guidelines on Procedures, etc. Concerning Anti-Dumping Duties, in order to reduce the burden of application procedures.
http://www.meti.go.jp/policy/external_economy/trade_control/boekikanri/download/trade-remedy/20170401_release.pdf

[2] 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

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
25 March 2016	Preliminary determination was made
9 April 2016	Provisional AD duties were imposed
9 August 2016	AD duties were imposed
AD rate China: 73.7% Korea: 49.5%	

Figure II-6-9 Highly Polymerized Polyethylene Terephthalate from China

History	
6 September 2016	Complaint (from four Japanese companies) to impose antidumping duties was accepted
30 September 2016	Investigation was initiated
4 August 2017	Preliminary determination was made
2 September 2017	Provisional AD duties were imposed
28 December 2017	AD duties were imposed
AD rate China: 39.8-53.0% (depends on the supplier)	

Figure II-6-10 Carbon Steel Butt Welded Joint from the Republic of Korea and China

History	
6 March 2017	Complaint (from three Japanese companies) to impose antidumping duties was accepted
31 March 2017	Investigation was initiated
8 December 2017	Preliminary determination was made
28 December 2017	Provisional AD duties were imposed
Provisional AD rate Korea: 41.8-69.2% (depends on the supplier) China: 57.3%	

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

From the establishment of the WTO to the end of February 2018, there were 521 consultation requests under the WTO dispute settlement procedures, including 117 cases involving anti-dumping measures. Of the 117 AD measure cases, six 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), DS454 (China – HP-SSST), and DS504 (Republic of Korea – Pneumatic Valves).

COLUMN:

"Circumvention" and Trade Rules

1. Introduction

Conventionally, the term "circumvention" has been interpreted to mean actions taken by exporters with an intent to avoid AD/CVD measures. Countries have discussed what countermeasures need to be taken and what kind of trade rules need to be developed to deal with such practices. This Column gives an overview of the history of discussion regarding circumvention and measures against such practices (anti-circumvention measures), as well as briefings of recent anti-circumvention measures cases and an explanation of the recent trend of expanding the concept of circumvention.

2. Past Discussions about Circumvention

(1) Background

An AD/CVD measure is a type of trade remedy, which is exercised against a specific product from a specific country. Therefore, if, for example, the exporter changed the export route of the product to include a third country or modified the specification of the product after the exercise of an AD/CVD measure, the product may fall outside the scope of said measure. In order to deal with such exporter's conduct, the importing country may take an "anti-circumvention measure" to expand the scope of AD duties/CVDs to include the export items that "circumvented" the measure. However, there is a risk that fair business practices, such as the renovation of supply chains and new product development, can be subject to such duties, unless proper rules are established to regulate such measures. With this situation in the background, there has been an ongoing discussion as to the definition of "circumvention" and what kind of anti-circumvention measures are acceptable in what cases.

(2) Patterns of Circumvention Practices

Generally, "circumvention" means actions taken by exporters in order to unduly avoid AD duties and CVDs imposed by importing countries. However, no strict definition of the term has been established, nor is there a consensus regarding the definition among countries (see (3) below). Nonetheless, the countries that have already incorporated anti-circumvention measures in domestic laws, including the U.S. and EU, seem to perceive the following action patterns as circumvention practices.

A. Circumvention through the importing country

Instead of exporting the product subject to the duties from the exporting country, bring the product components into the importing country to assemble the same product there.

B. Circumvention through a third country

Instead of exporting the product subject to the duties from the exporting country, bring the product components into a third country to assemble the same product and export the finished product from there.

C. Country hopping

The company in the exporting country manufactures the product subject to the duties using the manufacturing facilities of its affiliate located in a third country and exports the finished product from there.

D. Slight modification

Instead of exporting the product subject to the duties itself, export a slightly modified product.

E. Successor products

Instead of exporting the product subject to the duties itself, export a successor product that has been developed after the imposition of the duties.

The United States, EU, etc. have domestic laws based on which anti-circumvention measures have been taken against various patterns of circumvention practices listed above. As stated before, anti-circumvention measures expand the scope of AD/CVD measures that are already in place. This means, for example, that the scope of the AD/CVD measure for Product X from Country A is expanded to include Product X from Country B, or to include Product Y from Country A.

(3) Negotiations Concerning Rules

The topic of "circumvention" was also discussed at the Uruguay Round. The United States, European countries, etc., which had actively exercised AD measures, emphasized the need for establishing common rules for anti-circumvention measures, while Asian and other countries including Japan, which had often been subject to AD measures, were more cautious about the introduction of such rules, due to a concern about abuse of AD measures as anti-circumvention measures. Due to such difference in the views of the countries, the introduction of anti-circumvention measure rules did not see fruition at the Uruguay Round. After that, the

discussion was taken over by the Committee on Anti-dumping Practice under the WTO. Since 1997, unofficial group negotiations have been carried out with a view to establishing common rules. In this context, the United States and other countries also argued the necessity for common anti-circumvention measure rules at the Doha Development Agenda. However, there was a huge disparity in countries' opinions as to what should be deemed as a "circumvention" practice. As negotiations at the Doha Development Agenda came to a deadlock, no common rules have yet been established to this date.

As there is no established international rule concerning anti-circumvention measures at the moment, it is not necessarily clear whether it would be acceptable under the WTO agreements to expand the scope of AD/CVD measures that have already been implemented, without proving the fact of dumping concerning imports of additional products or imports from additional countries that would be included in the expanded scope or the fact that the domestic industry has been damaged by said imports.

(4) Duality of the Circumvention Problem

As seen above, while we cannot necessarily deny the argument that there is a need for some sort of measure against practices referred to as "circumvention," i.e. acts of unduly avoiding AD/CVD measures, there is also a concern that the arbitrary imposition of anti-circumvention measures by various countries in the absence of international regulatory rules could result in the unrestricted abuse of AD/CVD measures and encouragement of protectionism. The circumvention is a problem that entails such duality.

3. Recent Cases Concerning Anti-Circumvention Measures

In a recent case, the U.S. Department of Commerce commenced an investigation in September 2016 on cold-rolled steel sheets and surface-treated steel sheets from Viet Nam that were allegedly substantially Chinese products subject to AD duties.

The investigation found that hot-rolled or cold-rolled steel sheets produced in China went under a "minor or insignificant" processing in Viet Nam and then were exported to the United States, which according to the investigation report constituted "circumvention" of the AD/CVD measures imposed on cold-rolled steel sheets and surface-treated steel sheets from China. The investigation affected exports of products from Japanese companies' establishments in Viet Nam to the United States, despite the fact that these products did not use hot-rolled steel sheets made in China at all. However, it is questionable in the first place whether processing from hot-rolled steel sheets into cold-rolled steel sheets or the surface treatment of cold-rolled steel sheets can be called a "minor or insignificant" processing under the U.S. laws. It is worth paying attention to the discussion as to whether it is appropriate to expand the scope of AD/CVD measures that have already been imposed as anti-circumvention measures even in cases such as the one above.

4. Expansion of the Concept of "Circumvention"

As seen above, the focus of the past discussion concerning the "circumvention" problem and issues surrounding anti-circumvention measures has been the avoidance of AD duties or CVD and the appropriateness of the expansion of AD/CVD measures already imposed on such practices.

On the other hand, it appears that there is also an ongoing trend in recent years to allege "circumvention" based on an expanded interpretation of the term. For example, "circumvention" is

cited as an underlying factor for an investigation under Section 232 of the Trade Expansion Act of 1962 (United States). The problem discussed in this context is that, as in the case of steel and aluminum products, AD/CVD measures may not be able to effectively prevent dumped products from coming into the United States even if imports of specific products (e.g., steel and aluminum products) from specific are restricted with such measures, because in some cases such measures would only direct the subject products to other countries, which would eventually be exported to the United States from said countries, or in other cases, imports of downstream products would increase, if the total production capacity is in excess globally. In fact, the United States stated that it had already exercised more than 150 AD/CVD orders against various countries when it launched the investigation under Section 232 on steels; nonetheless, the country's steel industry was still harmed due to the effects of unfair trade practices, including subsidies provided by foreign governments, and due to excess production capacity (Executive Order of April 20, 2017, regarding an investigation under Section 232).

"Circumvention" is an old and new issue as it had been already discussed from before the foundation of the WTO and the discussion is still ongoing today. The recent tariff increase by the United States based on Section 232 of the Trade Expansion Act of 1962 as stated above took the form of an expansion of "anti-circumvention measures" of an unprecedented scale, raising a concern about an inclination towards protectionism. On the other hand, it seems that this problem stems from excessive global production of certain products and unfair trade practices driven by such situation (market-distorting subsidies provided by overseas governments, production activities of state-owned firms that interfere with the market mechanism, etc.). It is preferable to deal with this issue through multilateral efforts to enhance the exercise and enforcement of the rules concerning national subsidies, as well as continued efforts for realizing optimized production capacity in each country through, for example, the OECD Global Forum and dialogues on steel, rather than depending on "anti-circumvention measures" exercised from a protectionist stance.

COLUMN:

USE OF SALES PRICES OF A THIRD COUNTRY IN RELATION TO ANTI-DUMPING DUTIES IMPOSED ON CHINA (THE ISSUE OF CHINA'S MARKET ECONOMY STATUS)

1. PROBLEM AREAS

In dumping determination, the gap between the "normal value" of the export item and the "export price" is recognized as the dumping margin (see 1. (1) of this Chapter). In accordance with an agreement upon China's accession to the WTO in 2001 (China's Accession Protocol), with respect to dumping determination for exports from China, WTO Members are allowed to compare prices of products exported from China with alternative prices (e.g., domestic sales prices of a third country) as normal values, not domestic sales prices in China.

Behind this, there is a recognition that in China the market economy has not sufficiently developed, as exemplified by excessive subsidies and low-interest loans from the government, and accordingly that true domestic prices are unknown or unreasonably low, and thus cannot be appropriately compared with export prices, making it difficult to calculate an appropriate difference (margins of dumping).

A part of the supporting provisions for the above agreement (Subparagraph 15(a)(ii) of China's Accession Protocol) expired in December 11, 2016, when 15 years passed since the accession of China. Due to the expiration, how to treat dumping determination for exports from China afterwards became an issue of international debate (so called the (Non-)Market Economy issue).

What underlie this international debate are the arguments regarding legal interpretations resulting from the expiration of a part of the relevant provisions. This debate also draws attention in the context of the question of whether China should be treated as a market economy country when behind China's excess capacity issue are said to be market-distorting subsidies from the government (including market-distorting low-interest loans given by government-affiliated financial institutions to particular industries).

2. POLICY ACTION OF EACH COUNTRY

(1) The United States

In its AD Act (the Tariff Act of 1930 [§1677(18)]), the U.S. defined a "non-market economy (NME) country" as a country for which alternative prices can be used when conducting an investigation for imposition of AD duties, and the U.S. Department of Commerce separately determined that China is an NME country. The U.S. maintains the treatment of China as an NME country and takes the position to continue using alternative prices in an AD investigation on China's exports after the expiration of Subparagraph 15 (a)(ii) of China's Accession Protocol.

Moreover, in October 2017, the United States conducted an AD investigation on Chinese aluminum foil and re-determined China as an NME country under the domestic law for the first time in eleven years since 2006. The reason for this determination was that the market mechanism was not properly functioning as the Chinese government, the Communist Party, etc. were distorting incentives for major economic entities (financial institutions, the manufacturing industry, the energy industry, and infrastructures, etc.) by directly or indirectly managing resources distribution as the owners of these entities or through giving instructions on performance goals to these entities based on national industrial projects, etc.

(2) EU

In December 2017, the EU amended its AD regulation (REGULATION (EU) 2017/2321). The AD regulation before the amendment (REGULATION (EU) 2016/1036) specifically named China and other countries as "NME countries" for which the use of alternative prices was allowed. It also required the use of such alternative prices in AD duty investigations in principle. On the other hand, the amended regulation simply provides that the use of alternative prices is allowed for countries and industries for which a significant market distortion has been found to be occurring, instead of using the term "NME country" or designating specific countries as NME countries. However, the new regulation provides that a report to the effect that a significant market distortion is found is to be produced when the European Commission has enough evidence to support such fact. The European Commission stated the reason for the amendment of the regulation, saying, "the purpose of this new legislation is to make sure that Europe has trade defense instruments that are able to deal with current realities – notably state-induced distortions which too often lead to overcapacities – in the international trading environment, while fully respecting the EU's international obligations in the legal framework of the World Trade Organization (WTO)."[3]

[3] Press release issued upon the amendment of the regulation (http://europa.eu/rapid/press-release_IP-17-5346_en.htm)

In December 2017, the European Commission issued a report under the new regulation to the effect that a significant market distortion was found with respect to China, clearly stating that alternative prices are allowed to be used in AD investigations against China. The findings in the above report included the following: [1] the framework for economic activities in China continues to be distinct in that the state authority has a definitive power over the determination of resources distribution and pricing; [2] the distribution and pricing of elements influencing production activities (land property, energy, the capital system, raw materials, labor, etc.) are significantly influenced by the state authority; and [3] as a result of specifically examining the four industries that have been frequently subject to the EU's AD investigations (namely steels, aluminum, chemicals, and ceramics), it was found that the above two findings also apply to these four industries. Based on these findings, the report concluded that there was a significant market distortion occurring in China, as prices and costs in China were heavily interfered with by the government, rather than being formed by the power of the free market.

(3) Japan

As for Japan, Articles 2, Paragraph 3 of the Cabinet Order on Anti-Dumping Duties stipulates that third country prices may be used in an investigation for imposition of AD duties on Chinese products.

After December 11 of 2016, Japan has continued to interpret that third country prices can be used in an AD investigation on Chinese products, and necessary amendments were made to the Guidelines on Procedures for Countervailing and Anti-Dumping Duties to clarify this interpretation.

(4) Other Countries

In 2005 when Australia was about to start FTA negotiations with China, it announced that it would treat China as a market economy country in its AD investigation. In 2005, the Republic of Korea also pledged that it would treat China as a market economy country. In an AD investigation into Chinese products, the two countries apply the same rules as those for AD investigations into products of other market economy countries. Brazil made a political commitment with China to recognize China as a market economy in 2004. However, it has not yet amended its domestic laws and regulations and has continued to use third country prices in an AD investigation on Chinese products in practice.

On the other hand, even after the expiration of a part of the supporting provisions on December 11 of 2016, Canada maintains its provisions so that third country prices can be used in an AD investigation into Chinese products. As for India, third country prices can be used in an AD investigation on China under domestic laws and regulations and in practice, and the Indian government has not announced any plan to change this situation.

3. DISPUTE SETTLEMENT PROCEDURES UNDER WTO

On December 12 of 2016, China requested bilateral consultations under the WTO Agreements with the U.S and the EU regarding the issue of China's market economy status.

In the case with the United States (DS515), China made a second request for consultation with the United States in November 2017, following its re-designation as an NME country in the aforementioned AD investigation on aluminum foil. However, as of March 2018, China has not made a request for the establishment of a panel against the United States.

In the case with the EU (DS516), a panel was established in April 2017. The procedures are still ongoing with the participation of twenty countries as third parties, including Japan, the United

States, Canada, Mexico, Brazil, Australia, and Russia. The United States made the following legal arguments in its third party opinion (already published): [1] while "price comparability" between normal value and export price is a prerequisite under Article VI of the GATT, domestic prices and costs in NME countries are distorted and thus lack such price comparability; therefore, domestic prices and costs in such countries should not be used as normal values; [2] even after the expiry of Section 15(a)(ii) of China's Accession Protocol, the remaining text of (a) supports the above interpretation of Article IV of the GATT; therefore, the use of alternative prices should be continued to be allowed in AD investigations against China (as long as China remains as an NME country); [3] Since China still remains as an NME country today, WTO Members are allowed to use alternative price against China.

Thus, the issue will be resolved through WTO dispute settlement procedures.