

COLUMN:

THIRTY YEARS OF THE REPORT ON COMPLIANCE BY MAJOR TRADING PARTNERS WITH TRADE AGREEMENTS (WTO, FTA/EPA AND IIA)

The history of the Report on Compliance by Major Trading Partners with Trade Agreements (WTO, FTA/EPA and IIA) (simply, the “Report”) dates back to 1992. In the midst of the discussions over trade friction with developed countries, the Report, which was first published in 1992, has consistently presented a “rules-oriented” approach over the past thirty years, asking what “fairness” means in response to the “results-oriented” approach, seeking a calm and constructive resolution of trade friction.

In this column, we would like to first look back at the background history of the first publication of the Report in 1992, then divide the past thirty years into four periods looking back on the history and significance of the thirty years of the Report.

1. PHASE 1: START OF THE REPORT ON COMPLIANCE BY MAJOR TRADING PARTNERS WITH TRADE AGREEMENTS (WTO, FTA/EPA AND IIA) (1992–2000)

The origin of the Report stems from Japan’s experience of being “unilaterally” judged to be engaging in unfair trade practices based on “results” such as trade surpluses, and being demanded to correct trade imbalances in the discussions over trade frictions with developed countries in the 1980s. The people involved at the time looked back on the background of the first publication of the Report, and stated that the issues they were aware of at the time were as follows: “Instead of judging whether a party is behaving fairly or unfairly according to the U.S.’s values, we need to redefine fairness based on consistency with GATT rules. We should determine fair trade and unfair trade based on values that are the antithesis to the U.S.’s values, so to speak.”¹ The Report starts from this awareness of the problem, and argues that the principle of “fairness” is the “rules-oriented” approach, which means that the “fairness” of a country’s trade policies and measures should be judged objectively based on internationally agreed-upon rules, not on results, and that if appropriate international rules do not exist, the first step should be to establish rules, and that fairness and unfairness should not be discussed without international rules.

The first issue of the Report (1992 edition) states in its “Introduction” part that the globalization of economic activities has led to frequent trade frictions, that there have been various discussions and confusion over the concept of “unfair trade”, and that “the purpose of the Report is to provide, under such circumstances, an overview of “unfair trade” in Japan’s major trading partners (top 10 trading partners: U.S., EC, South Korea, Australia, Indonesia, Hong Kong, Canada, Singapore, Thailand, and Malaysia) and to calmly and constructively examine countermeasures.” The Report then explains the three main “aims” of the publication.

First, to put an end to the confusion surrounding the concept of so-called “unfair trade,” a perspective on the adoption of internationally agreed-upon rules such as GATT and equivalent international disciplines should be provided as the basic criteria for the recognition of “unfair trade.” The second aim is to share the understanding that “all are sinners” and to encourage mutual efforts to solve the problem. The third aim is “to make policy proposals to solve problems in each country.” Regarding the third aim, the 1992 Report states, “At least three types of solutions are being considered.” It goes on to state that the first solution is the use of GATT dispute resolution procedures, and the second is “the adoption of other economic policies (e.g., policies to enhance competitiveness) as a policy mix, in conjunction with border measures (e.g., import restriction measures) when such measures are justified in light of

¹ Page 34 of “Masakazu Toyoda Oral History (2020)” edited by Izuru Makihara Laboratory, Research Center for Advanced Science and Technology, The University of Tokyo.

international disciplines, or, in lieu of such border measures when such measures are not justified”, and the third solution is the support for policy through international cooperation.

Based on the above, Part 1 “General”, Chapter 1 of the 1992 Report (which follows “Introduction” part), entitled “What is So-Called ‘Unfair Trade’?” states that although the term “unfair trade” is used in discussions over trade frictions, it has caused confusion due to the lack of a common definition of such term, and attempts to provide a criterion and perspective for the concept of “unfair trade” with the intention of providing a framework for handling trade frictions in a calm and constructive manner. In other words, it presents two approaches as criteria for recognizing “unfair trade,” namely, the “rule-oriented criteria” and the “results-oriented criteria,” and from the outset, the Report adopts the former, a fundamental position that has been carried on for the following thirty years. Although it is rather lengthy, we would like to quote below the description in Part 1 “General”, Chapter 1 “What is So-Called ‘Unfair Trade’?”

“The commonly used criteria for “unfair trade” seem to fall into two broad categories. The first criterion is based on internationally agreed-upon rules, and the second criterion focuses on the results of trade, and is not necessarily based on internationally agreed-upon rules. Let us call the former a “rule-based criteria” and the latter a “result-based criteria.”...

Of the above criteria, the Report adopts only the four types of “rule-based criteria” as criteria. In a word, they are GATT and equivalent international disciplines...On the other hand, the “result-based criteria,” which is not adopted in the Report, has the following problems.

First, this criterion is based on the so-called “results-oriented” approach, which has the basic problem that it does not have an established criterion for determining the causal relationship between the “results” of a transaction and the policies or measures in question. In particular, it is undeniable that the tendency to relate macro current balance or trade imbalance directly to imperfections in market access lies behind such consequentialism, which can be a “false prescription based on a fallacy.” The elimination of macro current balance and trade imbalance should essentially be done through macroeconomic policies, and it is nothing but an illusion to think that it can be achieved through the elimination of unfair trade policies and measures.

In addition, the concept of “unfairness” or “unreasonableness” often used in “result-based criteria,” although it appears to be rules-oriented, has the fundamental problem that the criteria for making judgments on these concepts have not been established among countries. In other words, the “rules” applied are unilaterally created by a specific country and lack objectivity and transparency. The unilateral measures taken by the U.S. adopt this approach, and as has been often pointed out, it is tantamount to having the same country serve as both prosecutor and judge, which, it must be said, lacks due process. The Report takes the position that, where there are no international disciplines, disciplines should be established. While there is a belief that, in cases where international principles are inadequate, “defiance of GATT rules” can be justified from a strategic standpoint, the Report does not support this view.”²

The 1992 Report then clarified that, in line with the recognition that “all are sinners,” “the countries studied in this study, while having different characteristics, have a good deal of problems in light of GATT and equivalent international disciplines.”³ In response to this first Report, foreign officials used the admonition, “People who live in glass houses should not throw stones,” and the Report was met with

² Pages 3 through 5 of the 1992 edition of the “Report on Compliance by Major Trading Partners with Trade Agreements (WTO, FTA/EPA and IIA).”

³ Page 166 of the 1992 edition of the “Report on Compliance by Major Trading Partners with Trade Agreements (WTO, FTA/EPA and IIA).”

a variety of opinions and criticism both at home and abroad.⁴ Despite these voices, attempts to publish the Report continued into the next and subsequent years.

In its “Conclusion,” the 1992 Report proposed, “it is necessary to steadily establish rules in areas where international rules have not yet been established,”⁵ but the Uruguay Round was subsequently agreed upon in 1993, and in the following year, the 1994 Report introduced in Chapter 1 the results of the Uruguay Round negotiations and an overview of the WTO agreements. In addition, the Information Technology Agreement (ITA) was another outcome of the WTO negotiations at that time, and following its agreement in 1996 and entry into force in 1997, it was featured as a column in the 1998 Report.

2. PHASE 2: SUPPORT FOR NEGOTIATIONS ON THE DOHA DEVELOPMENT AGENDA, CHINA’S ACCESSION TO THE WTO, THE START OF “METI PRIORITIES”, AND THE ESTABLISHMENT OF “PART III: OVERVIEW OF THE FTA/EPA AND BIT AGREEMENTS” (2001-2007)

(1) SUPPORT OF THE DOHA DEVELOPMENT AGENDA

At the Fourth WTO Ministerial Conference held in Doha, Qatar in 2001, the launch of a new round (the Doha Development Agenda) was declared, and negotiations began in 2002. The 2002 Report explained the path leading up to the Ministerial Conference as an addendum, and took up the outline of the Ministerial Conference, the success factors, and future issues. Since the 2003 edition, the Report has provided an independent addendum on the Doha Development Agenda, which explained the developments in the negotiations in detail.

(2) CHINA’S ACCESSION TO THE WTO

China joined the WTO in December 2001, followed by Taiwan the following year. The 2002 Report added China and Taiwan to Part I, which summarizes policies and measures by country and region, and featured the accession of China and Taiwan. With regard to China, while it stated that “China is making serious efforts to develop and revise numerous laws and regulations, reform its organizational structure, and develop human resources, all of which are necessary in conjunction with its accession to the WTO, and its efforts deserve some praise”, it also stated that “there are still points that need to be revised.” Therefore, the Report contrasted the commitments associated with the accession with the implementation status and points that need to be revised.

(3) CREATION OF METI PRIORITIES

In conjunction with the publication of the 2004 Report, more than 10 years after the first publication of the Report, the “Ministry of Economy, Trade and Industry (“METI”) Priorities” were released in response to the Report.⁶ By publishing the items that METI considers to be of high priority for the time being for the future of trade policy, and the METI Priorities for such matters, METI has decided to present the direction of specific actions and measures to solve problems, in addition to its analysis

⁴ Pages 35 and 49 through 50 of the previously mentioned book edited by Izuru Makihara Laboratory, Research Center for Advanced Science and Technology, The University of Tokyo.

⁵ Page 167 of the 1992 edition of the “Report on Compliance by Major Trading Partners with Trade Agreements (WTO, FTA/EPA and IIA).”

⁶ Prior to the start of the “METI Priorities”, starting from the 1998 Report, the Ministry of International Trade and Industry (“METI”) simultaneously announced its priority agenda items (“Future Treatment of Issues Pointed Out in the Unfair Trade Report Concerning Trade Policies and Measures in Each Country”) in response to the Report.

provided in the Report based on international rules. Attempts to simultaneously publish “METI Priorities” and the Report are still ongoing.

Specifically, the 2004 METI Priorities address policies and measures of the U.S. (U.S. Anti-Dumping Act of 1916, Byrd Amendment, and anti-dumping measures for hot-rolled steel sheets imported from Japan), China (issues related to the refund of the multiplication tax imposed on semiconductors, issues related to the concurrent selling of imported and domestic automobiles in relation to automobile sales, the operation of the import quota system for automobiles and their parts, non-performance of tariff concessions on photographic films, etc., the operation of anti-dumping measures, delays in the development of laws on trade rights and the distribution industry), the EU (draft Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Directive on Waste Electrical and Electronic Equipment (WEEE), Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (RoHS)), Malaysia (issues concerning the application of domestic tax on automobiles), and Thailand (issues related to the imposition of tariffs on digital cameras), as well as the prevalence of imitations, pirated copies, and other counterfeit goods as a common issue in China and other Asian countries.

(4) CREATION OF PART III BASED ON THE INCREASE IN EPAS AND INVESTMENT AGREEMENTS

Since the publication of the Report in the 1990s, many economic partnership agreements (EPA), free trade agreements (FTA), and bilateral investment treaties (BIT) have been concluded around the world. In Japan, new agreements were concluded with many countries and regions in 2002. As a result, bilateral agreements, such as economic partnership agreements and investment agreements, have gained an increasing status in international rules governing Japan’s rights and obligations in relation to trade policy. Compliance with the disciplines in these agreements as new international rules is in line with the “rules-oriented view”. From this perspective, the 2007 Report has positively positioned not only WTO agreements but also bilateral and regional agreements as legal frameworks that will serve as the basis for future dispute settlements, and has systematically introduced Part III as “EPA/FTA”, and these efforts are still ongoing.

3. PHASE 3: GLOBAL FINANCIAL CRISIS AND SUPPRESSION OF PROTECTIONISM (2008-2016)

(1) RESPONSE TO GLOBAL FINANCIAL CRISIS AND PROTECTIONISM

Since the global financial crisis of 2008, political pressure has increased in countries to introduce protectionist measures, presumably to support domestic industries and secure employment. If a country falls into protectionism under domestic pressure, other countries may follow suit or retaliate, leading to a chain reaction that could spread protectionism throughout the world. Efforts to deter protectionism at home and abroad have also been made.

Since the global financial crisis, METI has been identifying and analyzing problematic measures taken by foreign governments, and has been taking measures such as approaching partner countries individually in cooperation with relevant ministries and government agencies. In releasing the 2009 Report, METI published a reference document, which is closely related to the Report, entitled “Trends in So-called Protectionism during the Economic Crisis and METI’s Response”, which summarized the “relationship between protectionism and the rules-orientated approach,” and introduced protectionist measures taken by various countries as well as the WTO and METI responses, and also published follow-ups to such document in 2010 and 2011.

(2) DEALING WITH EMERGING COUNTRIES AND THE USE OF WTO DISPUTE SETTLEMENT PROCEDURES

As mentioned earlier, the background to the first publication of the Report in 1992 was the discussions about trade friction mainly with developed countries. However, in the wake of the global financial crisis (2008), growing emerging countries further enhanced their presence in the world economy, and their response to protectionism and trade-restrictive measures became more important than ever. At this time, therefore, the Report/METI Priorities began to address the issues of emerging countries more actively than ever before. The order of chapters in Part I, which describes the policies and measures by region and country, is based on the amount of trade with Japan, and since the 2008 Report, China has been described in Chapter 1, the first chapter of Part I.

At that time, the Doha Round negotiations were on the verge of reaching a conclusion, but broke down at the Ministerial Meeting in July 2008, and the round of negotiations at the WTO have stagnated since then, but Japan actively responded through WTO's dispute settlement procedures as well as by analyzing the consistency of international rules through the Report and by raising issues in the METI Priorities. Specific examples include China (DS433: Measures Related to the Exportation Restrictions on Rare Earths, DS454: Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes from Japan), Argentina (DS445: Measures Restricting the Importation of Goods), Russia (DS463: Recycling Fee on Motor Vehicles), Ukraine (DS468: Safeguard Measures on Passenger Cars), South Korea (DS495: Import Bans on Fishery Products from Japan, DS504: Anti-Dumping Duties on Pneumatic Valves from Japan), Brazil (DS497: Discriminatory Tax Benefits for Automobiles), and India (DS518: Safeguard Measures on Hot-Rolled Steel Sheets).

4. PHASE 4: PRECARIOUS MULTILATERAL TRADE SYSTEM AND RESPONSES TO MARKET-DISTORTING MEASURES (2017-PRESENT)

(1) U.S.-CHINA TRADE FRICTION, RESPONSE TO MARKET-DISTORTING MEASURES, AND BREXIT

Emerging economies continued to grow even after the global financial crisis. In particular, thanks in part to massive government support, China became the world's second largest economy in 2010, and increased its presence in the WTO and the world trade system, while also being questioned about the excess capacity issue and its attitude toward compliance with WTO agreements (for more details, see column "THE 20TH ANNIVERSARY OF CHINA'S ACCESSION TO THE WTO AND THE TRADE POLICY REVIEW OF CHINA (TPR)" in the 2022 Report).

On the other hand, during the aforementioned Phase 3, although the increase in protectionist tendencies was curbed through cooperation between countries through the WTO, from the late 2010s onward, protectionism reached its third major peak since the 20th century, along with (i) the post-Great Depression bloc economy period (around 1930), and (ii) the period of trade friction between Japan and the U.S. (around 1980) (White Paper on International Economy and Trade 2019). An exchange of retaliatory measures over each country's trade policies were also seen in this period, especially since the formation of the U.S. Trump administration in January 2017, which led to an exchange of tariff hikes between the U.S. and China, and intensified trade friction.

Against the backdrop of these movements, the 2018 Report revised its "Preface", which presents the fundamental perceptions of the Report, and warned against an increase in market-distorting measures by some emerging countries and a swing back to "results-oriented" measures by some developed countries. It also called for attention to the correction of economic imbalances through trade-restrictive policies,

and to the possibility that negative impacts may spread globally through the exchange of countermeasures. On the other hand, the Preface of the same year's Report suggests that even though there may be divergent views on what constitutes a "level playing field" depending on the standpoint from which one talks about the issue, a broad consensus has been achieved for the idea that such judgement should have an accumulation of internationally agreed-upon rules as an integral part of its foundation, and reaffirms its adherence to the "rules-oriented" approach.

Market-distorting measures taken by third countries have been discussed in the framework of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union. In the Report, themes related to market-distorting measures and ensuring a "level playing field," are discussed in the columns on subsidies ("IMPORTANCE OF ENHANCEMENT OF DISCIPLINE FOR IMPROVED TRANSPARENCY OF SUBSIDIES" in the 2018 Report and "DISCUSSIONS FOR STRENGTHENING DISCIPLINE ON SUBSIDIES" in the 2019 and 2020 Reports), state-owned enterprises ("ATTEMPTS TO REINFORCE REGULATIONS FOR STATE-OWNED ENTERPRISES" in the 2017 Report), and forced technology transfer ("DISCUSSIONS ON FORCED TECHNOLOGY TRANSFER" in the 2020 and 2021 Reports) (for more details on the Trilateral Trade Ministers Meeting, see the "TRILATERAL MEETINGS OF TRADE MINISTERS OF JAPAN, THE U.S., AND THE EU" column in the 2022 Report).

The United Kingdom's departure from Europe (EU) was another event that had a major impact on the international economy during this period. Following a referendum in June 2016, the United Kingdom decided to leave the EU in January 2020, and the Report also addresses issues related to this in a column (see "THE U.K.'S DECISION TO LEAVE THE EU (BREXIT)" in the 2017 Report and "UK'S WITHDRAWAL FROM THE EUROPEAN UNION" in the 2021 Report).

(2) CRISIS OF THE WTO DISPUTE SETTLEMENT SYSTEM AND THE PARALYSIS OF ITS APPELLATE BODY

In addition, at this time, the paralysis of the WTO's Appellate Body, which supports the WTO dispute settlement system, was also a major event that shook the WTO system and the rules-based trade system. In response to the paralysis of the Appellate Body in December 2019, the Minister of Economy, Trade and Industry issued a statement ("Statement by Minister Kajiyama on the WTO Appellate Body"). Since 2018, the Report has also been publishing a column entitled "ISSUES CONCERNING THE WTO APPELLATE BODY" that addresses issues related to the Appellate Body pointed out by the U.S., as well as moves and initiatives of other countries.

(3) NEW TRADE ISSUES

New trade issues, such as digitalization and data protectionism, the Carbon Border Adjustment Mechanism (CBAM), and the spread of COVID-19, which has become a global issue since 2020, are also featured in the Report in columns and other sections.

Technological advances such as the Fourth Industrial Revolution and the rapid digitalization of the economy and society have rapidly increased the need to formulate rules for digital trade. To meet these needs, it is important to discuss a wide range of issues related to online economic activities and to formulate digital trade rules in trade agreements and international frameworks. In light of these developments, the Addendum "Electronic Commerce" has been included in the 2017 Report through the 2021 Report, and was carried on to the Addendum to the 2022 Report with a new title "Digital Trade", with necessary updates.

In addition, in recent years, countries around the world have introduced or are considering introducing

systems aimed at environmental protection, and as a result, raising the issue of how to harmonize environmental protection policies with trade policies. In light of these developments, the 2021 Report and the 2022 Report address the Carbon Border Adjustment Mechanism (CBAM) in the column “TRADE AND ENVIRONMENT: OVERVIEW AND WTO CONSISTENCY OF CARBON BORDER ADJUSTMENT MEASURES”.

The global spread of COVID-19 has also raised concerns that the global economy may once again lean towards protectionism. In response to these developments, the 2020 Report addresses these issues as a reference in METI Priorities, and in the 2021 Report and the 2022 Report, the column “COVID-19 AND TRADE” discusses the movements in the WTO, as well as measures in countries around the world and WTO rules regarding COVID-19.