COLUMN:
CUMULATIVE PROVISIONS IN THE ANTI-DUMPING AGREEMENT -BASED ON DS601 PANEL REPORT-

Regarding DS601 (*China - AD on Stainless Steel (Japan)*), as discussed in this Report, the final Panel Report, circulated in June 2023, found that the AD measures by China are inconsistent with the WTO Agreement. The Panel Report was adopted in July (to which China did not appeal). While the Panel Report accepted Japan's claims on the majority of issues, including Articles 3.2, 3.4, 3.5, and 4.1 of the AD Agreement, one of the issues on which Japan's claims were not accepted was Article 3.3 of the AD Agreement (cumulative injury assessment).

1. POINT AT ISSUE

Article 3.3 of the AD Agreement stipulates as follows: "Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product."

In other words, for imports of a product from more than one exporting country, where (a) the margin of dumping and the volume of import exceed a certain threshold and (b) the investigating authorities determine that "the conditions of competition" are "appropriate", the effects of the imports of a product from more than one country can be assessed cumulatively (collectively). In such a case, it would be more straightforward for the investigating authorities to find the injury, as they do not need to find the effects on domestic like products of the imported product from each exporting country. Consequently, it should be relatively easier for the authorities to determine the imposition of the AD duties on the entire subject products. In fact, in the United States, there have been several quantitative analyses published indicating that the utilization of cumulative injury assessment in AD investigations increases the probability of the imposition of the AD duties.

Conversely, however, the application of cumulative assessment would make it more challenging for a company subject to the AD investigation to contest the injury findings. The point of dispute in the individual injury findings is whether the product from the home country of that company contribute to the injury to the importing country. Whereas, the cumulative injury finding lies in whether the subject imports as a whole (including not only the product of the home country of the company but also imported products from other subject countries) contributes to the injury to importing country. In such cases, no matter how much the company argues that their products have little impact on the industry of the importing country, this will not be taken into account by the investigating authorities. In other words, the injury will be found in the way that a company may get "mixed up" and responsible even for the injury caused by similar products from other countries which happen to be competing in the importing country approximately at the same time. This consequence seems unreasonable in some cases. This also departs from principles of the AD duties (such as GATT Article VI:6 (a) and Article 9.1 of the AD Agreement) which stipulate that injury resulting from dumped imports must be found for each exporting country and duties must be imposed for each country. It is not clear from the provisions why the cumulative injury assessment may override these principles.

The requirements to find the injury cumulatively (Article 3.3 (a) and (b) of the AD Agreement) also present a number of challenges. Since the requirement of Article 3.3 (a) can be satisfied when the margin of dumping and the volume of imports of subject imports from each country exceed the certain level, it is crucial to determine whether "the conditions of competition" are "appropriate" as set out in (b). However, the text of

the provision is extremely concise and abstract, which has led to numerous instances where the investigating authorities do not give sufficient consideration to "the conditions of competition" and easily determine the cumulation to be "appropriate".

The situation mentioned above is also a serious problem for Japanese exporting companies. In recent years, in overseas AD investigations, there are few cases where only Japanese products are solely subject to the investigation. In many cases, products from other competing exporting countries (typically, products from China, whose export pressure is increasing around the world) are also subject to the investigation at the same time. In such cases, the question arises as to whether Article 3.3 of the AD Agreement is applicable to the Japanese products and the products of other exporting countries. Japanese products often avoid direct competition with products from other countries by distinguishing themselves in terms of quality, performance, and price range, even when the product names are identical to those of products from other countries, and strive to survive in the export market. Such complex circumstances, however, are often not taken into account by the investigating authorities when they find the "appropriate"ness of "the conditions of competition" under Article 3.3 of the AD Agreement. Consequently, the impact of the Japanese products are assessed cumulatively (collectively) with that of imports from other countries, and even if the contribution of the Japanese products alone to the negative impact on the importing country is questionable, the AD duty may be imposed since their impact gets "mixed up" with the impact of imports from other countries (such as Chinese products).

2. PRECEDENT CASES IN THE PAST

While the text of Article 3.3 of the AD Agreement is ambiguous as pointed out above, there are very few precedents that contribute to its interpretation. Prior to DS601, the only precedents were DS219 (*EC – Tube or Pipe Fittings*) and DS405 (*EU – Footwear (China)*).

DS219 was the first dispute settlement procedure in which the main point of dispute was the interpretation of Article 3.3 of the AD Agreement. In this case, Brazil claimed that EU acted inconsistently with Article 3.3 of the AD Agreement by cumulatively assessing the impacts of imports of steel products from Brazil, China, Croatia, the Czech Republic, Yugoslavia, Japan, South Korea, and Thailand. Although Brazil's claims were rejected, the Appellate Body Report of this case considered the purpose of the cumulation provision, referring to it as "rationale behind cumulation" (para. 116 of the Appellate Body Report), and stated that the provision is intended to address situations where the relevant imports "are in fact causing injury" but "could not individually be identified as causing injury". This finding is useful in examining the disciplines under Article 3.3, but it is still unclear in what situations this would occur and how it relates to the requirement as set out in Article 3.3.

In DS405, the problem was presented as to EU's finding in which the impact of imports of shoes from China and Vietnam was assessed cumulatively. The panel, however, upheld the determination of EU that "the conditions of competition" were "appropriate" on the grounds of substitutability of the subject imports for customers, similarity of sales channels, and the fact that the price was lower than that of domestic like products (para. 7.400-403 of the Panel report). This finding of the panel was adopted since China (the complaining party) did not appeal.

In summary, all of the precedents upheld the cumulative findings of the investigating authorities in consequence and did not provide straightforward discussion on the purpose of Article 3.3 of the AD Agreement, the fundamental issue behind the cases.

3. DS601 AND PANEL DECISION

In DS601, an extremely wide-range of products was subject to the AD investigation, encompassing three types of stainless steel products (stainless steel slabs, hot rolled stainless steel coils, and hot rolled stainless steel plates) and these products were also diverse in their chemical components (such as nickel, chrome, and manganese). In addition, each of the countries subject to the AD investigation (Japan, South Korea, Indonesia, and EU) had completely different main export products, with different chemical components, price range, export trends, and commercial distribution (para. 7.85-95 of the Panel report of DS601). For example, Indonesia, which exports a considerable volume of nickel-based slabs and hot rolled coils that utilize the country's abundant nickel ore, and Japan, which exports a considerable volume of hot rolled steel plates and chromium-based hot rolled coils that employ advanced processing technology, do not directly compete in the Chinese market. Moreover, only Indonesian products showed a sharp increase in export volume during the period of the investigation, while the export volume from Japan and EU remained almost unchanged. Nevertheless, the Chinese authorities found the injury, in their cumulative injury finding, by cumulatively assessing the impact of imports from the four subject countries/regions, giving almost no consideration to the differences in the competitive relationship among these exporting countries in with respect to "the conditions of competition" Under Article 3.3. This is a typical example of the problems in the cumulative finding faced by Japanese exporting companies.

Japan claimed that, in its interpretation, the circumstance in which "the conditions of competition" are "appropriate" under Article 3.3 means a state of intense competition between subject imports, and between subject imports and domestic like products, "in such a way that the imports from any source can make up for lower levels of imports from any other source" (7.67), and China's cumulative finding is inconsistent with Article 3.1 and Article 3.3 of the AD Agreement as it, in this sense, lacks the finding of "the conditions of competition".

However, while the panel demonstrated a certain level of understanding regarding the factors presented by Japan as being "the heart of the competitive relationship" and "might well inform an investigating authority's determination" (7.67), the panel greatly respected the discretion of the investigating authority in terms of how to consider specific circumstances, and consequently rejected Japan's claims. The reasons for this conclusion presented by the panel include, among other things, that the text of Article 3.3 does not impose any additional obligation to analyze the detailed competitive relationship of this type (7.66) and that when accepting Japan's interpretation, there may be some cases where cumulative finding cannot be applied even when it is required (7.70) (for example, the case where the effect of imports from individual exporting country is minimal but the combined effect satisfies the requirement of the "injury".)

4. FUTURE CHALLENGES

With the adoption of DS601 Panel report, the discussions on cumulation based on this case were concluded by the panel's finding. The panel's interpretation is questionable as it practically allows the finding of "the conditions of competition" as mandated by Article 3.3 (b) to become almost meaningless and also leaves concerns as to the absence of a mechanism to prevent abusive and arbitrary cumulative decision. Nonetheless, it is certainly true that the wording of this Article (i.e., "the conditions of competition" and "appropriate") is somewhat vague, and it may be hard to say that it is obvious from the provision that the detailed analysis of competitive relationship between the importing countries, as alleged by Japan, is required. Permitting a considerable degree of discretion for the investigating authority is also common when the underlying article is abstract, and this approach seems to be aligned with the relevant precedents.

A more fundamental problem is that, in addition to the lack of clarity in the text of Article 3.3, the cumulative finding - despite its significant practical impact - is often applied easily without mutual understanding among the Members regarding the original purpose and function of cumulative finding under such Article. To address these problems, it will be necessary to explore the origins, functions and significance in the modern era of the cumulative finding mechanism and to reopen discussions on related provisions

among the Members, rather than relying largely on panel decisions in individual dispute settlement cases only. Japan should consistently strive to lead the discussions among the Members regarding the purpose and function of cumulative finding mechanism and create better disciplines, while raising practical issues faced by the export industry.