Chapter 2

United States

National Treatment

(1) Harbor Maintenance Tax "HMT"

Since 1987, the US has been operating a system that is designed to impose ad valorem taxes of 0.125% (0.04% prior to 1990) on freight (imports and exports and certain domestic freight) belonging to entities (shippers) that use harbors within the territory of the US.

Under this system, imported products are almost invariably subject to the tax because it is collected at the point of importation, where relevant duties are charged. The tax burden on exports and national freight is comparatively low because ship-owners or exporters voluntarily pay the tax in these circumstances on a quarterly basis. With regard to national freight, there are three exceptions: (a) payments under US$10,000 per quarter; (b) traffic in Alaska, Hawaii and dependent territories; and (c) the landing of fish from ships and some freight shipments of Alaskan crude oil. Yet, similar exceptions are not allowed for imported products.

The US system may violate GATT 1994 in three respects: 1. GATT Article II (Schedules of Concessions): The system imposes a tax that exceeds that prescribed in the schedules of concessions; 2. GATT Article III (National Treatment): Compared to domestic products, imported products are accorded less favorable treatment in terms of capture ratio and lack of exceptions, as explained above; and, 3. GATT Article VIII (Fees and Formalities Connected with Importation and Exportation): The system is designed to (and does, in fact) levy charges that exceed fees for harbor maintenance.

For details, refer to page 111 of the 2016 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA-.

(2) Merchant Shipping Act of 1920 (Jones Act)

<Outline of the Measures>

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

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

<Problems under International Rules>

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

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

<Recent Developments>

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

On the other hand, most Members including Japan have argued that they have not received sufficient explanation as to the measure being a gross deviation from basic principles of GATT. (For additional information on maritime services, see "Trade in Services".).

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

In January 2017, the US CBP (Customs and border protection) proposed a CBP notification amendment applying the Jones Act to offshore machine transport between US ports and coastal offshore facilities, carried by foreign manufactured ships or with a foreign ship registry, but after connecting with other countries and applying concerns, the proposal was withdrawn in May of the same year due to considerations for overall circumstances.

At the 2018 WTO TPRM (Trade Policy Review Mechanism), Japan raised the issue of the validity of the Jones Act.

In December 2019, the US CBP issued a notice stating that it will relax its interpretation on "vessel equipment", which is not subject to the Jones Act, regarding the transportation between US ports and coastal offshore facilities by sea. The updated interpretation will be applied to all transportation of cargo on and after February 17, 2020.

Quantitative Restrictions

(1) Export Management System

*This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.

<Outline of the Measure>

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

<Concerns>

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

<Recent Developments>

In the WTO agriculture negotiations, Japan expressed the need for regulation reinforcement by substituting export tariffs for bans on exports and other restriction measures in order to restore the balance of rights and obligations between exporting and importing countries and to maintain food security. In December 2008, in the chairperson's text of modalities of agriculture, the reinforcement of regulations concerning export bans and restrictions in WTO Agriculture Agreement Article 12.1 was noted. Japan has continued to urge reinforcement of regulations against export bans and restrictions at WTO agriculture negotiations and various occasions for bilateral discussions, and in 2018 as well we performed analysis on the current state of prohibited/restricted exports and explained these to each country.

(2) Export Restrictions on Logs

<Outline of the Measure>

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

<Problems under International Rules>

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

<Recent Developments>

Japan will continue encouraging improvements in these measures through such as multilateral and bilateral consultations.

Tariffs

(1) Tariff Structure

*This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.

<Outline of the Measure>

The current simple average bound tariff rate for non-agricultural products is 3.2%. Items with high tariffs include footwear (maximum 48%), glassware (maximum 38%), Apparel products (maximum 28.6%), porcelain and ceramics (maximum 26%), woolen goods (maximum 25%), trucks (25%), leather products, etc. (20%), cotton fabrics (16.5%), and titanium (maximum 15%). The tariff rate on trucks is very high at 25%, placing imported trucks under a severe competitive disadvantage; Japan has strong interests in seeing this tariff rate reduced. Furthermore, the binding coverage on non-agricultural products of the US is 100% and the average applied tariff rate in 2018 was 3.1%.

<Concerns>

High tariff rates themselves do not, per se, conflict with WTO Agreements unless they exceed the bound rates. However, in light of the spirit of the WTO Agreements of promoting free trade and enhancing economic welfare, it is desirable to reduce tariffs to their lowest possible rate, and eliminate the tariff peaks (see Part II, Chapter 5, 1 (3)) described above.

<Recent Developments>

With the aim of increasing the number of items subject to elimination of tariffs on IT products, ITA expansion negotiations launched in May 2012 outside the Doha Round negotiations and an agreement was reached in December 2015. Elimination of tariffs on 201 items started gradually starting from July 1, 2016 and about 90% of the relevant tariffs have been eliminated as of July 2019. By January 2024, tariffs on all 201 items will have been completely eliminated for 55 members (see 2. (2) “Information Technology Agreement (ITA) Expansion Negotiation” in Chapter 5 of Part II for details). As for the US, elimination of tariffs started in July 2016. For example, high tariff items for which tariffs are to be eliminated by the US include parts such as microphones, and others (8.5%), binocular microscopes

(7.2%), photoresist (6.5%), etc. Tariffs on all subject items including the above items were eliminated gradually until their complete elimination in July 2019.

As announced in the Japan-US Joint Statement issued at the Summit Meeting between Japan and the US in September 2018, negotiations for a Japan-US Trade Agreement began in April 2019 between trade delegates from both countries and reached the final agreement in September 2019. Under the Agreement, both countries agreed that Japan will make no concessions on taxable industrial products and the US will immediately or gradually eliminate tariffs on certain industrial products. The Agreement will enter into force within 30 days (or a date separately agreed upon) after the date on which both countries have notified each other of the completion of their respective applicable domestic procedures.

(2) Method of Calculating Tariffs on Clocks and Wristwatches

<Outline of the Measure>

The US calculates tariffs on finished clocks and watches as the aggregate of the tariffs on their components. These calculations are complex and the trade procedures are onerous.

For example, the tariff on a wristwatch is the total of the tariffs on its: (a) movement; (b) case; (c) strap, band or bracelet; and (d) battery. A duty rate has not been set for 8 digit HS codes which classify wrist watches as completed products.

At the 9th and 10th digits of their HS Code, these components have numbers assigned unilaterally as Statistical Suffix according to the Statistical Notes to the Chapter 91 of the US Tariff Schedule, and exporters are required to abide by them.

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

<Problems under International Rules>

This calculation method is not a violation of WTO rules because it is in accordance with the US schedule of the tariff concession. However, the complex method of calculating tariffs and assignment of its own HS Code place excessive burdens on traders and is an obstacle to the promotion of smooth trade. The US calculation method assumes mechanical clocks/watches, which are currently extremely rare, but it has been also applied to electric clocks/watches, which doesn't reflect actual distribution.

The issue was discussed during the Japan-US Deregulation Initiative talks in 2002 and 2003. The Report issued in June 2004 reflected Japanese concerns over clock and watch tariff rate calculation methodology and rules of origin certificates. The report stated that negotiations would continue with deference to both the Japanese government’s position and the ongoing WTO discussions. In fact, however, no improvement has been made so far.

<Recent Developments>

Since 2002, Japan has capitalized on a range of opportunities, including the Japan-US Deregulation Initiative, Japan-US Trade Forum, and WTO Trade Policy Review (TPR) of the US, to ask them for some improvement and/or solution, only to find the problems left unresolved. We assume that the US clock/watch business is faced with the same problems because they outsource production to contractors in Asia. To facilitate international trade, Japan will continue asking the US for improvement.

Japan took part in negotiations for the Trans Pacific Partnership (TPP) Agreement negotiations, and, the participants reached the outline agreement in 2015, which should have paved the way for immediate elimination of US tariffs on wristwatches once the Agreement comes into effect. However, with its announcement of withdrawal from the Partnership and wristwatches not being part of the items subject to US tariff elimination under the Japan-US Trade Agreement signed in September 2019, the issue has been left as a challenge to be solved.

Anti-Dumping Measures

The US is a traditional user of AD measures. The number of AD measures imposed by the US since 1995 is 484 (as of June 30, 2019), and this number is the largest among developed countries that are

WTO Members[1].

The US's system for AD measures is highly transparent, because the US investigation authorities actively disclose related information[2]. This has made it easier for interested parties to assess the progress of and issues surrounding investigations and has secured opportunities for interested parties to submit their views and rebuttal arguments in order to protect their interests.

On the other hand, the US still maintains some elements of unilateralism and protectionism in its operation of the AD system. The number of AD-related cases for which consultations were requested through the WTO dispute resolution process after the establishment of the WTO is 133, and of those, 56 cases arose from AD measures of the US[3]. It is important for Japan to continue to monitor the consistency of AD measures of the US with the agreement.

In the past, Japan has pointed out numerous issues with the US's AD system to the US government, demanding that they be improved. These issues include the Byrd Amendment, improper dumping determination through use of the zeroing methodology, and long-term continuation of AD measures (the administration of "sunset reviews"). Following are major issues that have recently arisen.

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

The Byrd Amendment is a law that enables tax money that the government collected as AD and countervailing duties on imports to be distributed to US domestic producers who requested and supported applications of AD and countervailing measures. As it enhanced the effect of AD and countervailing measures to promote protectionism and had the effect of increasing applications for AD and countervailing measures, in December 2000, Japan, along with the E.U. and other countries jointly requested consultations under WTO Dispute Settlement procedures against the US.

In September 2002, a WTO panel issued a report concluding that there were violations of the AD and SCM Agreements. Responding to this report, the US appealed. Then, in January 2003, the WTO Appellate Body also released its report identifying violations of the same Agreements.

However, because the US did not comply with the DSB recommendations within the term stated, which was the end of December 2003, Japan and other countries requested that the DSB approve countermeasures against the US in January 2004. Following the arbitrator's approval on the level of these countermeasures, Japan applied countermeasures in September 2005.

In February 2006, the US passed the Deficit Reduction Act of 2005, which repealed the Byrd Amendment. However, this Act maintained the Amendment until October 1, 2007, and continued the distribution of the imposed amount on goods imported up to this date. For this reason, Japan has extended the term for the aforementioned countermeasures since 2006 until 2013. However, since the amount of Byrd distribution to Japan was very small, Japan decided to retain the rights of the countermeasure and not to extend the countermeasures in 2014 and thereafter.

However, since it is possible that the Byrd Act distribution of the amount of AD and CVD duties imposed on goods that cleared customs before October 1, 2007 may continue in the future, Japan will continue to consider countermeasures taking into account the amount of distribution by the US, etc. and urge the US to promptly halt the distributions approved by the Byrd Amendment and to completely rectify the violations of the WTO agreements. For details, refer to pages 70 - 72 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA-.

(2) Calculation of the Margin of Dumping via the Zeroing Procedure

<Outline of the Measure>

The US has applied a calculation method under which the price difference is regarded as "zero" in calculating the weighted average of the product when an individual model of, or an individual

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1 https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf

2 For instance, the United States Department of Commerce makes available laws and regulations, manuals, inquiry formats, and other materials concerning AD investigation on its website (http://trade.gov/enforcement/operations/). Similar materials are also made available by the United States International Trade Commission (USITC) on its website (https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm).

3 See the WTO website (https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A6#).

transaction of, product is exported at a higher price than the normal values in the domestic market (where they are not dumped). With this approach, the dumping margin is artificially inflated (See Figure I-2-1). This way of calculation is called “zeroing”.

<Problems under International Rules>

In the case of the AD measure applied by the EU to bed linen from India (DS141), the WTO Appellate Body found in March 2001 that when comparing the weighted average of export prices and that of normal values to calculate a dumping margin (known as W-W comparison), applying the zeroing methodology is inconsistent with the WTO Agreements. However, the US, taking the position that the WTO ruling against zeroing methodology applied only to the specific case (“as applied”), and did not constitute a finding that the “zeroing” methodology “as such” violated the WTO Agreements, continued to use the methodology.

Japan’s industries, including the bearing industry Japan, as well as other sectors, have been subject to AD duties at a rate calculated using the zeroing methodology. In November 2004, Japan, claiming that application by the US of the zeroing methodology to 13 cases of AD measures, such as Japan-made heavy steel plates and ball bearing, as well as the zeroing methodology itself, violated the WTO Agreements, requested WTO consultations with the US (DS322) an February 2005, Japan also requested the establishment of a panel. In January 2007, the Appellate Body fully accepted the claims of Japan, and determined as summarized blow.

(i) Application of the zeroing procedures in original investigations (as such)

The Appellate Body supported the panel’s ruling that the application of the zeroing methodology in original investigations violates the AD Agreement because recognition of dumping and dumping margin must be based on the relation to the product investigated as a whole, not individual transactions, and because the comparison of normal values and export prices must be considered in its entirety. The Appellate Body ruled that the US violated Articles 2.1, 2.4, and 2.4.2 of the AD Agreement by applying the zeroing methodology in original investigations to calculate dumping margins based on comparison between individual transactions (known as T-T comparison).

(ii) Application of the zeroing procedures in periodic reviews (as such)

The Appellate Body dismissed the panel’s ruling that the application of the zeroing methodology in periodic reviews and other processes does not violate the AD Agreement, pointing out the same reasons mentioned above in (i), and ruled that application of the zeroing methodology in periodic reviews violated Articles 2.4 and 9.3 of the Agreement as the former requires the members to make a “fair comparison” between export prices and normal values, and the latter stipulates that the total amount of AD duties must not exceed that dumping margin.

(iii) Application of the zeroing procedures in periodic reviews and sunset reviews (as applied)

The Appellate Body ruled that application of the zeroing procedures in periodic and sunset reviews of the AD measures violated the Articles 2.4, 9.3, 11.3 and other articles of the AD Agreement.

<Recent Developments>

To date, as in the above-mentioned case of DS322, etc., panels and the Appellate Body have found that zeroing in all stages of AD procedures, including original investigations and regular administrative reviews violates the AD Agreement. However, “if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison” (referred to as “targeted dumping”) “a normal value established on a weighted-average basis may be compared to prices of individual export transactions” pursuant to the second sentence of Article 2.4.2 of the AD Agreement. As this provision appears to assume a comparison of normal value with certain export transactions, some Members claim that the zeroing methodology is allowed under the provision. While, as described above, panels and the Appellate Body have repeatedly determined in past dispute cases that the zeroing methodology was inconsistent with the AD Agreement, none of these cases directly concerned targeted dumping under the second sentence of Article 2.4.2, and they have not explicitly determined that use of the zeroing methodology to calculate dumping margins in such cases violates the Agreement. In this respect, in recent years the US have been finding targeted dumping in many cases and have been expanding and developing the use of the zeroing methodology.

The Republic of Korea in August 2013 and China in December of the same year requested the WTO consultations, claiming that the application of the zeroing methodology in cases where targeted dumping was determined violates the AD Agreement (DS464 and DS471). In 2016, the Appellate Body found in DS464, which was brought by the Republic of Korea, that the zeroing methodology is inconsistent with the AD Agreement, since the second sentence of Article 2.4.2 does not require to select certain export transactions while ignoring others.

The panel in DS471, which was brought by China, also found that the text of the second sentence of Article 2.4.2 does not allow zeroing and that the zeroing methodology is inconsistent with the Article. In this case, the panel's finding regarding zeroing was not appealed. However, the Republic of Korea and China each made claims to the WTO in January and September 2018 respectively that the US is not complying with this judgment and requested the authorization to suspend concessions to the US in the annual amount of USD 7 billion.

However, the US has been using the zeroing methodology through several analytical methods, such as Nails Test, Nails Test II and Differential Pricing Analysis, which it developed while making certain changes to its methodology to determine targeted dumping. Japan will continue to pay attention to the consistency of the targeted dumping determinations and methodologies used for determining dumping margins by the US with the Anti-Dumping Agreement.

<Figure I-2-1> Application of the Zeroing Methodology to Calculation of Dumping Margins: An Example

	Domestic Price ($)	Export Price ($)	Dumping margin of individual product ($)
Product A	115	95	20
Product B	80	70	10
Product C	100	150	-50 (Under zeroing methodology: 0)
Product D	105	85	20
Total	400	400	

(For each product, domestic sales and exports volumes are all considered to be “1 unit” for ease of calculation.)

(Note)

When the zeroing methodology is not applied, a dumping margin is calculated as shown below:

Dumping margin (%) = Weighted average of differences between domestic and export prices) x 100

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

That represents no dumping having occurred. However, under the zeroing methodology,

the dumping margin (%) $= \frac{20+10+0+20}{95+70+150+85} \times 100 = 12.5\%$, showing that the dumping has occurred.

<Figure I-2-2> List of Main Judgments of the WTO Panel and Appellate Body concerning Zeroing Disputes

		Original Investigation				Periodic Review	
		W-W Comparison		T-T Comparison			
		As applied	As such	As applied	As such	As applied	As such
EU - AD on Bed Linen from India (DS141)	Appellate Body Report circulated in March 2001	Violation	-	-	-	-	-
US - AD on Softwood Lumber from Canada (DS264)	Appellate Body Report circulated in August 2004	Violation	-	-	-	-	-
US – EU Zeroing (DS294)	Panel Report circulated in October 2005	Violation	Violation	-	-	No Violation	No Violation
	Appellate Body Report circulated in April 2006	-	-	-	-	Violation	-
US - AD on Softwood Lumber from Canada (Compliance) (DS264)	Appellate Body Report circulated in August 2006	-	-	Violation	-	-	-
US – Japan Zeroing (DS322)	Panel Report circulated in September 2006	Violation	Violation	-	No Violation	No Violation	No Violation
	Appellate Body Report circulated in January 2007	-	-	-	Violation	Violation	Violation

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

<Outline of the Measures>

In June 1999, the US decided to impose AD duties on certain hot-rolled steel products from Japan. In January 2000, Japan requested consultations with the US and challenged several aspects of the US measures, including the: (a) methodology of calculating the margin of dumping; (b) determination of "critical circumstances" (calling for retroactive imposition of duties); (c) determinations of injury and causal link; and (d) unfair investigation procedures. Japan considered each of these to be violations of the US obligations under GATT and the AD Agreement. The consultations failed to settle the dispute. This led to the establishment of a panel in March 2000. In February 2001, the panel report was circulated to all Members. The panel agreed with some of Japan's claims, but rejected others. Both the US and Japan, therefore, appealed to the Appellate Body in April and May 2001, respectively. The Appellate Body report, which upheld most of Japan's claims, was circulated in July 2001, and was adopted in

August 2001. For details of Japan’s claims, refer to pages 122 - 123 of the 2016 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, FTA/EPA and IIA-.

<Recent Developments>

The reasonable period of time (RPT) for compliance with the Appellate Body Report of this case was set to November 23, 2002, however, the US failed to fulfill its obligations in regard to all recommendations. To implement the remaining recommendations, the US sought to amend the domestic law, but it was unsuccessful, and so requested extension and further extension of RPT. Japan accepted the US requests to extend the deadline three times. However, regarding the 4th request, Japan and the US concluded an agreement in July 2005 that Japan maintained the right to apply countermeasures due to the ineffectiveness of repeated extensions and the loss of confidence in the reliability of the WTO dispute settlement procedures, Later, at the end of 2006, the Recommendation Implementation bill died due to the closure of the Congress without passing the bill. Until 2010, at regular Dispute Settlement Body (DSB) meetings, Japan had continued to demand early implementation by the United States, and also took up the issue as an agenda item/question in Japan-US working-level consultations and during the Trade Policy Review (TPR) of the United States. In 2011, Japan took up the issue as an agenda item at the Japan-United States Economic Harmonization Initiative. In June 2011, complying with the ruling of sunset reviews which was initiated in 2010, the US retroactively terminated, as from May 2010, the AD measure against Japanese-made hot-rolled steel plates, which had been in place since 1999. Although the AD measure itself was terminated as described above, the US AD Act stipulating the calculation method of the all others rate has not been revised. Japan also made an inquiry in writing about the prospect for revisions of domestic laws specifying the calculation methods at the WTO Trade Policy Review Mechanism (TPRM) on the US measure in December 2014, and the US government replied that it would take appropriate measures in cooperation with the US Congress. However, full compliance with the WTO recommendations has not yet been achieved. As failure to comply with the DSB recommendations may damage the credibility of the WTO dispute settlement system, Japan needs to urge the United States to take measures to revise its legislation in accordance with the recommendations.

(4) Unfairly Long-Term Continuation of AD Duties (Sunset Provision)

<Outline of the Measure>

Article 11.3 of the AD Agreement (the Sunset Provision) stipulates that any AD measure shall be terminated (sunsetted) in five years unless the authorities determine that the elimination of the AD duty would be likely to lead to continuation or recurrence of dumping and injury. The US AD law includes the Sunset Provision, and sunset reviews are undertaken in the US. However, many AD measures have actually been enforced for more than five years. As of the end of June 2019, there were 12 AD measures against Japanese products that had lasted for 10 years or more (Figure I-2-3).

<Problems under International Rules>

As described above, Article 11.3 of the AD Agreement stipulates that any definitive AD measure shall be terminated in five years unless the authorities determine in a sunset review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. However, many of the AD measures imposed by the US have been enforced for more than five years. Japan has shown its concern that the administration of the sunset review system by the US may be inconsistent with the AD Agreement.

In January 2002, Japan requested bilateral consultations with US about the sunset review of AD measures against Japanese corrosion-resistant carbon steel flat product, that the interest of Japanese steel industry was high (DS244). A panel was established in May 2002 and the dispute was adjudicated under the WTO dispute settlement procedure. Brazil, Canada, Chile, the EU, India, the Republic of Korea and Norway participated in the panel proceeding as third parties.

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

<Recent Developments>

In August 2018, because in part of pressure from Japan, among others, the US decided that AD countermeasures against Japanese-manufactured stainless steel bar, would be terminated, after 22 years of imposition. However, with regard to the current application of sunset reviews by the US, the authorities appear to make a decision on the premise that "once the AD measures are terminated, exports would resume, leading to continuation or recurrence of dumping or injury," without taking into consideration the global supply-demand situation and the perspectives of cost-benefit performances of companies that respond to administrative reviews and sunset reviews. This is one of the causes of long-term continuation of many AD measures.

Since 2013, at AD Committee meetings held in the spring and autumn, Japan has taken actions such as requesting early termination of measures continued for a long time, and it will continue to request the US to strictly apply Article 11.3 of the AD Agreement, which sets out the principle of termination of AD measures within five years in most cases, and to perform appropriate reviews in accordance with the WTO Agreement.

<Figure I-2-3> AD Measures against Japan Continuing over 10 Years (As of June 2019)

Date of measure imposed	Products	Continuance
8 December 1978	Prestressed concrete steel wire strand	40 years
10 February 1987	Carbon steel butt-weld pipe fittings	32 years
12 August 1988	Brass sheet & strip	30 years
10 May 1991	Gray Portland cement & clinker	27 years
2 July 1996	Clad Steel Plate	22 years
15 September 1998	Stainless steel wire	20 years
27 July 1999	Stainless steel plates	19 years
26 June 2000	Large-diameter Carbon Steel Seamless Pipe	18 years
26 June 2000	Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4 ½ inches)	18 years
28 August 2000	Certain Tin Mill Products	18 years
6 December 2001	Welded Large Diameter Line Pipe	17 years
2 July 2003	Polyvinyl alcohol	15 years

(5) AD Measures on Thick Plates from Japan

<Outline of the Measures>

In May 2017, the US government made the final decision to impose AD duties on thick plates from Japan. The problem with this decision is that injury to a domestic industry is recognized without considering differences in components, intended uses and price ranges, which is inconsistent with the AD Agreement. Until the final decision is made, the Japanese government has sought improvement by pointing out the problems mentioned above at a public hearing and a meeting of the AD Committee. Nevertheless, the US made the final decision with the above concerns remaining. For details, refer to page 43 of the 2018 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA-.

Subsidies and Countervailing Measures

The 2018 Farm Bill

<Outline of the Measure>

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

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

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

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

Serious discussions about the next Farm Bill began in 2011 as the expiration of the 2008 Farm Bill was nearing. However, discussions stalled because the majority and minority parties could not agree on the amount of farm budget reductions. Disagreement about reductions in the overall budget deficit and the presidential election in November 2012 also had an effect. The 2008 Farm Bill expired in September 2012 without being replaced by a new one. Discussions continued after the extension of the 2008 Farm Bill for a year in January 2013. The 2014 Farm Bill (applicable period: from FY2014 to FY2018) was enacted in February 2014. It abolished the deficiency payments, production flexibility contract payments and ACRE program and introduced agriculture risk coverage, price loss coverage and the supplemental coverage option, etc. In 2019, the 2018 Farm Bill (applicable period: from FY2019 to FY2023) was enacted, but the framework of the 2014 Farm Bill (agriculture risk coverage, price loss coverage, etc.) was continued.

(i) Domestic Support

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

Under the 2018 Farm Bill, agriculture coverage, price loss coverage and other programs were maintained or improved with no major changes from the contents of the 2014 Farm Bill. Until now, once the farm's producers elected agriculture coverage or price loss coverage, the decision was irrevocable, however, the 2018 Farm Bill allows producers to make a choice between the two programs on an annual basis.

(a) Agriculture risk coverage (introduced by the 2014 Farm Bill)

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

(b) Price loss coverage (introduced by the 2014 Farm Bill)

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

Under the 2018 Farm Bill, effective reference price triggering PLC payments was revised (up to 115% of the statutory reference price).

(c) Price support loan program (continued)

The price support loan program provides farmers with short-term loans by the Commodity Credit Cooperation (CCC) and allows the farmers to suspend their obligations to guarantee repayments by mortgaging their products when the market prices are lower than the loan rates. The 2014 Farm Bill changed the loan rates for cotton because of the ruling of the US-Brazil Cotton Panel, and the conventional system was basically retained for other products. The 2018 Farm Bill made several improvements, such as increasing loan rates for all applicable crops.

(d) Supplemental coverage option (introduced by the 2014 Farm Bill)

The supplemental coverage option (SCO) is supplemental insurance covering the portion not covered by the agricultural insurance subscribed to by farmers. The difference between the guaranteed revenue/yields of the agricultural insurance subscribed to by farmers and 86% of the standard revenue/yields of the agricultural insurance is covered. The SCO is not allowed to be used concurrently with agricultural risk coverage.

(ii) Export Promotion of Agricultural Products

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

Export credit guarantee program

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

<Problems under International Rules and Recent Developments>

(i) Domestic Support

The WTO Doha Round negotiations on agriculture have featured debates not only on the rules for reducing the aggregate measure of support (AMS) subject to reduction, but also on the rules requiring reductions in overall trade-distorting support (OTDS), including blue-box policies and de minimis. As a result, in the 2014 Farm Bill, the flexible production payments contract, which are classified in the WTO Agriculture Agreement as a green permitted policy, was abolished while the price decline measures and revenue compensation measures were enhanced. In January 2017, the US made a domestic support notification, and new agriculture coverage, price loss coverage and supplemental coverage options were classified as yellow policies (those subject to AMS reduction requirements).

Furthermore, in 2019, continuing from 2018, the US announced subsidies for farmers for unfair retaliatory measures by foreign countries. Japan needs to pay attention to consistency between AMS and the Agricultural Agreement, such as AMS levels.

(ii) Export Promotion of Agricultural Products

Although export subsidies were fully abolished by the 2014 Farm Bill, frequent use of export credits, which is insufficient in making the disciplines of the WTO Agreement on Agriculture effective, gives an advantage to US agricultural products in terms of export competitiveness. Under this system, the CCC takes on the debts when the guaranteed debts go into default, making the system extremely close to circumventing export subsidies.

At the 10th WTO Ministerial Conference in Nairobi, Kenya in December 2015, the members agreed on matters including the following with regard to agricultural export credits: (i) clearly define "export credits"; (ii) make the maximum repayment term no more than 18 months; and (iii) ensure that export credit programs are self-financing and cover the long-term operating costs and losses.

Safeguards

Safeguard for Crystalline Silicon Photovoltaic (CSPV) Products and Large Residential Washers

<Outline of the Measure>

The US launched safeguard investigations on import of CSPV cells & modules and large residential washers in May and June 2017, respectively. In November to December of that year, the investigator, the United States International Trade Commission (USITC) submitted recommendations to the President that safeguard measures be imposed on the products. In January 2018, President Trump decided to impose safeguards on them, which were imposed in February of that year.

With these measures, imported CSPV cells & modules have ad valorem duties imposed on them over four years, from February 2018 through February 2022, at a rate of 30%, 25%, 20%, and 15% each year. (Only for imported cells, annual tariff quotas of 2.5 gigawatts (duty-free) are granted.)

<Problems under International Rules>

The petition filed by US domestic producers, as well as the investigation report produced by the USITC, state that the main purpose of the safeguard measures for CSPV products in this case lies in taking action to rapid increases of low-priced and low-efficient CSPV products manufactured by Chinese companies. Given the principle of safeguard under the Article 5.1 of the Agreement on Safeguards and Article 19.1 (a) of the GATT, which state safeguard measures should be applied only to the necessary extent, exemption of high-priced and high-efficient CSPV products manufactured by Japanese producers should be considered as they are not directly relevant to the purpose of the measures. However, high-efficient products have yet to be exempted.

In its original investigation report, dated November 13, the USITC failed to examine one of the conditions for imposing safeguard measures, "unforeseen developments" (Article 19.1(a) of the GATT), and produced a supplemental report, dated December 27, only after requested by the United States Trade Representative (USTR) to do so. The supplemental report confirmed the existence of "unforeseen developments" on the grounds that anti-dumping measures and countervailing duties the US had taken against Chinese firms over the past years failed as they moved their production bases overseas to avoid the duties. However, manufacturers' attempts to evade trade remedies by moving its production bases are not unprecedented. Some may point out that such attempts should not be regarded as "unforeseen developments" that justify any safeguard measures.

<Recent Developments>

Regarding this safeguard on CSPV products, Japan, China, the Republic of Korea, Taiwan, the EU, Singapore and many other exporting countries requested consultation for compensation under Articles 8.1 and 12.3 of the Agreement on Safeguards. Furthermore, the Republic of Korea, insisting that the safeguard measures both for large residential washers and CSPV products are inconsistent with the WTO Agreements, filed a consultation request under the DSU in May 2018 and the panel was established in September of that year (DS546; Japan participated as a third party). The U.S. announced product exclusions from measures of 8 types of products in September 2018 and 3 types of products in June 2019, but this was only a part of the exclusion requests that includes Japanese products.

Japan will continue requesting the US government to mitigate possible impact of the measures on Japanese products.

Rules of Origin

Special Marking Requirements of Origin on Watches and Clocks

<Outline of the Measure>

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

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

<Problems under International Rules>

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

At the Japan-US Deregulation Initiative talks in 2002 and 2003. Japan made a request to simplify the requirements. The Report issued in 2004 reflected Japanese concerns over clock and watch tariff rate calculation methodology and rules of origin certificates. The report stated that negotiations would continue with deference to both the Japanese government’s position and the ongoing WTO discussions. In fact, however, no improvement has been made so far.

<Recent Developments>

Since 2002, Japan has capitalized on a range of opportunities, including the Japan-US Deregulation Initiative, Japan-US Trade Forum, and WTO Trade Policy Review (TPR) of the US, to ask them for some improvement and/or solution, only to find the problems left unresolved. We assume that the US clock/watch business is faced with the same problems because they outsource production to contractors in Asia. To facilitate international trade, Japan will continue asking the US for improvement.

Standards and Conformity Assessment

(1) American Automobile Labeling Act

The American Automobile Labeling Act requires all passenger cars and light trucks to carry labels indicating the US and Canada made percentage (by value).

The US claims that the purpose of the system is to provide helpful information for consumers to make better purchasing decisions, but it is, in fact, a type of “Buy American” provision. The system requires an enormous amount of clerical work for record-keeping in order to calculate parts percentages, which is likely to become an unnecessary obstacle to trade. Moreover, recently, most of the car models with a high percentage of American and Canadian-made parts are Japanese cars.

(2) Regulation on Corporate Average Fuel Economy (CAFE)

The Energy Policy and Conservation Act of 1975, which includes Corporate Average Fuel Economy (CAFE) regulations, obligates automobile manufacturers and importers to achieve certain levels of average fuel economy for the vehicles they handle, and levies fines for violations. CAFE regulations stipulate that domestic and imported vehicles be distinguished and that their average fuel economy be calculated separately. These regulations were once appealed by the EU and found as being inconsistent with the national treatment provision of Article III: 4 of the GATT.

The current standards were enforced under the Obama Administration in 2012 and improvement targets are set each year to reach the goal of an average of 54.5 miles per gallon for passenger cars and light-duty trucks by 2025. The midterm review was scheduled to be implemented in 2018, but its postponement was decided in December 2016 just before the end of the Obama administration. After that, in August 2018, the Trump administration announced to relax the regulations. In September 2019, the Trump administration announced that it will revoke California's authority to set its own auto emission standards. In response to the decision, California and 22 other states, along with 2 cities, filed a suit against the Trump administration. Automakers that opposed to the regulations set by states' own rights announced their participation in the lawsuit. On the other hand, there are also some automakers that support the policy of California, showing a divide among automakers.

Trade in Services

(1) The Foreign Investment and National Security Act of 2007: FINSA

*This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.

<Outline of the Measure>

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

This Act, generally known as the "Exon-Florio Amendment", is a revision of Article 721 of the Defense Production Act of 1950, which governs matters concerning foreign investment examinations in terms of national security. Major changes made in this revision include: establishing the Committee on Foreign Investment in the United States (CFIUS) as a statutory institution, instituting reviews of examination criteria (incorporating the impact on critical infrastructure and technology), and strengthening Congressional oversight (requiring notification to Congress of the examination results of individual cases), etc. Furthermore, according to the Foreign Investment Risk Review Modernization Act (FIRRMA) established in August 2018, review scope has been expanded (some small-scale investments, such as investments that may include access to undisclosed technology, are now subject to review), review period has been lengthened, obligation of pre-screening for certain transactions has been enforced, reviewed elements have been added (contribution to nations of concern, influence on cybersecurity, etc.), etc., strengthening CFIUS authority. In November 2018, CFIUS implemented a "Pilot Program", which continued to apply until the final regulations became effective on February 13, 2020. Traditionally, CFIUS exercised jurisdiction over businesses under the control of foreign companies, but going forward, CFIUS will also have jurisdiction over non-controlling investments if certain requirements are met. In particular, when certain requirements are met, CFIUS has jurisdiction to review any investment by a foreign person in US businesses involved in certain critical technologies, critical infrastructure, or the personal data of US nationals that may pose a threat to national security, even if the foreign person will not obtain control of the US business. CFIUS filings are generally voluntary, but mandatory filing is imposed on certain investments involving US critical technology companies, and for investments understood as an acquisition by a foreign government substantially. CFIUS is also authorized to review transactions of real estate that meet certain requirements, such as those situated in and/or around specific airports, maritime ports and military installations.

The specific legal procedure includes prior submission for some investments, and upon submission of allegations by the parties concerned or requests from CFIUS members, CFIUS decides whether to conduct an investigation, and, where it does, submits a report to the President. The President decides on suspension or prohibition of the investment on the basis of the report.

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

<Concerns>

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

<Recent Developments>

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

According to the CFIUS' latest report to Congress, of the 237 notifications issued by CFIUS in 2017, there were 20 cases in which Japanese companies were involved. CFIUS investigated 172 cases out of the 237 notices filed in 2017, or 73%, indicating that the number of cases is increasing compared to the investment rate of less than 50% until 2016. Recently, CFIUS investigated the investment of Renesas Electronics in Intersil Corporation (2017) and also in IDT (2018). It is necessary to keep watch to ensure that this Act will not unfairly impact investments by Japanese firms in the US in the future.

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

No. of subject transactions, withdrawn cases, and President's decision (2013 - 2015)						
Year	No. of notifications		No. of notifications withdrawn during the screening period	No. of investigations	No. of notifications withdrawn during investigations	No. of President's decisions
		No. of notifications for investment from Japan				
2015	143	13	3	66	10	0
2016	172	13	6	79	21	1
2017	237	20	7	172	67	1
Total	552	46	16	317	98	2

No. of cases subject to notification in which Japanese companies were involved by form of transaction (2015 – 2017)				
Manufacturing Industries	Mining and Public Projects, and Construction	Wholesaling, Retail and Transport	Finance, Information & Communication and Services	Total
20	4	2	20	46

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

(2) Financial Services

*This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.

<Outline of the Measure>

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

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

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

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

<Concerns>

The US should repeal clauses that discriminate against foreign firms and are not granted exemption in the WTO Agreement. It is desirable that the US should discontinue or improve regulations that make entries of foreign firms difficult from the viewpoint of liberalizing financial services.

<Recent Developments>

In some states there have been improvements in regulations that made it difficult for foreign companies to enter the market. In order to revise the disadvantages arising from the fact that the regulations vary from state to state, an insurance bill covering all of the US was proposed in both houses of Congress in 2006 with the objective of introducing an “Optional Federal Charter (OFC)” for the insurance sector and has been under discussion. Additionally, in July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act was passed. The Federal Insurance Office was established under the Department of the Treasury based on the aforementioned Act. However, the Federal Insurance Office does not have the authority to direct or regulate, and therefore the system that each state controls financial supervision and control remains the same.

New regulation regarding reinsurance was enacted by the National Association of Insurance Commissioners (NAIC) allows for a removal of the collateral that is required when accepting reinsurance for insurance companies that are qualified in certain conditions under relevant regulations. In order for insurance companies to be covered by collateral removal measures based on this regulation, the locations of insurance companies must be approved by NAIC as Qualified Jurisdictions and Reciprocal Jurisdictions. In December 2019, Japan was reapproved as a Qualified Jurisdiction and approved as a Reciprocal Jurisdiction in January 2020.

(3) Telecommunications

*This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.

<Outline of the Measure>

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

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

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

Furthermore, in these public interest examinations, there is no legal basis to have a body called “Team

Telecom" from authorities concerned, and the content of examinations is also unclear.

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

<Concerns>

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

<Recent Developments>

Japan has raised concerns and requested improvement in the above problems on several occasions. The Federal Communications Commission (FCC) decided to refrain from applying the regulations for direct investments under Article 310(b)(3) of the Federal Communications Act in August 2012, and took measures such as clarifying some procedures in relation to regulations on indirect investments under Paragraph (b)(4) of the same article for radio stations for public communications services and for broadcasting stations in August 2013 and April 2017, respectively. (However, these measures are not intended to abolish the regulations).

(4) Maritime Transport

<Outline of the Measures>

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

(i) Merchant Marine Act of 1920 (the so-called Jones Act)

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

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

On 4 September 1997, the FMC imposed sanctions under this law on three Japanese shipping companies making calls at US ports. The sanctions included a $100,000 fine per call at a US port. In making its decision, FMC alleged that US shipping interests were harmed by the prior consultation system employed by Japanese ports. On October 16, the FMC announced that Japanese ships were to be barred from entering or leaving US ports unless their companies paid the September fines. On October 27, this forced the three Japanese shippers to pay FMC $1.5 million in fines. FMC suspended the sanctions indefinitely on November 13, citing an agreement that had been reached on improvements to the prior consultation system and an exchange of documents that had taken place between the two governments. In January 1998, Japan initiated consultations on the measure with the US under the US–Japan Treaty of Friendship, Commerce and Navigation, which guarantees national treatment and most-favored-nation status to ships from each other's countries in order to seek its full withdrawal.

FMC withdrew the sanctions on May 28, 1999, but the withdrawal did not mean that the FMC agreed with the Japanese arguments. The FMC has continued to demand reports from domestic and foreign shipping companies on practices in Japanese ports. In August 2001, claiming that amendments to Japan's Port Transportation Law (effective as of November 2000) had not dealt with exclusive Japanese port practices, the FMC issued an order expanding the scope of shipping companies covered under the provision requiring the submission of information. This order demanded that Japanese shipping firms submit Japanese laws and notifications. This is beyond the scope for which it is considered appropriate to demand submissions by shipping firms, placing unjustifiable and excessive burdens on them.

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

(ii) The Public Law Lifting the Ban on the Export of Alaskan Oil

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

This measure based on the Act was criticized as violating the WTO Ministerial Decision regarding non-application of new measures during the negotiation of the Doha Development Agenda. The Consolidated Appropriations Act of 2016 incorporated the provisions to lift all the restrictions on exporting oil and does not obligate the use of US ships as mentioned above. As such, Japan considers the restrictions on exporting oil to have been abolished.

(iii) Maritime Security Program

In 1937, the US enacted a subsidy program that paid US shipping companies operating on routes to major countries the difference between their operating costs and the operating costs of foreign shippers. This was done in order to prepare a merchant marine fleet that would be available in times of national emergency. Large government subsidies have been paid to US shipping companies ever since. This system was curtailed in 1998, and the last contract ended in 2001. However, the system's successor, the Maritime Security Program (MSP) has been operating since 1996.

This system provides subsidies to certain US shipping companies that own and operate US-flag vessels over ten years in exchange for their availability during times of need. This system, initially authorized to run for ten years, was extended twice and is currently operating agreements through 2025.

In 2019, a total of $300 million (60 vessels; $5 million per vessel) was funded for shipping companies.

Clearly this distorts free and fair competition in the international maritime transport market. It must be discontinued as soon as possible.

<Problems under International Rules>

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

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

<Recent Developments>

The updated Jones Act with the relaxed interpretations on "vessel equipment" will be applied to all transportation of cargo on and after February 17, 2020. Japan has repeatedly requested the US to rectify the above-described problems at bilateral meetings, such as Japan-US consultations on maritime issues and multilateral meetings, such as CSG (Consultative Shipping Group) meetings.

Protection of Intellectual Property

(1) Trademarks Systems (WT/DS176, US Omnibus Act 211)

Section 211 of the Omnibus Act of 1998 prohibits, under certain conditions, US courts from approving and executing ownership on behalf of Cuban nationals of trademarks, etc. but this provision does not apply to US national successors, etc.

The EU requested a bilateral WTO consultation in July 1999, alleging violations of Article 3 (national treatment) and Article 4 (most-favored-nation obligations) of the TRIPS Agreement (DS176; Japan participated as a third party). Then, after going through the panel and the Appellate Body procedures, in January 2002, the Appellate Body found the provision in violation of Articles 3 and 4 of the TRIPS Agreement. The Appellate Body and panel reports were adopted in February 2002, and the US informed the panel of its intention to adhere to its WTO obligations, but since then, no revision including abolition of Section 211 of the Omnibus Act has been made.

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

(2) Copyright and Related Rights

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

The EU claimed that such provisions violate Articles 9 and 13 of the TRIPS Agreement and requested a panel to be established (Japan participated as a third party). In June 2000, the panel submitted a report stating that the provision did not constitute legitimate exceptions under the TRIPS Agreement, and thus, the US measures must be brought into conformity.

With regard to the implementation of the recommendation, arbitration was used to determine appropriate compensation and countermeasures. In June 2003, the US and the EU reached a temporary agreement under which the US would compensate the EU a total of $3.3 million. Although the agreement was in effect until December 21, 2004, the situation had not improved and the law has not yet been modified either. This also raises issues regarding the effectiveness of panel recommendations, and continued scrutiny is needed.

Government Procurement

US Buy American Rules

<Outline of the Measures>

The U.S. has adopted rules for government procurement which require the federal government and governments of some states to purchase US-made products or use US-made materials.

Buy American schemes are legislated as the Buy American Act and the Buy America Act.

The Buy American Act, having come into effect in 1933, provides that US-made products should be treated favorably in procurement by the federal government. The Buy American Act is implemented according to the Federal Acquisition Regulation (FAR). The FAR provide that, when a domestic offer is higher than a foreign offer, a certain percentage must be added to the foreign offer, which generally ranges from 6 to 12% in the case of goods procurement; 6% in the case of public works; 50% in the case of Department of Defense procurements to treat US-made products and materials favorably.

In some cases, the Buy American Act may not apply. The Trade Agreement Act (TAA) provides exempted products from the Buy American Act when they come from a country the US has signed a trade agreement with. Specifically, procurement of products and services from the signatories of the WTO Agreement on Government Procurement (GPA) and countries the United States has signed an FTA with, or “designated countries,” is exempted from the Buy American Act to the extent of national treatment the United States has committed to with the countries for government procurement. However, any product is regarded as produced in a “designated country” only when the product is wholly manufactured or substantially transformed in the country.

The Buy America Act offers a separate scheme from the Buy American Act. The Act is implemented by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), Federal Railway Administration (FRA), and Federal Aviation Administration (FAA) under their own procurement rules. The Act requires state governments to procure steel and other materials produced in the United States for large-scale transport and infrastructure projects they carry out with subsidies granted by the federal government. For instance, when a project is financed with a federal fund administered by the FTA, steel and other materials used for the project must be US-made. Under criteria the FTA has set, steel and other materials are regarded as manufactured in the United States only when they are fully manufactured through the processes based in the United States and all their components are also manufactured within the United States. However, secondary (subordinate) parts produced in foreign countries are not ruled out here.

The Buy America Act is considered as free from the obligations the US assumes under any international agreement it has concluded. This is because of the reservations made by the US to the application of the WTO GPA to large-scale transport and road projects financed by the federal government. As most of the large-scale projects in the US are at least partially financed by the federal government, the reservations allow the US to deny national treatment to suppliers from other countries.

<Problems under International Rules>

As described above, the US has in place schemes for treating favorably domestic products or prohibiting procurement of anything other than domestic products. Depending on the manner they are implemented, the schemes may violate the WTO GPA and other international rules.

<Recent Developments>

(a) Executive Order on Government Procurement System

On January 31, 2019, President Trump signed an executive order, "Strengthening Buy American Preferences for Infrastructure Projects". The executive order specifically defines the infrastructure projects applicable to the Buy American Act and encourages the use of American-made products for all federally-funded infrastructure projects. Generally, federal government funds are not granted to some of the regulated infrastructure projects, such as pipelines, power distribution, broadband and cybersecurity. Therefore, if infrastructure projects including these areas are funded, the US Congress and government agencies may impose legal and operational obligations to procure American-made products. The Executive Order also stipulates that the executing agencies of the target projects to encourage recipients of federal financial assistance to use, to the greatest extent practicable, iron and aluminum as well as steel, cement, and other manufactured products produced in the US. This indicates that more stringent requirements may be imposed on infrastructure projects already covered by the Buy American Act.

On July 15, 2019, President Trump signed an executive order, "Maximizing Use of American-Made Goods, Products, and Materials". The new executive order raised the domestic component content threshold (1)for American-made iron and steel end products from the current 50% threshold to 95% if the cost of foreign iron and steel used in such iron and steel end products constitutes 5% or more; (2)for all other end products from the current 50% threshold to 55%, or potentially as high as 75% in the future, if the cost of the foreign products used in such end products constitutes 45% or more. The executive order also directs the FAR Council to consider adding 20% or 30% (for small businesses) to the offered price of materials of foreign origin.* Note that the Executive Order 10582 (issued by President Eisenhower as of December 17, 1954) defines that "materials shall be considered of foreign origin if the cost of the foreign products used in such materials constitutes 50% or more" and stipulates that 6 - 10% to be added to the offered price of materials of foreign origin, but the executive order as of July 15, 2019 prevail.

(b) The Fixing America's Surface Transportation FAST Act)

The FAST Act is intended to make obligatory more use of domestic products, including train control, power equipment and vehicles and prototypes, and requires the share of domestic components for a vehicle account for at least 60%, 65%, and 70% of the cost in 2016 and 2017, 2018 and 2019, and 2020 onwards, respectively, and that the final assembling of vehicles be carried out in the US. The Act will expire at the end of September 2020 and we need to continue to closely watch regulatory moves in the future.

(c) Movements of New York and Texas for Introduction of Their Buy American and Buy America Acts

In April 2018, the New York Buy American Act came into effect in New York State. The Act requires state agencies to purchase US-made products when procuring goods or services above a specific amount. The Act is scheduled to expire in 2020, but there is a movement to make the Act permanent.

In Texas as well, a state law that reinforces the Buy America Act came into effect in September 2017. A major difference from the federal Buy America Act lies in the level of cost increases in a project for which it is exempted from the Buy America Act. Under the federal act, projects are relieved from the obligation to use steel produced in the US when that would result in an increase of cost by 0.1% or 2,500 dollars. The state law exempts a project from the Buy America rules only when its cost would increase by 20%.

Both state laws are mainly intended to narrow the range of exemptions of the Buy American Act and

Buy America Act at the state level. With the reservations made by the United States to the WTO GPA, as mentioned above, they do not immediately violate the Agreement in terms of trade with Japan. However, it is necessary to watch carefully whether any movements of states for preferential treatment or obligatory procurement of domestic products may violate international rules.

Unilateral Measures

(1) Section 301 of the Trade Act of 1974[4]

<Outline of the Measures>

Section 301 of Trade Act of 1974 authorizes the United States Trade Representative (USTR) to take action in cases such as where US rights under a trade agreement are violated, or where measures, policies, etc. of a foreign country violate or are inconsistent with a trade agreement. For amendments that had been made before to the Section, please see page 145 of the 2016 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, FTA/EPA and IIA-.

[Investigation Procedures]

The USTR engages in the following investigation procedures: (a) initiates investigations into trade practices based on complaints from interested parties or on its own authority (Section 302); (b) simultaneously requests consultations with the country in question (Section 303); (c) determines whether there is any practice, etc. that necessitates implementing an action or what action the USTR should take, within a set period of time (for investigations under a trade agreement, 30 days from the conclusion of dispute settlement procedures or 18 months from the beginning of investigation, whichever comes sooner; for others, 12 months from the beginning of investigation) (Section 304); and (d) implements the action, in principle, within 30 days of the decision (though the USTR may delay action for a period of up to 180 days) (Section 305).

[Reason for Measures]

For Mandatory Action (Section 301(a))

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

For Discretionary Action (Section 301(b))

The USTR must take action in cases where a measure, policy, etc. of a foreign country is unreasonable or discriminatory and burdens or restricts US commerce and action by the US is appropriate.

As for the meaning of “unreasonable” measures, etc. taken by a foreign country, the law stipulates that it applies to measures, etc. that are “not necessarily in violation of or inconsistent with US legal rights under international laws,” but which are “deemed to be unfair and inequitable” (Section 301(d)(3)(A))

In addition, several measures have been cited as examples of unreasonable measures, etc. taken by a foreign country, such as “violation of opportunities to establish a company,” and “denial of appropriate protection of intellectual property rights” (Section 301(d)(3)(B)).

<Problems under International Rules>

In November 1998, the EU requested WTO consultations with the US because procedures based on Section 304 of the Trade Act of 1974 and other provisions could potentially permit unilateral decisions or measures by the US government without waiting for a WTO panel decision or WTO Dispute Settlement Body (DSB) approval. Because no agreement was reached in the consultations, a panel was established in March 1999. Japan participated as a third party and presented arguments in support of the

[4] Sections (1), and Section (2) below, are written as of April 25, 2018.

EU’s position. The panel report (WT/DS152/R) was adopted at the DSB meeting in January 2000.

The panel found that the wording of Section 304 of the Trade Act of 1974 and other provisions seemed to contravene DSU Article 23.2, but when read in conjunction with the interpretative guidelines for the Trade Act prepared by the US President (Statement of Administrative Action) and other statements by the U.S. government (“the United States will administer those provisions in a manner that is consistent with its obligations under the WTO Agreement”), Section 304 and other provisions are not WTO violations. The panel decision is based on the assumption that the US will adhere to statements it made during the panel meetings. Therefore, Japan will need to continue to watch for faithful administration of the US statement.

<Recent Developments>

(i) Investigation under Section 301 for Forced Technology Transfer by China

On August 18, 2017, the USTR launched, on its own authority, an investigation under Section 301 for technology transfer pressures and other acts by China. In March 22, 2018, the USTR found that the designated targets of the investigation were unreasonable or discriminatory, imposing burdens and/or restrictions on the commercial activities of the United States. These targets included forced technology transfer, mandatory inclusion of certain provisions in license contracts, etc., systematic acquisition of US firms and theft of trade secrets.

In response to this, the US released a candidate item list for tariffs on Chinese products on April 3, 2018 and imposed additional tariffs on Chinese products on July 6 2018. Following this, on April 4, 2018, China requested consultations at the WTO claiming that additional tariff measures taken by the US violate most-favored-nation treatment (Article I:1 of the GATT) and announced that it would impose additional tariffs on US products. On July 6, 2018. China imposed additional tariffs on US products.

After that, while the tariff war continued between the US and China, on January 15, 2020, both countries reached agreement on protection of intellectual property, ban on technology transfer, elimination of trade barriers for agricultural and marine products, opening of financial markets, policy and transparency commitments on currency issues, trade expansion, etc. After the agreement, the US lowered and postponed some of the additional tariffs imposed on China.

(ii) Section 301 Investigation of France's Digital Services Tax

On July 4 and 11, 2019, the French National Assembly and the French Senate passed the DST bill, respectively. Then, on July 24, 2019, President Macron signed the bill into law. From January 2019, the French DST will impose a 3% tax on total annual revenues generated by some companies from providing certain digital services in France. The tax applies only to companies with total annual revenues from the covered services of at least €750 million in the EU and €25 million in France. In response to this, the US Trade Representative announced the initiation of 301 investigations into the French DST on July 10, 2019 and released the investigation report with the following contents on December 2, 2019.

(a) Discrimination Against US Digital Companies

The French DST is intended to, and by its structure and operation does, discriminate against US digital companies. First, statements of French government officials and parliament members show that the DST is intended to target US digital companies. Second, the taxation only covers the services where US companies dominate but excludes the service areas where French companies are more successful. Third, the DST’s revenue thresholds target US companies but not many non-US companies offering services in France. Finally, the DST is treated as a deductible expense under the French corporate tax.

(b) Retroactive Application

The immediate effectuation and retroactive application of the French DST goes against tax certainty, which is an important principle in international taxation, is unusually burdensome for covered US companies and its cost pass-through effect will likely burden other US small companies and US consumers.

(c) Taxation on Revenues

The taxation on revenue instead of income goes against the prevailing principles of international tax policy, which recognize income but not revenue as a usual and appropriate basis for corporate taxation, which is reflected in over 3,000 bilateral tax treaties, the majority of which are based on the OECD Model, the UN Model, the US Model and US-France Model Tax Treaties.

Such taxation, firstly, is far more burdensome for low-profit companies than an income tax would be. Secondly, it imposes a great burden even on profitable companies because they are more likely to result in double taxation or higher tax rates. Lastly, it imposes on covered companies significant administrative burdens.

(d) Taxation on Revenues Unconnected to a Physical Presence in France

The fact that taxation is determined based on the location of a user instead of the company goes against the prevailing principles of international tax policy, which provide that a company is subject to income-type taxation only to the extent the company has a permanent establishment in the taxing country.

Such taxation, firstly, increases the burden of companies to manage the DST. Secondly, it will be additional to the existing income and consumption taxes imposed within the architecture of the international tax system.

(e) Taxation Unfairly Targeting Certain Digital Companies

The French DSA goes against the international tax principles counseling against targeting the digital economy for different tax treatment than other traditional business models.

Because digitalization is occurring across the economy, it is difficult to clearly define only some companies as "digital companies". The OECD's report on the BEPS (Base Erosion and Profit Shifting) project has also warned against the creation of new taxation rules that only target digital companies.

Based on the investigation report, the US Trade Representative found that the French DST is unreasonable and discriminatory, which imposes a burden or restriction on US commerce, and solicited comments from the public on USTR's proposed actions including: (1) additional duties of up to 100% on certain French products with a trade value of $2.4 billion, and (2) imposing fees and restrictions on French services.

At the US-France Summit Meeting held in January 2020, it was agreed that the French government would suspend the collection of its DST until December 2020, and the US would postpone threatened retaliatory tariffs on French goods and accelerate the discussions on taxation rules at the OECD level.

For other major investigations launched recently under Section 301 of the Trade Act, please see page 147 of the 2016 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, FTA/EPA and IIA-.

(2) Section 232 of the Trade Expansion Act of 1962

<Outline of the Measure>

Under Section 232 of the Trade Expansion Act of 1962, the President of the US can take measures to adjust imports of products, etc. when imports threaten national security. Prior to the president's decision to take measures, the Secretary of Commerce investigated whether there is a threat to national security from the applicable imported products. Within 270 days after the initiation of the investigation, the Secretary of Commerce must submit an investigation report to the President. In the event the Secretary of Commerce determined there was a threat to US national security in the imported products, that would be reported and a recommendation of whether to make import adjustments would be issued.

Upon receipt of the report that import of the product threatens national security, the President must decide within 90 days whether he concurs with the findings in the report and decide whether he will take any action (embargo, tariff increase, import quantity limit, tariff quota, commence negotiations to limit imports, etc.) to adjust its imports. After the President decides to take action to adjust imports, it will be implemented within 15 days.

[Investigation Procedures]

Upon request of the head of any department or agency, upon application of an interested party, or upon his/her own motion, the Secretary of Commerce: (i) immediately initiates an appropriate investigation to determine the effects on the national security of imports of the article (Section 232(b)(1)(A)); and (ii) immediately provides notice to the Secretary of Defense of any investigation initiated (Section 232(b)(1)(B)). In the course of the investigation, the Secretary of Commerce: (i) consults with the Secretary of Defense regarding methodological and policy questions raised in the investigation; (ii) seeks information and advice from, and consult with, appropriate officers of the US; and (iii) if it is appropriate and after reasonable notice, holds public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation (Section 232(b)(2)(A)). Upon the request of the Secretary of Commerce, the Secretary of Defense must provide the Secretary of Commerce an assessment of the defense requirements of any article that is the subject of an investigation conducted (Section 232(b)(2)(B)).

Within 270 days after the launch of the investigation, the Secretary of Commerce must submit an investigation report to the President. When having found the imported product threatens to impair the national security, the Secretary of Commerce must report the findings to the President (Section 232(b)(3)(A)). Any portion of the report which does not contain classified information must be published in the Federal Register (Section 232(b)(3)(B)).

<Problems under International Rules>

Under Section 232 of the Trade Expansion Act of 1962, increases of tariffs above the rate stated in the list of tariff concessions, may be inconsistent with Article 2 of the GATT (Tariff Concessions) and embargo and quantity restrictions may be inconsistent with Article 11 of the GATT (Quantitative Restrictions), respectively. In this respect, the US may invoke Article 21 of the GATT (Security Exceptions) even in the steel and aluminum import restriction measures based on the Section 232 described later.

One of the points at issue on Article 21 of the GATT is whether the panel has the authority to review this article. On this issue, members have quite different opinions between them. Some countries, including the US, argue that Article 21 of the GATT is a self-judging clause and that the panel does not have the authority to review the article. The US also argues that national security is a political matter that cannot be settled through dispute settlement procedures at the WTO. (The US takes this position also with respect to Section 232 measures on steel and aluminum as mentioned below.)

However, in April 2019, the first WTO panel decision (Russia – Measures Concerning Traffic in Transit, DS512) on Article 21 of the GATT was issued, finding that the panel has the authority to review the article and explicitly denying the US argument that the panel does not have the authority to review the article (US participated as a third party). (Both countries did not appeal and the WTO panel report was adopted in April 2019. See also the column below.)

Regarding the Section 232 measures, the US takes the position, arguing that Article 21 of the GATT is self-judging and that the panel has no authority to review the invocation of Article 21 and to make findings on the claims raised in this dispute, but it does not specify the justification for its measure is based on which of the items in Article 21 (b).

In any case, allowing an extremely broad range of exceptions for national security reasons may lead to abuse of the national security exceptions which could restrict international trade.

For example, the measures taken by the US under Section 232 regarding steel and aluminum, discussed later, not only close the US market but also disrupt the global steel and aluminum markets, giving a significant negative impact on the entire multilateral trade system. Furthermore, the WTO agreement also prohibits duty-free quotas introduced in some countries and taking or seeking to take voluntary export restraints (Article 11 of the Agreement on Safeguards). How the quota mentioned above is implemented should be carefully watched.

<Recent Developments>

(a) Section 232 Measures for Steel/Aluminum

In April 2017, the US initiated a Section 232 investigation on imported steel and aluminum.[5] In January 2018, Commerce Secretary Ross submitted reports for each of the investigations to the president

[5] Regarding the background that led to the investigation, refer to page 55 of the 2018 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, FTA/EPA and IIA-.

and recommended that import restrictions in the form of additional tariffs or volume allotment, or a combination of both, be imposed on imported stainless steel/aluminum (the report was published in February).

After that, on March 23, 2018, the US started imposing additional tariffs on steel and aluminum. However, Australia (steel/aluminum), the Republic of Korea, which accepted restricted volume (steel)[6], Brazil (steel) and Argentina (steel/aluminum) were excluded from these tariff measures.[7] Furthermore, with respect to products that cannot be sufficiently produced in the US, and products that have national security concerns, exclusion is determined by the Secretary of Commerce based on applications of individuals and organizations operating within the US in steel/aluminum product supply to building/manufacturing industries or consumers.

China, the EU, Canada, Mexico, Norway, Russia, Turkey, India and Switzerland each brought separate cases against the US regarding Section 232 measures. Panels were established in November 2018 (in December for India and Switzerland) for these matters.[8] However, in May 2019, Canada and Mexico ended dispute resolution procedures, stating that they reached a mutually satisfactory resolution with the US.

Furthermore, the EU, China, India, Russia, and Turkey, arguing that the measures taken by the US are in effect safeguard measures, have initiated countermeasures under Article 8 of the Agreement of Safeguard (or rebalancing measures. See Part II Chapter 8, 1(2)(i) and (5)(3))[9]. In response to this, the US argues that Section 232 measures are based on security and that they are not Safeguard measures, requesting WTO consultation regarding the countries that initiated rebalancing (panels were established for each case in November 2018).

Japan, as a US ally, has repeatedly expressed its concerns to the US, arguing that imports of steel and aluminum from Japan pose no threat to their national security. At the same time, in order to accelerate and simplify the product exclusion process, Japan tries to the extent possible, at a variety of levels, to avoid adverse effects on the industry. Also, as well as other exporting countries, considering that the nature of the US measures is essentially that of safeguard measures, Japan has notified to the WTO of its intent to reserve its rights to take rebalancing measures (May 2018). Furthermore, Japan has a systemic concern and is participating in the panel proceedings for US Section 232 measures and rebalancing measures against the US.

In addition to the above, in January 2020, President Trump signed a proclamation increasing tariffs on derivative steel and aluminum products (steel nails, aluminum cables, etc.) by an additional 25% and an additional 10%, respectively, from February 2020. Cited reasons included that despite the implementation of tariffs on steel and aluminum products under Section 232 of the Trade Expansion Act, imports of steel and aluminum derivative items have increased by significant amounts and the inability of the US steel industry to maintain capacity utilization levels above 80%, which was the objective of the Section 232 measures.

(b) 232 Measures regarding Automobile/Automobile Parts

In May 2018, the US initiated a Section 232 investigation on automobiles and automobile parts. The Secretary of Commerce submitted an investigation report to the president on February 17, 2019 (the report has not been made public). On May 17, 2019, the US found that imports of automobiles and automobile parts pose a national security threat. The US delayed the decision for 180 days and directed to pursue negotiations with the EU, Japan and other countries to address the threat to US national

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[6] On March 26, it was announced that the US agreed to exempt the Republic of Korea from steel tariffs permanently, on the condition that the country receives 70% of the annual average Korean steel exports to the US between 2015 to 2017.

[7] On March 26, it was announced that the US agreed to exempt the Republic of Korea from steel tariffs permanently, on the condition that the country receives 70% of the annual average Korean steel exports to the US between 2015 to 2017. On the other hand, it was announced that "the United States has agreed on a range of measures with Argentina, Australia, and Brazil, including measures that will contribute to increased capacity utilization in the United States, and measures to prevent the transshipment of steel articles and avoid import surges", but details are unknown. (Presidential Proclamations as of April 30 and May 31)

[8] For the main points of each country's argument, refer to the column "Security Issues" (page●).

[9] Other than these countries, Canada and Mexico also impose additional tariffs on US imports, both of which are under the NAFTA rebalancing clause.

security. Those 180 days lapsed on November 13, 2019, but no measures were decided.

In the Summit Meeting between Japan and the US in September 2018, it was agreed that both countries refrain from taking measures against the spirit of the joint statement during the process of the consultations, in other words, that no additional duties based on Section 232 would be imposed on Japanese automobiles. In addition, in the Summit Meeting between Japan and the US in September 2019, based on the conclusion of the Japan-US Trade Agreement and Japan-US Digital Trade Agreement, both nations agreed that “While faithfully implementing these agreements, both nations will refrain from taking measures against the spirit of these agreements and this Joint Statement”. Both nations also affirmed that this means that no additional tariffs under Section 232 will be imposed on Japan’s automobiles and automobile parts.

In the USMCA side letter, Canada and Mexico each agreed with the US respectively to be excluded from Section 232 measures up to a certain volume and amount of automobiles and automobile parts exported to the US. As mentioned previously, according to the WTO agreement, taking or seeking to take voluntary export restraints is also prohibited (Safeguard Agreement Article 11), and quantitative restrictions are generally prohibited except for tariff quotas, etc. which are explicitly allowed in the WTO Agreement

(GATT Article 11). While at this stage the details of the final measures of Section 232 have not been made clear, such approaches as agreeing on exclusions from Section 232 measures, expressing certain export volume and amounts, raise a question on their consistency with the above agreements.

Imports of automobiles and automobile parts from Japan, which is a US ally, pose no threat to US national security. Rather, it greatly contributes to US industry and employment. Also, Japan stands in opposition of measure that contribute to managed trade that distorts free and fair trade, and believe that measures in all trade should be consistent with the WTO agreement. Japan is making this position to the US in a various opportunities.

Also, many Japanese companies, such as automobile manufacturers, have a presence in the US, Mexico and Canada. These Japanese corporations have been operating under NAFTA. Regarding the USMCA side letter, we will especially continue to monitor future behavior carefully.

(c) Section 232 Measures for Titanium Sponge

In February 2019, the US initiated a Section 232 investigation into titanium sponge. In November 2019, DOC found these imports pose a threat to national security and recommended the President to take measures apart from the adjustment of imports. In response to the report, the President agreed to the above finding (the existence of a security threat due to titanium sponge imports) on February 27, 2020, but decided not to make import adjustments (additional tariffs, etc.). However, the President directed the DOD and DOC to form a working group to implement discussions with Japan whose titanium sponge imports to US accounted for about 94% to agree upon measures to ensure access to titanium sponge in the US for use for national defense and critical industries in an emergency.

Although most titanium sponge imports in the US are from Japan, these products of Japan, which is a US ally, pose no threat to US national security. In fact, titanium sponge products exported from Japan are highly reliable with a well-controlled quality, which supplement the insufficient supplies in the US. These are the materials that rather support US security. The measures to be agreed upon in future discussions should also be consistent with the WTO agreement.

(3) Special 301

<Outline of the Measure>

Special 301 sets forth a process introduced as a result of a revision to Section 182 of the Trade Act of 1974 based on Article 1303 of the Omnibus Foreign Trade and Competitiveness Act of 1988. Under this provision, the USTR is to identify (a) countries that “deny adequate and effective protection to the intellectual property rights” and (b) countries that “deny fair and equitable market access to US persons that rely upon intellectual property protection” as “priority foreign countries” in the report to be submitted within 30 days after the submission of the annual National Trade Estimate Report on Foreign Trade Barriers. The USTR must initiate investigations and consultations with the “priority foreign countries” within 30 days after such identification (Section 302(b)(2)(A) and Section 303 of the Trade Act of 1974), and within 30 days from the conclusion of dispute settlement procedures or 6 months from the beginning of investigations determine whether there is any practice, etc. that necessitates implementing a countermeasure and, if so, what action the USTR should take (Section 304(a)(3)).

The USTR has prepared a Priority Watch List and a Watch List to promote the process under Special 301.

<Problems under International Rules>

There is the same concern as for procedures regarding Section 301 of the Trade Act of 1974.

<Recent Developments>

In the "2019 Special 301 Report" released by the USTR in April 2019, 11 countries including Algeria, Argentina, Chile, China, India, Indonesia, Kuwait, Russia, Saudi Arabia, Ukraine and Venezuela were placed on the Priority Watch List, and another 25 countries, including Barbados, Bolivia, Brazil, Canada, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Jamaica, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Switzerland, Thailand, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan and Vietnam, were placed on the Watch List.

(4) US Re-export Control Regimes

<Outline of the Measure>

The US re-export control regime is a system that imposes restrictions on specific products that are exported from the US and then re-exported to third countries. It requires permits from the US government for all exports, including from Japan, in cases of: (1) US made products (cargoes, software, technologies); (2) products including US-made products over a certain level (built-in product); (3) specified direct products produced by using US-made technologies and software; (4) products produced at a plant with US direct products as major parts. The US re-export control regime is also applied to exports to entities listed in the Entity List (List of foreign entities (companies, individuals, research institutes, government/private organizations, etc.) that are against the interests of US security/foreign policy to regulate exports to such entities).

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

<Problems under International Rules>

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

<Recent Developments>

On occasions such as the Japan-US Deregulation and Competition Policy Initiative (hereinafter referred to as the Japan-US Deregulation Initiative) held since 2001, Japan pointed out the possibility of excessive exterritorial application of US domestic laws. Furthermore, Japan requested that the US exempt exports from Japan which have participated in various international regimes on export control and implemented export control fully and effectively from the application of US re-export control. At the same time, Japan requested the US to introduce a tentative measure until the re-export control operation is improved: (1) to establish a Japanese web site and a help desk at the Embassy of the US in Japan that lets Japanese companies understand the details of the legislations; and (2) to mandate that US exporters provide sufficient product information so Japanese companies can determine the applicability of the regulation to their products.

As a result of Japan's request, in 2003, the United States Department of Commerce (DOC) posted on its website a brief description in Japanese of its Re-export Control Regime. The US government also took measures to deepen understanding of its Re-export Control Regime, such as holding a seminar regarding the Regime in Tokyo. In November 2003, DOC created the "Best Practices for Transit, Transshipment, and Re-export of Items Subject to the Export Administration Regulations (hereinafter referred to as “Best Practices”), stipulating that exporters should provide commodity information such ECCN to their customers.

However, these “Best Practices” do not have legal binding force and cannot fundamentally solve the problems of importers (re-exporters) in acquiring information regarding commodities exported from the US based on these points, Japan made the above request again at the US-Japan Regulatory Reform and Competition Policy Initiative and US-Japan Economic Harmonization Initiative.

Although no change in the operation was observed, in a statement it released in January 2014, the Bureau of Industry and Security (BIS) indicated its position that “BIS recommends that US exporters send the ECCN’s of exporting products to foreign importers and obtain copies of import licenses in the respective countries before exporting based on ‘Best Practices’”. The BIS also provides the SNAP-R (Simplified Network Application Redesign) system online to enable application for re-exports and checking of the classification of items, etc.

In June 2011, the Strategic Trade Authorization (STA) was added as a new exception to US export control regulations, as an initiative to revise the US export control system. As a condition of the STA, US exporters are obliged to provide an ECCN for commodity information to importers. Further discussions are necessary to secure the provision of sufficient commodity information on commodities that are not excluded from the STA.

In the US, emerging and foundational technology is included in the Export Control Reform Act, established in August 2018. Currently, public comment scheme is being designed regarding the definition and basic regulation methods for technology, but while it is preferable that opinions of industry are seriously considered, for an effective import export control system so that it doesn't significantly hinder corporate activities or research and development. At the same time, these sort of new regulations also must be watched carefully so that the effect on re-export control regime is minimized.

Other Matters

Container size regulations for alcoholic beverages

<Outline of the Measure and Concerns>

In the US, distribution of distilled alcoholic beverages and wine is allowed only in containers of specific sizes, such as 1,000 ml, 750 ml, and 375 ml. Alcoholic beverages and wine cannot be exported to the country in bottles of sizes traditional in Japan, for instance 1,800 ml and 720 ml.

Regarding distilled alcoholic beverages, the US Treasury announced a proposed amendment to the regulations on the capacity of distilled alcoholic beverages at the time of signing the TPP12 Agreement (February 2016). A note promising that the US will proceed with the procedures toward the regulatory amendment was exchanged between the Japanese and US governments (the note comes into effect on the effective date of the TPP12 Agreement, which is not yet effective at this time).

<Recent Developments>

The US Treasury announced a proposed amendment to federal regulations that remove the restrictions on the quantity of distilled alcoholic beverages and wine and solicited comments from the public (until October 2019). At that time, the Japan National Tax Agency and Liquor Business Associations submitted statements expressing their support for the proposed amendment.

When the Japan-US Trade Agreement was signed (October 2019), both nations exchanged a note promising that the US Treasury will take the final steps on the proposed amendment to federal regulations that remove the restrictions on the quantity of distilled alcoholic beverages and wine (effective on January 1, 2020).