Chapter 1

THE UNITED STATES

NATIONAL TREATMENT

1) Harbor Maintenance Tax "HMT"

<Outline of the measure>

Since 1987, in accordance with the Water Resources Development Act of 1986 (Public Law 99-662), as amended, the United States has operated a system that is designed to impose *ad valorem* taxes of 0.125 percent (0.04 percent prior to 1990) on freight (imports and exports and certain domestic freight) belonging to entities that use harbors within the territory of the United States. The system is commonly known as the Harbor Maintenance Tax (HMT).

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 territorial dependents; 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. In addition, US military personnel are given an annual limit of $500 million of the *ad valorem* taxes. Reportedly, as of October 1997, a surplus of $1.1 billion had accumulated.

<Problems under international rules>

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, 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.

<Recent developments>

In February 1998, the European Union requested WTO consultations with the United States regarding this system under GATT Article XXII. Japan participated in the consultations as a third party. Consultations were held in March and June 1998, but no further developments have occurred.

In March 1998, the Supreme Court of the United States held the HMT as unconstitutional with respect to exports. In accordance with this decision, the US government stopped collecting the tax from exporters beginning in April 1998. However, the HMT is imposed on importers and the problems described above have not been resolved.

2) Merchant Shipping Act of 1920 (Jones Act)

<Outline of the measure>

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 United States and its territories. This restricts exports of foreign-made ships to the United States.

<Problems under international rules>

The measure is considered a violation of GATT III (National Treatment) and Article XI (General prohibition of quantitative restriction). The United States, however, claims 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 United States recognized that the special rule should not carry over to GATT 1994, but the United States maintained that the measure should continue, mostly to uphold the Jones Act. In the end, Member countries agreed to put the special provision in GATT 1994. This Paragraph, maintained under such unusual proceedings, causes considerable problems.

Furthermore, despite the caveat in Paragraph 3 of GATT 1994 requesting review 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, the United States introduced language that "the review should terminate when no change was found in the subjected laws and regulations." This language permits reviews to terminate in an easy and simple manner. This may be in violation of the spirit of the Paragraph 3. In addition, the United States maintains that "the measure is to maintain the national security by allowing only US shipbuilders to construct and repair ships convertible to military purposes, thereby retains the responsive capabilities of US Navy." However, the United States has not provided detailed explanations on the causal relationship between "(this) special restrictive measure" and "the maintenance of national security." It is necessary to continue monitoring US action in the future.

<Recent developments>

The Jones Act has been discussed in the WTO General Counsel since July 1999. Most Members, including Japan, have insisted that the measure likely constitutes a violation of Articles III and XI of the GATT, but the United States has maintained its legality, asserting that, under the provisional application of the GATT 1947, existing laws were "grandfathered" and, thus, are exempt from the obligations of the GATT 1947.

In January 2003, the issue was addressed during the general session without any substance; the United States submitted its annual report on the Jones Act. Later in November, the United States held an informal meeting and, at the general session in December, Japan requested the United States orally and in writing to provide: (1) a detailed explanation on the data included in the aforementioned annual report; (2) the data Japan previously requested the United States to submit on the number of foreign-owned shipbuilders in the United States, the number of shipbuilders to build US-ships for use under the purpose of GATT Paragraph 3, the number of employees and annual sales of such shipbuilders, *etc*.; and (3) information on revising the Jones Act. Although the United States submitted responses to Japan's requests orally and in writing, the contents of their responses could hardly be called sufficient. Since there was no progress during 2004, it is necessary to continue monitoring future US action. (For additional information on maritime services, *see* "Trade in Services".)

QUANTITATIVE RESTRICTIONS

1) Export Management System

<Outline of the measure>

The “International Emergency Economic Powers Act” of the United States gives the government the ability to invoke unilateral export restrictions on agricultural goods for reasons of foreign policy or domestic shortages. The law was used in 1973 to ban exports of soybeans and soybean products and, again in 1974 and 1975, to restrict exports of wheat to the Soviet Union and Poland. Such restrictions significantly impact the targeted countries. We find the measure problematic not only because of its potential to distort trade, but also because of its negative impact on food security; it impairs the stability of imports of foodstuffs by importing countries.

<Problems under international rules>

For the import of agricultural products, the UR Agreement requests the replacement of non-tariff border measures with tariffs, in principle, and reduction of tariff rates. The regulation on export bans and export regulations under Article 12 of the Agriculture Agreement is moderate 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 DDA WTO negotiations on agriculture, Japan submitted a proposal which would strengthen disciplines on export prohibitions or export restrictions, in terms of redressed imbalance of rights and obligations between exporting and importing countries, while ensuring food security. It was finally agreed under Annex A of the WTO Framework Agreement (Framework for establishing modalities in Agriculture) in July 2004 that “Disciplines on export prohibitions and restrictions in Article 12.1 of the Agreement on Agriculture will be strengthened.” Also in 2005, Japan utilized various opportunities such as DDA negotiations on agriculture and bilateral meetings with each country to repeatedly express its position mentioned above.

Figure 1-1

Comparison of disciplines importing and exporting countries in the area of Agriculture

	Importer side	Exporter side
Tariffs	Import tariffs on every agriculture product is binding Obligation to reduce tariffs under UR Agreement Able to raise tariffs through safeguard measures that are in accordance with the set rules	Export tariffs are not binding No obligations to reduce export taxes Free to set new tariff or raise tariff as no rules to govern them.
Quantitative restrictions	Quantitative restrictions on imports should be converted to tariffs. Must set minimum access.	Possible to set new restriction or continue restriction on exports provided: Consideration of the effects of such restriction upon the food security of importer countries Prior notification, and if required consult with importer countries

2) Export Restrictions on Logs

<Outline of the measure>

The United States enacted logging restrictions in order to protect the spotted owl and other animals. These restrictions reduced the domestic supply of logs, which led to the "Forest Resource Conservation and Shortage Relief Act of 1990," a law which restricts log exports. The United States currently bans the exportation of logs taken from federal and state-owned forests west of the 100° west longitude line.

<Problems under international rules>

The United States 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 United States. The measure therefore cannot be justified 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>

The export control measures over logs, including this issue, may be a measure to protect the domestic industry under the pretext of forestry resource protection. In 2006, Japan continued to address this issue in the negotiating group for market access of non-agricultural products in the Doha Round.

TARIFFS

1) High Tariff Products

<Outline of the measure>

The simple average bound tariff rate for non-agricultural products as a result of the Uruguay Round is 3.2%. Items with high tariffs include footwear (maximum 48%), glassware (maximum 38%), porcelain and ceramics (maximum 28%), woolen goods (maximum 25%), trucks (25%) and titanium (maximum 15%). The tariff rate on trucks is significantly higher than the 2.5% tariff on passenger cars, placing imported trucks under a severe competitive disadvantage; Japan has strong interests in seeing this tariff rate reduced.

<Problems under international rules>

Higher tariff rates themselves do not, *per se*, conflict with WTO Agreements unless they exceed the bound rates. However, from the viewpoint of promoting free trade and enhancing economic welfare, it is desirable to reduce tariffs to their lowest possible rate, and eliminate the tariff peaks described above.

<Recent developments>

Negotiations on enhancement of market access for non-agricultural products in the Doha Development Agenda (DDA) are ongoing and include negotiations on reducing and eliminating tariff rates.

2) Method of Calculating Tariffs on Clocks and Wristwatches

<Outline of the measure>

The United States calculates tariffs on finished clocks and watches as the aggregate of the tariffs on their components. These calculations are complex and the trade procedures intrude 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. In other words when a company exports a finished wristwatch to the United States, it must classify its components under more detailed customs code than an eight-digit HS code according to the nature of the component, and then calculate and total the tariffs for each component: the movement, case, band and battery.

<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 places excessive burdens on traders and is an obstacle to the promotion of smooth trade. In addition, the US calculation method is based on the presumption of mechanical clocks and watches, only few of which are distributed in the world; therefore it does not reflect distribution and is an unusual calculation method internationally.

<Recent developments>

During the Japan-US Deregulation Dialogues in 1998 and 1999, Japan requested that the US revise its clock and watch import tariff calculation for complete units and simplify the trade procedures by classifying them and setting duties under a 6-digit HS code, rather than accumulate the tariff amounts for individual components. However, the report on tariff simplification published by the US International Trade Commission (ITC) in March 1999 failed to offer adequate improvements, and tariffs continue to be calculated under 8-digit tariff codes for each component and the total of them. In addition, calculation methods based on size and price divisions remain and there has not been adequate improvement.

The issue was further discussed during the Japan-US Deregulation Initiative talks in 2002 and 2003. The Japan-US Deregulation Initiative 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.

During the Japan-US Trade Forum 2005, Japan demanded that the US improve its calculation methodology of clock and watch tariff rates.

Furthermore, Japan is requesting that the US resolve this problem on the negotiations of non-agricultural market access in the Doha Development Agenda (DDA).

ANTI-DUMPING MEASURES

While the United States is one of the most open markets in the world, it still maintains elements of unilateralism and protectionism in its trading system. The field of Anti-Dumping (AD) is perhaps the largest source of hidden protectionism in the United States, and many countries have complained about the shortcomings of the US regime. The US legislation could be interpreted or applied in ways that are inconsistent with the Anti-Dumping Agreement, so it will be very important to monitor closely the US administration of its law and, if any problems exist, to point them out.

In the past, Japan has raised various generalized problems with US AD measures, including: (1) “zeroing” and asymmetrical price comparisons (“constructed export price (CEP) offset”) in calculating dumping margins; (2) the definition of “affiliated party”; (3) problems in applying “facts available”; (4) the treatment of “captive production” related to the injury determination; (5) treatment of the “like product” regarding later developed products within the scope of the AD Duties; and (6) the criteria of sunset reviews. The section below details cases where these issues remain a concern.

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

<Outline of the measure>

In October 2000, the US Congress passed the Agricultural Appropriations Act of 2001, which included an amendment to the Tariff Act of 1930 providing for the distribution of duty revenues collected through anti-dumping and countervailing duty measures to companies in the US that petitioned for the relevant measures. The Continued Dumping and Subsidy Offset Act of 2000 is called the “Byrd Amendment” because it was introduced by Senator Byrd.

<Problems under international rules>

In December 2000, Japan, the European Union, Australia, the Republic of Korea, Brazil, India, Thailand, Indonesia and Chile jointly requested consultations with the United States under the DSU. The nine Members alleged that the Byrd Amendment was inconsistent with the WTO Agreements. Canada and Mexico requested consultations with United States for the same reasons in June 2001. The issue was not resolved in either of the consultations, and panels were established in August and September 2001 respectively. The case was adjudicated by a single panel; the Panel report was circulated in September 2002.

The Panel found the Byrd Amendment was inconsistent with WTO Agreements. The United States appealed the Panel's decision in October 2002. In January 2003, the Appellate Body upheld the Panel's finding that "specific actions against dumping/subsidy" under the ADA, the ASCM and GATT are limited to three measures: (1) definitive AD/countervailing duties; (2) provisional measures; and (3) price undertakings. The measures in the Byrd Amendment are "specific actions against dumping/subsidy," but are not one of the three permitted measures. Thus, the Appellate Body found that the Byrd Amendment was inconsistent with WTO Agreements and recommended that the United States bring it into conformity with WTO Agreements. In the same month, the Appellate Body report was adopted by the Dispute Settlement Body.

However, The United States let the implementation deadline pass without any sign of implementing the recommendation. Subsequently, in January 2004, Japan, the European Union, Canada, the Republic of Korea, Mexico, Brazil, India and Chile requested that the WTO approve imposition of countermeasures. The United States, in turn, claimed that the level of the countermeasures requested was not appropriate. At the DSB Meeting in the same month, the matter was referred to arbitration to decide the level of countermeasures. In August 2004, the arbitrator ruled that the authorized level of retaliation in each case would be equal to 0.72 multiplied by the amount of disbursements to US companies under CDSOA.

In November 2004, the above-mentioned seven joint applicants excluding Chile again requested approval to impose countermeasures. The countermeasures, which enable each applicant to raise tariffs on imports from the US within the scope of the arbitration ruling, were approved by the DSB in November 2004. In December, Chile also filed an application to impose countermeasures, which was approved by the DSB.

Receiving approval on the content of countermeasures from the WTO, the EU and Canada invoked countermeasures in May 2005, as did Mexico in August and Japan in September.

<Recent developments>

On February 8, 2006, with US President Bush's signature, the Deficit Reduction Act of 2005 came into force. This act states that: (1) Article 754 of the Tariff Act of 1930 (the Byrd Amendment) and related acts shall be repealed, retroactive to October 1, 2005; and (2) distribution shall continue with respect to duties on entries of goods made and filed before October 1, 2007.

The repeal of the Byrd Amendment is welcomed as a significant improvement, but the distribution of duties will be continued under the above transitional clause. Therefore, the position of the United States continues to remain inconsistent with the WTO agreements. In addition, there still remain incentives to apply for AD measures, which would continue the unfair competitive advantage for US producers. In light of this situation, with the period of Japan's countermeasures set to expire at the end of

August 2006, Japan promulgated a government ordinance to extend the countermeasure by one year until the end of August 2007.

The EU has also maintained a countermeasure, while Mexico invoked a countermeasure in September 2006, effective for a limited period of two months until the end of October. Canada's countermeasure expired at the end of April 2006, as the country reached an agreement with the United States on the treatment of tariffs totaling approximately US$5 billion concerning softwood lumber.

The amount of the distribution of duties of FY2006 relating to Japanese products under the transitional provision was approximately 7.8 billion yen. Japan should continue to strongly urge the United States to immediately halt the distribution and resolve the inconsistency with the WTO agreements.

2) "Calculation of dumping margins via the zeroing procedure" (WT/DS322)

<Outline of the measure>

The Unites States applies a procedure known as "zeroing" that in effect artificially inflates dumping margins. Under this procedure, in adding up margins calculated through an investigation into each model or export transaction, negative margins (export prices are higher than the normal values in a home market) are converted to zero. (*See* Figure 1-3.)

In March 2001, the WTO Appellate Body ruled that the zeroing procedure which the EU used in calculation of dumping margins on the basis of a weighted average normal value with a weighted average export price for imports of cotton-type bed linen from India violated the AD Agreement. However, the United States took the position that the WTO ruling against zeroing applied only to two specific cases (the EU's AD measure against Cotton-type Bed Linen from India and the US's AD Final Determination on Softwood Lumber from Canada), and would not constitute a finding that its "zeroing" procedure, as such, violates the WTO. The United States continued to apply the "zeroing" procedure.

<Problems under international rules>

Japan's industries, including the bearing industry, have been harmed for a long time under the zeroing procedures, since excessive and unjustifiable AD duties have been imposed. Given these circumstances, in November 2004, Japan requested WTO consultations with the US over its zeroing procedure, and bilateral consultations were held in December. As there were no satisfactory results, Japan requested the establishment of a panel, which was established the same month.

The major arguments are as follows:

(1) Japan's major arguments

Japan insisted that not only the actual application of zeroing as applied to individual cases by the US, but also the US zeroing methodology as such were inconsistent with WTO agreements. The grounds for the inconsistency were wide-ranging, and Japan focused on the following two points: (1) an absence of dumping margins on the "product as a whole" by using zeroing is inconsistent with the WTO Agreements; and (2) an absence of "fair comparison" by using zeroing is inconsistent with the WTO Agreements.

(2) The US's major arguments

The US insisted on the following points : (1) the zeroing methodology is not a "measure" that is covered by the dispute settlement procedures; (2) dumping margins are not required to be calculated on the "products as a whole" under the WTO Agreements; and (3) the zeroing methodology does not violate the obligation of "fair comparison".

<Recent developments>

(1) Dispute Settlement Procedures

The panel report, issued on September 20, 2006, found that: a) the use of the zeroing method in the original investigation for determining the presence or absence of dumping applied the AD measures and for deciding the dumping margin violates the WTO agreements; but b) the use of the zeroing method for calculating the amount of AD duty in procedures after the decision to apply the AD measures (*e.g.*, as part of a periodic review) does not violate the WTO agreements.

In response, Japan appealed to the Appellate Body in October 2006. After its oral hearing in November of that year, the Appellate Body issued its report in January 2007. This report accepted the overall claims of Japan that zeroing was inconsistent with the WTO agreements throughout AD procedures. The finding that the zeroing method in the sunset review was inconsistent with the WTO agreements is remarkable, as it is the first such case.

In advance of the issuance of this report, a WTO panel concerning the US use of the zeroing method that was established upon request from the EU issued a report in November 2005. The panel partially accepted the EU's argument, finding that the zeroing method: a) "as applied" on individual cases in the original investigations; and b) "as such" violates Article 2.4.2 of the AD Agreement. This finding was upheld by an Appellate Body report issued in April 2006. With regard to the zeroing method "as applied" in individual cases as part of administrative reviews, the panel ruled that there was no violation of the law, but the Appellate Body overturned this ruling. (The Appellate Body did not find violation of the WTO agreements with regard to the zeroing method "as such" as part of administrative reviews.)

When the United States implemented the recommendation concerning the issue of Canadian softwood lumber, it decided to impose a still higher dumping margin by applying the zeroing to another type of comparison. Concerning this issue, Canada filed a new request for WTO consultations, and the Appellate Body ruled in August 2006 that the US measure violated the WTO agreements.

Japan strongly urges the United States to respect the ruling of the Appellate Body with due consideration for the significance and importance thereof, and abolish the zeroing method.

Other countries such as Mexico, Argentina and Thailand have also requested WTO consultations with the United States with regard to the US zeroing method, and it is desirable that Japan call for the abolition of the zeroing method in these cases as well, by involving itself therein as a third-party country.

(2) WTO/Rules Negotiations

In May 2005, Japan, together with the "AD (Anti-Dumping) Friends," proposed establishing a rule requiring the application of Article 2 of the AD Agreement to administrative reviews (Article 9.3, the AD Agreement) and banning the use of the zeroing method in such reviews.

Furthermore, in April 2006, Japan called for taking account of all transactions conducted over a certain period (usually one year) as a principle common to all types of comparisons (fair comparison), which means a ban on the zeroing method. Japan also proposed requiring in principle the use of the same type of comparison in original investigations and reviews, and allowing the use of a comparison of the weighted-average normal value with individual export transaction prices (W-to-T method) only as an exceptional measure.

Figure 1-2

Examples of Unfair Price Comparisons

	Domestic Price ($)	Export Price ($)	Dumping Margin ($)
Transaction 1	115	95	20
Transaction 2	80	70	10
Transaction 3	100	150	-50*
Transaction 4	105	85	20

(Note: Sales volumes are all considered to be "1 unit" to simplify calculations.)

* The practice of "zeroing" dictates that this dumping margin (-50) be calculated as "0".

The dumping margin (DM) would be calculated as follows if zeroing were not used:

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

There would be no dumping margin. However, the use of zeroing results in the creation of an artificial margin.

$$DM = \frac{20+10+0+20}{95+70+150+85} \times 100 = 12.5\%$$

3) US Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (WT/DS184) and Delay in Implementing the WTO Recommendation

<Outline of the measure>

In October 1998, the United States initiated an investigation against certain hot-rolled steel products from Japan and, in June 1999, imposed AD duties.

In January 2000, Japan requested consultations with the US and challenged several aspects of the US measures, including the: (a) methodology of calculating 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. (Brazil, Canada, Chile, the European Commission and the Republic of Korea participated in the Panel proceeding as third parties.)

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. (Korea, the European Commission, Canada, Brazil and Chile participated as third parties.) The Appellate Body report which upheld most of Japan's claims was circulated in July 2001. In August 2001, it was adopted by the Dispute Settlement Body (DSB).

Japan's arguments supported by the Panel and Appellate Body were as follows:

(1) The application of "facts available" to three investigated companies by the United States Department of Commerce ("DOC") in this case was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

(2) DOC's inclusion of margins based on partially on "facts available" in the calculation of the "all others rate", which is the dumping margin applied to imports from exporters or producers not individually examined, was inconsistent with Articles 9.4 and 18.4 of the Anti-Dumping Agreement.

(3) DOC's exclusion of sales to affiliates as "outside the ordinary course of trade" was arbitrary and inconsistent with Article 2.1 of the Anti-Dumping Agreement.

(4) The injury determination which "focused primarily" on the merchant market sector was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Anti-Dumping Agreement requires the authority to focus on the industry as a whole.

The DSB made the following recommendations:

(1) amend the statutory provision regarding the "all others" rate;

(2) eliminate the practice of excluding sales to affiliates from the normal value calculation;

(3) re-calculate dumping margins in a manner consistent with the Anti-Dumping Agreement; and

(4) re-determine injury in conformity with the WTO Agreement.

In February 2002, following DSB arbitration, the reasonable period of time (RPT) for compliance was set at 15 months from the date of adoption of the Panel and Appellate Body Reports (in other words, by November 23, 2002). The US amended its regulations and undertook recalculations in regard to (2) and (3) above, within the RPT, but it completely failed to fulfill its obligations in regard to (1) and (4). The US requested Japan to accept an extension of the RPT to implement the remaining recommendations. Japan agreed and the RPT was extended until the end of the first session of the 108th US Congress or the end of 2003, whichever came first. The US Administration sought to amend the Act in April 2003 and US Trade Representative Zoellick and Secretary of Commerce Evans jointly sent a letter to the US Congress urging them to pass the Amendment but there was no prospect for the Amendment to pass the US Congress before the end of the 2003 session. The US requested the WTO

to extend the deadline for implementing the ruling to the end of July 2004. After that, the Administration requested further extension of RPT until the end of July 2005. Considering that the US Administration already recalculated dumping margins and had continued efforts to amend the Act, Japan found it appropriate to continue to accept the US requests to extend the deadline.

<Problems under international rules>

The delay in implementing the WTO recommendation is a significant issue that undermines the credibility of the dispute settlement system of the WTO. The details of the issues under the AD Agreement concerning the two unimplemented cases are as follows:

(1) Amendment of the US AD Act that stipulates calculation methods for the "all others" rate

Under the AD Agreement, the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned, of the product under investigation. But in cases where the number of exporters and producers involved is so large as to make such a determination impractical, the authorities may limit their examination (*see* Article 6.10, latter clause). With regard to exporters not included in the examination, an “all others” rate is applied to imports not to exceed the weighted average margin of dumping established for sampled companies (Article 9.4). However, the authorities shall disregard margins established under the circumstances referred to in paragraph 8 of Article 6 (Proviso 1, Article 9.4).

In contrast, the US Tariff Act stipulates that margins of dumping for individual sampled companies should be excluded from the calculation of the “all others” rate only if they are completely based on facts available, thus violating the AD Agreement (*see* Diagram US-3).

<Diagram US -3>

	Sampled companies				Non-sampled companies	
Exporters	A	B	C	D	E	F
Dumping margins	10%	20%	30% (Partially based on facts available)	40% (Entirely based on facts available)	all others rate	all others rate

Note: The above figures are based on the assumption that the export volumes are the same for all cases.

The dumping margin for non-sampled companies in groups E and F:

→ Under the WTO agreements, the margin of dumping should be the weighted average of the margins for groups A and B equalling 15%

→ Under the US system, the margin of dumping is the weighted average of the margins for groups A, B and C equalling 20%

(2) Re-determination of injury consistent with the AD Agreement by the US International Trade Commission (ITC)

The ITC determined that injury (based on analysis of factors such as market shares of imported goods and the profit rate of the US steel industry) by "focusing primarily" on the merchant market sector and excluded "captive production". This violates Articles 3.1 and 3.4 of the AD Agreement, which mandate that injury be determined with respect to the industry as a whole.

<Recent developments>

As mentioned above, legislation for implementing the recommendation (H.R.2473) was introduced in the US House of Representatives and submitted to Congress on May 19, 2005, but there was no prospect of its enactment by the deadline for implementation at the end of July 2005. Therefore, a fourth extension of the deadline was discussed. However, there was concern that an additional extension of the deadline would not bring about any particular effects but might undermine the credibility of the dispute settlement system of the WTO. On July 7, 2005, based on the US will to continue their efforts to implement the DSB recommendation on this matter, Japan and the US reached an understanding that Japan would retain its right to suspend concessions or other obligations without extending the deadline any further. This understanding was approved at the DSB regular meeting on July 20, 2005. At a subsequent regular meeting of the Dispute Settlement Body, the US explained its efforts toward implementing the recommendation, but the above legislation was scrapped, with deliberations thereon remaining unfinished despite Japan's repeated requests for implementation as the 109th session of the US Congress came to a close at the end of 2006.

Japan will continue to strongly urge the United States to immediately take measures in line with the recommendation.

4) Sunset Provision (US Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (WT/DS244) and unfairly long-term continuation of AD duties)

<Outline of the measure>

As a result of the Uruguay Round negotiations, the Sunset Provision was newly added to the AD Agreement (Article 11.3), stipulating that definitive anti-dumping duties shall be terminated on a date not later than five years from its imposition unless

the authorities determine, in a review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Pursuant to this Uruguay Round provision, the Sunset Provision also was newly included in the US AD Act , and sunset reviews came to be implemented. However, of the 74 cases against Japan, as to which five years had passed since imposition of AD duties, most of the 39 cases in which AD duties were revoked involved US domestic industries that expressed no concern about continuation of the measures. As a result of full reviews, the US International Trade Commission (ITC) determined to revoke the AD duties in only 11 cases (zero since 2000), and the Department of Commerce (DOC) has not determined to revoke any cases. (Table: the US – 4). As a result, nearly half of US AD measures have continued in effect for over ten years (Table: the US – 5).

Figure 1-4

Revocation and continuance of orders imposing definitive AD duties on products imported from Japan (including price undertakings) by Sunset Reviews (after the establishment of the WTO)

Inauguration year of reviews	-1999				2000-			
result	Expire (No expression of concern from domestic industries)	Sunset Reviews			Expire (No expression of concern from domestic industries)	Sunset Reviews		
		ITC revoke	DOC revoke	Cont.		ITC revoke	DOC revoke	Cont.
	17	9	0	17	11	2	0	19

Notes: (1) The US has also implemented Sunset Reviews on measures imposed before enactment of the WTO Agreement, sequentially since 1998.

(2) Figures include second Sunset Reviews. Partial revocation is counted as continuance (as of 8 February 2007) (based on data created by the Fair Trade Center).

Figure 1-5

AD duties imposed on products imported from Japan continuously over 10 years (as of the end of February 2007, including price undertakings)

Date of Order	Products	Continuance
6 December 1973	Polychloroprene rubber	33 years
8 December 1978	Prestressed concrete steel wire strand	28 years
10 February 1987	Carbon steel butt-weld pipe fittings	19 years
25 March 1988	Stainless steel butt-weld pipe fittings	18 years
12 August 1988	Brass sheet & strip	18 years
24 August 1988	Granular polytetrafluoroethylene resin	18 years
15 May 1989	Ball bearings	17 years
10 May 1991	Gray Portland cement & clinker	15 years
21 February 1995	Stainless steel bar	11years
11 August 1995	Oil country tubular goods	11 years
2 July 1996	Clad Steel Plate	10 years

<Problems under international rules>

As stated above, the AD Agreement stipulates that any definitive AD duty shall be terminated in five years, unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The US sunset regime, however, is designed so that AD measures shall be continued in general and revoked as the exception, which is a reversal of the rule and the exception. Therefore, Japan considers that the US sunset review procedure is inconsistent with the AD Agreement. Indeed, the implementation of the US Sunset Review procedures showed that of the 74 AD cases against Japan that went through sunset review procedures, 35 cases resulted in a determination that the AD duties should remain in effect. (Table: the US – 4).

In view of then upcoming sunset review on AD measures against Japanese corrosion-resistant carbon steel flat products that had been in effect since 1998, Japan requested bilateral consultations with the U S in January 2002 in order to confirm the basic principle that any definitive AD duty shall be terminated in five years. Japan and the US did not resolve the matter at the consultations held in March 2002; a panel was established in May 2002 (Brazil, Canada, Chile, the EU, India, 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. Japan appealed to the Appellate Body in September 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 United States did not act consistently with the WTO Agreements.

Japan's claims and the arguments in the Appellate Body report are summarized below:

(1) Consistency with WTO Agreement for the Sunset Policy Bulletin (SPB) "As Such"

- Japan claimed that the Panel erred in concluding that SPB was not a mandatory legal instrument obliging a certain course of conduct and thus was not, in and of itself a challengeable measure within the meaning of Article 18.4, and therefore could not give rise to a WTO violation.
- The Appellate Body reversed the Panel's findings; it ruled that the SPB is a measure that is "challengeable", as such, under the WTO Agreement, whether it was a mandatory legal instrument or not. However, as a result of the "lack of relevant factual findings by the Panel or uncontested facts on the Panel record", the Appellate Body said that it was unable to rule on Japan's claim.

(2) Applicability of the Article 2.4 of the AD Agreement to sunset review, and the prohibition of zeroing methodology

- Japan claimed that the concept of "determination of dumping" as set forth in Article 2 should be applied to the determination of "dumping" in the sunset review at issue. Thus, it was inconsistent with the AD Agreement that DOC determined the likelihood of continuation or recurrence of dumping based on a dumping margin calculated using a "zeroing" methodology, which itself was inconsistent with Article 2 of the AD Agreement, as the basis for determining the existence of dumping.
- The Appellate Body reversed the Panel's findings and determined that if these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the AD Agreement. However, given the lack of factual findings by the Panel on this point, the Appellate Body did not determine that DOC acted inconsistently with the AD Agreement. (*See* also 2 "Calculation of dumping margins via the zeroing procedure" (WT/DS322).)

(3) The making of likelihood determinations on a order-wide basis

- Japan claimed that the Panel erred in finding that DOC acted consistently with the AD Agreement. In Japan's view, investigating authorities must make their likelihood determination in a sunset review not on an "order-wide" basis but on a "company-specific" basis.
- The Appellate Body reversed the Panel's finding that the SPB as such could not be challenged under the AD Agreement. However, the Appellate Body found that Article 11.3 of the AD Agreement (sunset review) did not require investigating authorities to make company-specific likelihood determinations in sunset reviews and DOC did not act inconsistently with the WTO Agreement by making its likelihood determination in this sunset review on an order-wide basis.

(4) The factors considered by USDOC in making a likelihood determination

- Japan challenged the Panel's finding that the United States made its determination regarding the likelihood of continuation or recurrence of dumping on the positive evidence and thus did not act inconsistently with Article 11.3 of the AD Agreement in this sunset review.
- The Appellate Body rejected Japan's claim, and determined that it was not unreasonable for DOC to conclude that analyzed factors pointed in the same direction towards likely future dumping, and upheld the Panel's finding.

The Appellate Body's conclusion that the United States did not act inconsistently with the WTO Agreements in the sunset review is regrettable. However, the Appellate Body's determination on part of Japan's legal claim ((1) the SPB is a measure that is "challengeable," as such, under the WTO Agreement and (2) the methodology of "zeroing" is broadly prohibited not only at the stage of the original investigation but at the stage of other proceedings) is significant in terms of strengthening the rules of AD procedures in the future.

<Recent developments>

The US is strongly criticized around the world for unfairly long continuation of AD duties although the WTO Agreement provides that any definitive AD duty shall be terminated within five years. Therefore, not only Japan but other countries such as Mexico and Argentina have claimed that the US sunset review regime is inconsistent with WTO Agreements and have requested consultations under the Dispute Settlement Understanding. Japan participated in these disputes as a third-party and pointed out problems involved in the US sunset review system in light of the AD Agreement. As a result, a compliance panel report concerning Argentine oil country tubular goods (OCTG), which was circulated in November 2006, found that the laws and regulations

set by the DOC were still inconsistent with the AD Agreement. It has been made clear at the WTO that there remains institutional and enforcement issues in the US.

Another problem exists where a user's industry in the US, which suffers from short supply of raw materials, requests an early revocation of the AD measures. For example, in polychloroprene rubber, for which the AD measures have been continued since 1973, a user's industry in the US appealed for revocation to the US government. In addition, major Japanese and US automakers jointly requested the revocation of the AD measures on corrosion-resistant carbon steel flat products mentioned above in view of their impact on the price competitiveness of US automobiles in the international market. As a result, the ITC determined that the expiry of the duty would not lead to recurrence of injury to the US industry, and this measure was terminated in February 2007.

Another issue is that the US determines the likelihood of dumping and injury based on the assumptions that exports have declined (or have ceased) because of the imposition of AD duties and that exports would increase or resume once the AD measures are terminated, without recognizing the global-supply-demand situation or cost-benefit performances of the companies that respond to annual reviews and sunset reviews.

Through bilateral consultation, Japan claimed that unfairly long AD measures would have an adverse affect not only on the industries of countries as to which under the AD duties are imposed, but also on US domestic industries, indicated by the above-noted cases and requested the US to terminate AD measures in five years and to implement appropriate reviews consistent with the WTO rules.

There are movements to resolve the above mentioned issues through revisions strengthening the AD Agreement, as well as through WTO Dispute Settlement procedures. Specifically, Japan has submitted several proposals to the Negotiating Group on Rules for strengthening regulations on sunset review mechanisms. (The proposals have four main aspects: (1) completion of reviews before the passage of five years from imposition of the measure; (2) automatic termination of measures at a defined point in time (ten years after their imposition); (3) determinations of the "likelihood of dumping" and termination of the measure on an exporter-specific basis; and (4) no self-initiation of reviews by the authorities should be allowed.)

Through WTO Dispute Settlement procedures and bilateral meetings with the US, Japan needs to make further efforts to strengthen rules regarding sunset reviews, as well as to continue urging the US to implement reviews consistently with the principles of the AD Agreement.

5) Model Matching

<Outline of the measure>

In calculating dumping margins, the investigative authorities categorize the subject products and similar domestic products in the exporting country into several models. Next, they identify domestic models that are "the same as" or "the most similar to" the export models (so-called model matching). With respect to model matching, the Department of Commerce (DOC) stated in its 2003-2004 annual administrative review regarding AD measures for ball bearings originating in Japan, without any persuasive reason, that it would change the model matching methodology previously used in all of the past 14 reviews without problem. This new methodology may require comparisons between products that are not similar.

<Problems under international rules>

The new model matching methodology requires Japanese companies to submit enormous volumes of data concerning domestic sales and prices. This is an excessive and unreasonable burden. In addition, while the AD Agreement Article 2.4 requires a fair comparison between export price and domestic price, the new methodology may require comparisons between products that are not essentially similar, which will lead to a lack of predictability in pricing strategies. The new methodology is applied retrospectively, as reviews conducted using the new model matching methodology also applied to import transactions before the adoption of the new methodology. Furthermore, with the Byrd Amendment still in effect, this might lead to further higher dumping margins and an increase in the distribution of duty revenues regarding foreign-made bearings, which is the largest target of the Amendment.

<Recent developments>

In August 2004, the Ministry of Economy, Trade and Industry (METI) sent a letter to the DOC to request reconsideration of the change in the model matching methodology. During the Japan-US Regulatory Reform Initiative in December, METI again pointed out problems with the new model matching methodology and requested its repeal. Concurrently, concerned Japanese companies pointed out the problems in the change of methodology and requested its repeal. In September 2005, the DOC made a final decision on administrative reviews for 2003 and 2004 by calculating dumping margins using the new model matching methodology. Following this decision, Japanese companies filed lawsuits in the United States, which are now pending. Meanwhile, the government of Japan asked the US again to revoke the adoption of the new model matching methodology at a session of the Japan-US Regulatory Reform Initiative in November 2006.

Japan needs to request the US to fully recognize the unfairness of the new methodology, which has not only the above-mentioned problems, but also problems of retrospective application, and to repeal the changed methodology.

(6) US Antidumping Act of 1916

<Outline of the measure>

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

<Problems under international rules>

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

Specifically, the WTO Panels and the Appellate Body found the following violations of the WTO agreements:

(1) The 1916 AD Act violated GATT Articles VI:1 and VI:2, which stipulate that the sole trade remedy for dumping is imposition of an AD duty calculated as the difference between the normal value and the export price.

(2) The 1916 AD Act is in violation of AD Agreement Articles 1, 4.1, 5.1, 5.2, and 5.4, which stipulate that support from 25 percent or more of the domestic industry is needed to initiate an AD investigation.

(3) The 1916 AD Act is in violation of AD Agreement Article 18.1, which stipulates hat AD measures cannot be taken except in accordance with GATT provisions.

(4) The 1916 AD Act is in violation of AD Agreement Article 18.4 and Article XVI:4 of the Marrakesh Agreement Establishing the WTO, which stipulate that WTO Member countries must have their domestic laws, regulations and administrative procedures conform to the WTO Agreements.

Despite the recommendations from the WTO Panel and the Appellate Body, the US let the implementation deadline pass (December 2001), without taking any corrective measures such as amending or repealing the 1916 AD Act. Therefore, in January 2002, Japan and the EU requested authorization for countermeasures at a meeting of the DSB. In December 2003, the EU formulated European Council

Regulation No. 2238/2003, which enabled European companies to recover damages incurred under the 1916 Act lawsuits.

A suit based on the 1916 AD Act was brought against imports of large newspaper printing presses and components from Japan in March 2000. In May 2004, the US Federal District Court of Iowa ordered a Japanese company to pay damages of approximately four billion yen. In this situation, Japan submitted a bill ("Japan's Special Measures Law Concerning the Obligation of Return of Benefits and the Like Under the US Antidumping Act of 1916") to the Extraordinary Diet in the fall of 2004 to enable Japanese companies to recover damages caused by lawsuits filed against tem under the 1916 Act., The bill was enforced on December 8, 2004.

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

<Recent developments>

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

References:

○European Council Regulation

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

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

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

○Japan's Special Measures Law

(1) The need for the legislation

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

(2) Outline of the Act

This Act consists of the following two points:

<u>(i) Creation of the right to claim damage recovery</u>

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

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

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

(3) Applicability of the Damage Recovery Act

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

lawsuits regarding the 1916 AD Act that were pending when the Act was repealed, such pending cases continue to be subject to the Special Measures Law for remedy.

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

<Outline of the measure>

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

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

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

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

In April 2006, the DOC (Department of Commerce) started reconsideration of the sunset reviews of 2002, and, on November 6, 2006, issued a preliminary decision to affirm the likelihood of continuation or recurrence of the dumping.

<Problems under international rules>

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

Furthermore, the preliminary decision applies to all large newspaper printing presses and components originating in Japan, and has unreasonably resulted in restoring AD measures against companies not subject to the changed circumstances review.

Therefore, this decision seriously harms not only legal stability, but also predictability for companies.

With regard to the above issue, the Government of Japan has expressed its concern to the US government and called for appropriate action in bilateral meetings.

<Recent developments>

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

This decision concluded that the DOC's reconsideration of the sunset review was illegal, regardless of the cause of the withdrawal of the US manufacturer's application for a sunset review that had led to the termination of the AD measure, on the ground that AD measures once terminated cannot be reinstated. Japan believes that the conclusion of this decision is reasonable. In accordance with the decision, the DOC announced that it was discontinuing its reconsideration of the sunset review on February 24, 2007.

The key points of the decision are:

(i) The reconsideration of the sunset review is ripe for judicial review even in the preliminary decision stage. (The court also noted that Japanese companies would face significant, continuing commercial uncertainty with respect to their sales.)

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

(iii) It is the ITC, not the DOC, which is responsible for determining whether there is a causal link between the Japanese manufacturer’s actions and the U.S, company’s withdrawal of the sunset review application.

Japan has expressed concern about this issue to the US government and called for appropriate action in bilateral meetings. The Government of Japan needs to continue to keep watch over this issue so as to ensure that the DOC will discontinue its reconsideration of the sunset review in accordance with the above-mentioned decision of the CIT, and resolve the disadvantage experienced by the Japanese companies involved in the case.

SUBSIDIES AND COUNTERVAILING MEASURES

1) Tax Treatment for Export Companies (ETI regime; formerly FSC regime) (DS108)

<Outline of the measure>

The United States excluded from taxable income a portion of the export revenues generated by foreign sales corporations ("FSC", *i.e.*, foreign companies that sell or lease outside of the United States goods produced in the United States), provided these revenues include more than a certain threshold of US products. Also, a parent company could treat dividends paid to it by an FSC as non-taxable income. The regime was employed mainly by US parent companies exporting their products through foreign subsidiaries.

<Problems under international rules>

In November 1997, the EU requested WTO consultations with the United States, claiming that the regime represented an export subsidy and a subsidy contingent upon the use of domestic goods over imported goods prohibited under Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM). Consultations were held between the United States and the EU, but they were unable to reach an agreement. In September 1998, a panel was established. Japan participated in the panel as a third party. The panel report was issued in October 1999 and found that the tax exemptions granted under the FSC program constitute export subsidies in violation of the Agreement. The report recommended that the United States eliminate the regime by October 2000. The panel did not, however, rule on whether the program was a subsidy contingent upon the use of domestic goods over imported goods. The United States appealed the panel ruling, while the EU requested an Appellate Body review on whether the program was a subsidy contingent upon the use of domestic goods over imported goods. Japan again participated as a third party. In February 2000, the Appellate Body upheld the panel ruling. In light of the Appellate Body ruling, the US declared that it would repeal the FSC program by November 1, 2000. Congress repealed the FSC and replaced it with the Extraterritorial Income Exclusion Act of 2000 ("ETI") signed by the President on November 17, 2000. The US claimed that the ETI: (1) expands the scope of tax deductions by not requiring that products (including services) be produced within the United States, so that the ETI does not constitute an export subsidy; and (2) amends the Internal Revenue Code of 1986 to exclude tax deductions for the income derived from foreign sales or leasing of products (including services) produced under certain conditions, therefore not creating a subsidy as defined in the Agreement. The EU criticized the ETI for: (1) maintaining the condition that sales be outside the United States, so that the ETI still provides an export subsidy; (2) requiring at least 50 percent

US content, so that the ETI also provides a subsidy contingent upon the use of domestic over imported goods; and (3) serving as a transitional measure allowing the FSC program to continue to operate after November 2000 for the foreseeable future, thereby violating the DSB decision that the regime be eliminated by November 1, 2000. The EU thus argued that the ETI continues to violate the ASCM. A panel was established to judge the WTO consistency of the ETI pursuant to Article 21.5 of the DSU. The EU also submitted a list of US products which could be subject to sanctions, preparing to invoke countermeasures.

In August 2001, the panel upheld the claims of the EU and Japan and found that the ETI provides an export subsidy prohibited under the ASCM and the Agreement on Agriculture and that its local content requirement violates GATT Article III (national treatment). In October 2001, the US appealed to the Appellate Body, arguing that the ETI did not comprise an export subsidy in that the method used to receive tax breaks was not restricted to exports and that there was accordingly no direct causal link between the ETI and exports. In January 2002, the Appellate Body upheld the panel's decision.

One of the major points of contention with regard to the ETI pertains to the relation between the ASCM and the prevention of double taxation of income for which tax is withheld abroad. The US claimed that, because the ETI was a system designed to prevent double taxation on such income, it was permitted under Footnote 59 of the ASCM Annex I, and, therefore, did not constitute an export subsidy banned under the Agreement. The EU and Japan rejected this argument on the grounds that the ETI was little more than a whitewashed version of the FSC regime and was clearly an export subsidy. Moreover, the EU and Japan arguedit was unlikely that the system was designed to prevent double taxation, as the US claimed, because the scope of the tax breaks under the ETI was selective. In August 2002, a WTO arbitrator concluded that the US$4 billion tariff concessions proposed by the EU constitutes appropriate countermeasures.

The US American Jobs Creation Act of 2004 (the Act), which repealed the ETI, was signed into law on October 22, 2004. The EU had imposed retaliatory measures on March 1, 2004, but agreed to temporarily suspend them when the Act took effect on January 1, 2005. However, to determine whether the Act complies with the rulings of the WTO, the EU requested the establishment of a WTO Article 21.5 compliance panel; the panel was established on February 17, 2005.

Under the Act, the ETI was scheduled to be repealed in its entirety by the end of 2006 (transition provision). Moreover, the ETI will remain in effect for any contract signed before September 17, 2003 (grandfathering provision). The EU argued that such provisions are inconsistent with the WTO Agreements.

In response, the United States did not contest the first Article 21.5 panel's findings. Instead, the United States argued that the first 21.5 panel made no new recommendation regarding the Act. The United States maintained its position that the recommendations of the first 21.5 Panel and the Appellate Body were not related to the

ETI. The Panel rejected the US's argument and concluded that the United States maintained prohibited FSC and ETI subsidies through the transition and grandfathering measures at issue, and that it continued to fail to implement fully the operative DSB recommendations and rulings to withdraw the prohibited subsidies. The Panel Report was circulated on September 30, 2005. The United States appealed to the Appellate Body, and the EU also appealed on November 27, 2005. The Appellate Body, upheld the 21.5 Panel's findings, concluding that the US still had not implemented the recommendation. The Appellate Body report was circulated in February 2006.

<Recent developments>

In May 2006 the US Congress passed a bill that included provisions to repeal grandfathering provisions in the US Job Creation Act of 2004. In consideration of this, the EU adopted a Council Resolution to extend the period to repeal sanctions through May 29 or, if President Bush signed the tax reduction bill by May 26, to repeal the regulations providing for sanctions measures effective May 29. President Bush signed the bill on May 17; therefore the resolution invoking sanctions was repealed effective May 29.

2) The 2002 Farm Bill — Export Promotion of Agricultural Products

<Outline of the measure>

In 1930, the United States introduced a price support loan program; in 1973, it established a deficiency payment system that endeavors to ensure farm profitability by reimbursing farmers for the difference between target prices and market prices. The 1996 Farm Bill (passed in April 1996 and in effect until 2002) eliminated the deficiency payment system, which requires production adjustments, and replaced it with production flexibility contract payments.

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 United States therefore provided emergency farm assistance packages four times between 1998 and 2001 totaling $27.3 billion.

The 1996 Farm Bill expired in September 2002. Congress passed a new Farm Bill in May 2002 to replace it (the new bill applies to the 6-year period from 2002 to 2007).

(i) Domestic Support

The 2002 Farm Bill is basically a continuation of the policy of the 1996 Farm Bill, but it introduces counter cyclical payments to replace the emergency farm assistance

programs (additional payments) that had been provided to farmers over the past several years because of price slumps.

(a) Counter Cyclical Payments (New)

This system sets a target price for each crop and reimburses farmers for the difference should the higher of the market price or the loan rate (*see* Paragraph (c) below), plus the production flexibility contract payment fall below the target price. (Payments are based on past acreage under cultivation etc., similar to production flexibility contract payment programs described in Paragraph (b) below.)

(b) Production Flexibility Contract Payments (Expanded)

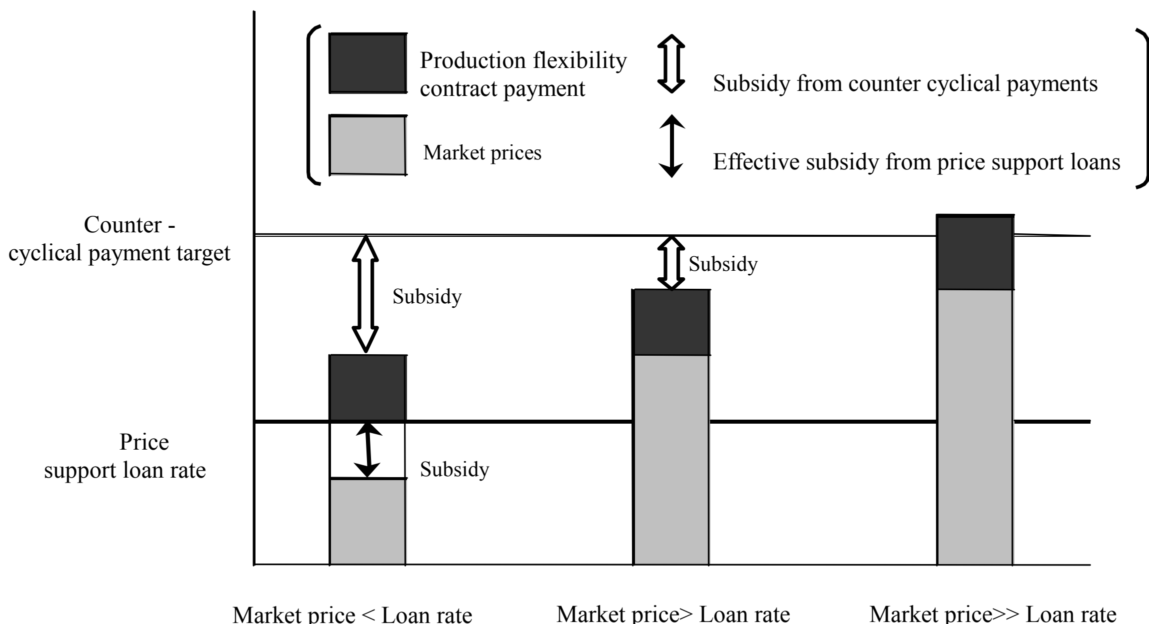
This system pays an amount calculated each year according to a set formula to farmers that in the past had planted wheat, rice, corn and other crops. Payments are based on past crops and acreage. The new Farm Bill increases the unit prices paid and adds soybeans and other crops to the list.

(c) Price Support Loans (Expanded)

This system allows farmers receiving short-term loans from the Commodity Credit Corporation (CCC) to repay the loans at market prices in the event that, during the term of the loan, market prices fall below the loan rate established by the Department of Agriculture. The new Farm Bill reviews loan rates, reducing them for soybeans, maintaining them for rice and increasing them for wheat and other crops.

Figure 1-5

Outline of the 2002 Farm Bill and domestic support



(ii) Export Promotion of Agricultural Products

In the 1980s, the European Union, faced with a serious glut of agricultural products, increased its subsidized exports. During this period, the United States saw its share of the export markets rapidly diminish as its competitiveness was sapped by the strong dollar and domestic price supports. Below we describe some of the export promotion programs enacted by the United States in order to recover from the slump in agricultural exports and farming. These programs are maintained by the new 2002 Farm Bill.

(a) Export Enhancement Program ("EEP")

The EEP specifies particular markets where exporters may receive bonuses equivalent to the discounts they provide their customers. One of the major items eligible for EEP bonuses are exports of chickens.

(b) Dairy Export Incentive Program ("DEIP")

The DEIP is an export subsidy system similar to EEP, with its application limited to such dairy products as skimmed milk powder, butter and cheese.

(c) Export Credit Guarantee Program

The Export Credit Guarantee Program seeks to promote exports of US agricultural products by having the CCC provide debt guarantees to banks issuing letters of credit for loans to finance imports of US agricultural products imported on a commercial basis by developing countries. The 2002 Farm Bill provides: (1) a short-term credit guarantee program (GSM-102) for short-term export credits involving loans of 90 days to three years; (2) a medium-term credit guarantee program (GSM-103) for medium-term export credits involving loans of three to 10 years; and (3) a suppliers export credit guarantee program (SCGP) that guarantees a part of accounts receivable by exporters of US agricultural products from importers. GSM-102 and GSM-103 apply to both US agricultural products and value-added products with at least 90 percent US content (by weight). Emphasis in the SCGP is on high value-added products and promising future markets.

<Problems under international rules>

(i) Domestic Support

Many countries have expressed concern over this new system because it is expected to increase the Aggregate Measurement of Support (AMS) given to US farmers. The new bill allows the Secretary of Agriculture to adjust the amount of outlays if there is the potential to exceed the commitment levels of AMS under the Uruguay Round Agreement on Agriculture. Japan will continue monitoring the program to

ensure that the value of domestic subsidies paid out does not exceed US concession commitment levels.

(ii) Export Promotion of Agricultural Products

Export subsidies like EEP and DEIP can be granted at will for exports to specific countries as long as total values and quantities are reduced as committed to in the Agreement on Agriculture. They are problematic nonetheless, because of their impact on international prices for agricultural commodities and their trade distorting effects.

The use of export credit guarantee programs provides advantages to US agricultural products in the competition against those of other exporting countries. In this sense, the disciplines on the export credits in the Agreement on Agriculture is not sufficient, and therefore benefits US, which frequently resort to export credits. Furthermore, this program names the CCC to collect credits when loans are defaulted on, and this makes it extremely close in nature to a circumvention of the rules on export subsidies.

<Recent developments>

Although the US insists in WTO agricultural negotiations on significantly reducing border measures and domestic support systems, other countries are concerned that the new Farm Bill will further protect US agricultural sectors and interests. The United States, in turn, insists that the new Farm Bill provides necessary support for farmers, who have been disadvantaged in the international market due to trade distorting measures taken by other countries. Furthermore, the US explained that there is no contradiction between the new Farm Bill and the US proposal at the WTO agricultural negotiation, because, upon agreement to drastically reduce trade-distorting measures, the United States will follow such agreement accordingly.

With regard to the US position, other countries, whether importing or exporting countries of agricultural products, questioned the United States' position not only at the regular meeting of the Committee on Agriculture, which reviews implementation of commitments under existing agreements, but also at the WTO agricultural negotiations. Utilizing all opportunities in various agricultural negotiating meetings and the bilateral meeting with the United States, Japan has repeatedly expressed its serious concerns that the US inclination towards protectionism is problematic in light of the fact that other countries have been faithfully undertaking reform in agricultural policy. Japan especially pointed to the counter-cyclical payments, which pose significant problems in terms of disciplining export subsidies and domestic subsidies. Japan believes that some of these measures, such as the price-fluctuating payments have trade-distorting export subsidy elements via their large scale support on exported agricultural products.

The following measures are scheduled to be eliminated by a date to be agreed upon under the Framework of Doha Work program by the General Council in July 2004.

- Export subsidies.
- Export credits, export credit guarantees and insurance programs with repayment periods above 180 days.
- Export credits, export credit guarantees or insurance programs with repayment periods at or under 180 days which are not in accordance with disciplines to be agreed upon.

RULES OF ORIGIN

Rules of Origin on watches and clocks

<Outline of the measure>

According to the rules of origin marking prescribed in the US 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 imprinting and tagging, 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.

<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.

<Recent developments>

There has been no improvement on above-mentioned. Therefore, the Government of Japan submitted a petition at the start of the third-year dialogue with the US under the Regulatory Reform and Competition Policy Initiative. As a result, a report released in June 2004 confirmed that “the Government of the United States acknowledges the concern of the Japanese Government concerning the rules governing origin labeling and will continue dialogue with the Japanese Government on the revision the rules based on the discussion of WTO.”

The Japanese government requested further simplification during the Third Japan-US Trade Forum in December 2005.

STANDARDS AND CONFORMITY ASSESSMENT SYSTEMS

1) American Automobile Labelling Act

<Outline of the measure>

The American Automobile Labeling Act was enacted under Section 210 of the Passenger Motor Vehicle Content Information Disclosure Act of October 1992. It requires all passenger cars and light trucks to carry labels indicating their percentage content of value-added in the United States and Canada. More specifically, the labels must indicate:

- The content percentage of United States and Canadian parts (on a model-by-model basis);
- The country, state and city of final assembly;
- If countries other than the United States and Canada supply 15 percent or more of the parts in the vehicle, the label must indicate the top-two countries supplying parts and the percentages supplied by each country;
- The country of origin of the engine and transmission (the country adding 50 percent or more of the value or the most added-value).

The Act took effect on October 1, 1994. Violators are subject to a fine of $1,000 per vehicle.

<Problems under international rules>

The United States claims that the system helps consumers make better purchasing decisions by providing them with information on the percentage of the automobile's price in relation to the amount of the vehicle that was produced in the United States/Canada. But the system is, in fact, a "Buy American" provision that implicitly attempts to call on consumers to buy domestic goods. The law forces foreign auto makers with operations in the United States, who tend to use large amounts of non-US/non-Canadian parts, and dealers who import vehicles, to take on an enormous amount of clerical work and record-keeping in order to calculate parts percentages. The system is therefore likely to become an unnecessary obstacle to trade and may be in violation of Articles 2.1 and 2.2 of the TBT Agreement.

<Recent developments>

In the meeting of the Automotive Consultative Group (ACG) held in January 2003, Japan indicated that this measure distorted sound investment activities by private companies and demanded improvement. The United States responded that it was

difficult for the government to handle this since it needed to be addressed by Congress in the form of legislation, but that automakers in Japan, the United States and Europe might develop joint strategies. It was agreed that Japan and the United States would continue to exchange views. Furthermore in March 2004, the Association of International Automobile Manufacturers (AIAM), which consists of foreign automobile manufacturers participating in the US market, submitted a report to the US Congress requesting the elimination of this measure, stating that: (1) labeling rules do not help consumers make better purchasing decisions; and (2) consumers are indifferent to labels.

2) Regulation on Corporate Average Fuel Economy (CAFE)

<Outline of the measure>

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.

<Problems under international rules>

In May 1992, the EU requested consultations with the United States because it viewed the CAFE regulations as being inconsistent with the national treatment provision of Article III:4 of the GATT. In March 1993, it requested that a GATT panel be established. In September 1994, a Panel report was issued.

The panel noted that separate foreign-fleet accounting prevented manufacturers of large domestic cars with low fuel economy from meeting the CAFE requirement for their domestic fleet by adding to it small foreign cars with high fuel economy. Such manufacturers could avoid fines only when they increased the volume of business of small domestic cars with high fuel economy. In such cases the CAFE measure placed small foreign cars in a less favorable competitive position with respect to small domestic cars. In such cases the CAFE measure also placed large foreign cars in a less-favorable competitive position with respect to large domestic cars. The panel, therefore, found the CAFE regulation in violation of Article III:4 of the GATT because the requirement of separate foreign fleet accounting under the CAFE regulation accorded foreign products conditions of competition less favorable than those accorded to like domestic products. The Panel further found that the practice could not be justified under Article XX(g) of the GATT. The report was not adopted and the United States has taken the position that since the CAFE regulations do not harm EU commercial interests, there is no reason to revise them.

<Recent developments >

In the meeting of the Automotive Consultative Group (ACG) held in January 2003, Japan indicated that this measure distorted sound investment activities by private companies and demanded improvement. The United States responded that it was difficult for the government to handle this since it needed to be addressed by Congress, but that automakers in Japan, the United States and Europe might develop joint strategies. It was agreed that Japan and the United States would continue to exchange views.

The Department of Transportation Appropriations Legislation for FY 2001 froze all changes in base values under current CAFE regulations. It also commissioned the National Academy of Sciences to study the effect and impact of the regulations, including their effect and impact on imported and domestic categories of vehicles. The study was issued on July 31, 2001. The report suggested that the two-fleet rule be abandoned, pointing out that there was no evidence that US autoworker jobs were affected positively or negatively by this categorized system.

The US Congress in 2003 contemplated strengthening CAFE standards via a comprehensive energy bill. However, the CAFE portion of the bill was deleted because of strong opposition from the US auto industry. In March 2006, the National Highway Traffic Safety Administration (NHTSA) took steps to tighten CAFE regulations on small trucks. Further, the Department of Transportation (DOT), is currently reviewing CAFE regulations on passenger cars, with NHTSA taking the lead in the review.

3) Adoption of the Metric System

<Outline of the measure>

The ISO and other international standardization institutions have adopted the international system of units (SI), which, based on the metric system, dictates the units to be used in formulating international standards. While virtually every other country in the world uses the SI — the metric system — the United States still uses yards and pounds for most purposes. Indeed, it is the only major trading country not to have made any progress in adopting the metric system.

<Problems under international rules>

While the Agreement on Technical Barriers to Trade (“TBT Agreement”) is designed to reduce technical barriers to international trade by encouraging the adoption of international standards, the delay in the adoption of the metric system in the United States poses an international trade barrier by forcing foreign producers to incur additional costs required for different labeling of goods destined for the US market.

Japan urges the United States to continue to take effective, powerful initiatives toward wider adoption of the metric system.

<Recent developments>

In bilateral talks on structural issues and at other bilateral conferences, Japan has sought agreement by the United States to adopt the metric system. In the Second Annual Report of Structural Impediments Initiative Follow-up, the United States committed: (i) to use the metric system in federal procurement, subsidy programs, and commercial activities; and (ii) to implement a Department of Commerce study on ways to substantially expand and increase use of the metric system by the private sectors. Similarly, in the third Joint Status Report on Japan-US Enhanced Initiative on Deregulation and Competition Policy of 2000, the United States committed to: (i) coordinating the full implementation of the revised Uniform Packaging and Labeling Regulations (UPLR) (which accept metric-only labeling on US consumer products as of January 1, 2000) between the National Institute of Standards and Technology (NIST) at the Department of Commerce and the National Conference on Weights and Measures (NCWN); and (ii) updating the Fair Packaging and Labeling Act (FPLA) to permit the option of metric-only labeling on products covered by the Act. In spite of these commitments, very few private-sector businesses within the United States use the metric system. Japan pointed out these problems to the US in the Trade Policy Review (TPRM) that was held at the WTO in September 2001, as well as in the Regulatory Reform and Competition Policy Initiative between Japan and the US in October 2001 and October 2002. More recently, Japan pointed out these problems to the US in the Trade Policy Review (TPRM) that was held at the WTO in January 2004, as well as in the Japan-US Initiative on Deregulation in December 2005 and December 2006.

The UPLR is currently enforced in 46 states in the US where retailers accept goods with metric-only labeling. The NIST will encourage the remaining four states (Alabama, Hawaii, New Jersey and New York), so that the metric system is employed there in the local level.

TRADE IN SERVICES

1) The Exon-Florio Amendment

<Outline of the measure>

The Exon-Florio Amendment provides for the initiation of investigations of acquisitions, mergers and takeovers of US firms by foreign persons or entities and

authorizes the President to suspend or prohibit transactions that threaten US national security.

The Committee for Foreign Investment of the United States (CFIUS) decides on and conducts an investigation if necessary and submits a report to the President. The President decides on suspension or prohibition on the basis of the report.

<Problems under international rules>

Although the WTO Agreement has no general rules on investment, the GATS disciplines investment-related service trade activities through investment. Although the GATS Agreement allows exceptions for national security reasons under certain conditions it is necessary for the United States to operate its investment restriction measures in conformity with the WTO Agreement and the GATS.

<Recent developments>

In the past, several Japanese firms had to change their original plans because of CFIUS investigations of their acquisitions of US firms. When Toshiba purchased the Westinghouse Electric Co., a builder of nuclear power plants, in 2006, an investigation was conducted by CFIUS.

In order to maintain transparency and fairness during the notification and decision process under CFIUS, it is important that the concept of national security not be unduly invoked under the Exon-Florio provisions. Japan has repeatedly requested that the United States consider this critical aspect and continues to do so, issuing a request at the Working Group meeting of the "Japan-US Investment Initiative" held in June and October of 2006. A written request was made to the US at the sixth "Regulatory Reform and Competition Policy Initiative" in December 2006.

In February 2006, Dubai Ports World, a state-run company of the United Arab Emirates, announced the purchase of port management businesses in the United States. There was a legislative proposal that purchases by state-run enterprises of foreign countries would require an extended investigation be performed and reports made to Congress on the case investigated. However, ultimately the proposal was not enacted.

2) Financial Services

<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 three states (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.

In the WTO Understanding on 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 the law that obligates foreign insurers to renew their licenses every year while in-state insurers have no-time-limit licenses.

<Problems under international rules>

The United States should repeal clauses that discriminate against foreign firms that are not granted exemption in the WTO Agreement. It is desirable that the United States 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 November 1999, the passage of the Gramm-Leach-Bliley Act permitted mutual entry into the banking, securities and insurance sectors in the form of financial holding companies. Insurance continues to be governed and regulated by state entities. Nonetheless, the Act introduced measures that unify licensing standards, raising the expectation that regulations on foreign insurers will be relaxed at some point in the future. The Act also introduces measures that seek to unify licensing standards. Moreover, in July 2001, the US American Insurance Association (AIA) proposed a bill on federal regulations for insurance companies with the aim of introducing federal chartering for non-life insurance as a means of redressing the profit loss sustained due to divergent regulations in every state. However, it has not been enacted. These moves toward unification of state regulations on standards should also benefit foreign insurers, and Japan looks forward to further progress in this regard.

3) Telecommunications

<Outline of the measure>

The FCC (Federal Communications Commission) regulations on the entry of foreign service suppliers, which took effect February 1998, basically exempted WTO Members from the “Economic Competitive Opportunity” (ECO) program. The new rules: (1) retain foreign ownership restrictions for direct investment regarding wireless

telecommunications services; (2) provide the FCC with wide discretionary powers by failing to articulate specific criteria for "public use" and "extremely high threat to competition" in the review standards for carrier certification and wireless station licensing; and (3) may allow licenses to be refused for reasons unrelated to the application by listing "foreign policy and trade concerns" among the elements of "public use". All of these constitute substantial barriers to foreign company participation in the market. As a recent example, it took an inordinately long time for a Japanese company's subsidiary to be granted a license.

One of the substantial barriers to foreign entry in the US telecommunications market involves state-level regulations. In the United States, most of the operations of communication regulations, which are decided upon by federal agencies, are left to the discretion of states, and the differences in operation from state to state may become barriers to wide-area telecommunication businesses. It is desirable that the state-level operation of the federal-level telecommunications rules and their revisions be unified or harmonized among states to enable wide-area service providers to run business smoothly.

On August 21, 2003, a final decision was made to revise once every three years the FCC rules for connection. However, states have substantial authority to judge the existence or non-existence of an obligation to unbundle many network elements and to determine regions in which the same obligation is to be applied. This causes a delay in the actual application of the new rules, and it is feared that a fractionalized market will cause inefficiency and excessive burdens on service providers. In particular, there is also a problem that predictability of service suppliers is not secure due to unclear criteria for judgment by individual states. It is desirable that the FCC should try to secure uniformity, efficiency and speed in the operation of uniform rules by individual states.

<Problems under international rules>

The above measures do not violate the WTO Agreement so long as they do not contravene GATS commitments. 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 resolution of the above problems on several occasions. In December 2006, in the sixth report to the leaders of Japan and the US concerning the "Japan-US Regulatory Reform and Competition Policy Initiative," Japan repeatedly requested that the United States consider this critical aspect.

4) Maritime Transport

<Outline of the measure>

The United States 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, 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:

a) Section 19 of the Merchant Marine Act of 1920 (the so-called "Jones Act") and Foreign Shipping Practices Act of 1988

(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. 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 United States 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. Japan alleged that the measure violated the treaty as well as the GATT and sought its full withdrawal. FMC withdrew the sanctions on May 28, 1999, but the withdrawal did not mean that FMC recognized the Japanese arguments. 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, 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, placing unjustifiable and excessive burdens on them. If FMC issued this order for the

purpose of judging whether it was going to enforce the unilateral sanctions, this constitutes a serious problem.

b) 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 has been criticized as violating the WTO Ministerial Decision on not applying new measures during the negotiation period of the Doha Development Agenda.

c) Maritime Security Program

In 1937, the United States 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), which has been operating since 1996, provides subsidies amounting to $100 million per year to certain US-registered vessels over ten years. 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 which generally infringe the WTO Agreements. It is desirable that they be rectified as soon as possible.

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

<Recent developments>

Japan has repeatedly requested the United States to rectify the above-described problems, including the removal of the measures during the Japan-US Deregulation Initiative in December 2006. Japan also seeks liberalization of US maritime services during the new WTO round negotiations.

PROTECTION OF INTELLECTUAL PROPERTY

1) Patent System (Hilmer doctrine)

<Outline of the measure>

In many countries, including Japan and European countries, when an application (hereinafter "corresponding application") is filed claiming a priority right as a patent application, which was first filed in another country (hereinafter "first application"), it is possible to prevent the granting of a patent right to subsequent applications filed in Japan or Europe after the filing date of the first application by excluding such subsequent applications. However, the examination practice in the United States is different. In the United States, if a corresponding US application "A" claims a priority right based on the filing of a first application in another country (for example, Japan), the exclusion of subsequent applications under Section 102(e)[1] of the US Patent Law does not enter into effect until the filing date of corresponding US application "A" (rather than the filing date of the first application). This is a legal doctrine ("the Hilmer doctrine") established by precedent, and it is also part of the examination procedures employed by the US Patent Office.

If subsequent application "B", which has the same claim(s) as the first application (A), is filed in the United States between the filing date of the first application "A" and the filing date of the corresponding US application "A", the subsequent application "B", can be excluded by the claims of corresponding application "A" provided that it is proved that the invention date on application "A" precedes the invention date on subsequent application "B".[2] In the past, it was impossible in practical terms to obtain verification of an invention date prior to the filing date of the first application "A" (in other words, the filing date of the first country application was considered the invention date), but amendments to the US Patent Law in 1994, made in conjunction with WTO membership, make it possible to demonstrate an invention day earlier than the filing

[1] Section 102(e)(2) of the US Patent Law grants the right to receive patents to all except when "the invention described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2) and (4) of section 371(c) of this title before the invention thereof by the applicant for patent."

[2] Section 102(g)(1) of the US Patent Law grants the right to receive patents to all except " before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it. In determining the priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other."

date of the first-country application in order to demonstrate prior invention in WTO Member countries other than the United States (see Section 104).

However, there is no guarantee that the United States will exclude subsequent applications as would be the case in Japan or Europe. Where the first application “A” does not have the same claim(s) as a subsequent application “B”,, which was filed in the US between the date of the first application “A” and the date of the corresponding U.S. application, it is not possible to exclude subject matter disclosed in the claim(s) of the subsequent application “B”, even if the subject matter exists in areas other than the claims of application “A”.

The problems that arise relate to the consistency between the WTO Agreement and the case law established under the Hilmer doctrine, as well as the examination procedure based on the Doctrine.

<Problems under International rules>

Article 4B of the Paris Convention applies *mutatis mutandis* to Article 2 of the TRIPS Agreement, which says that as a consequence of the priority claim, all the acts accomplished during the time between filing dates of the first and the latter applications do not give rise to any third-party right or any power to use. There are issues about the consistency of measures based on the Hilmer Doctrine with the TRIPS Agreement, due to a dispute over whether Article 4B means that the exclusion of subsequent applications takes effect on the filing date of the first application even for those portions of the descriptions not in the claims filed in the first application.

<Recent developments>

Japan is taking every opportunity to seek correction of the Hilmer doctrine, considering the vast impact this doctrine has on the Japanese industry and on several international negotiations. For example, in a document presented by Japan to the United States in December 2006 (“Recommendations by the government of Japan to the government of the United States regarding Regulatory Reform and Competition Policy”), Japan expressed its misgivings concerning this matter to the United States and requested improvements.

Provisions to abolish the Hilmer Doctrine were included in the Patent Reform Act of 2005 (introduced to the US House of Representatives on 8 June 2005) and the Patent Reform Act of 2006 (introduced to the US Senate on 3 August 2006). However, the legislation died since it was not enacted prior to the adjournment of the 109th Congress.

At a meeting of developed countries on patent law harmonization in September 2006, an agreement was reached to draft a treaty based on a treaty outline proposal that included setting the basic date for the exclusion of subsequent applications as the date of priority (which would abolish the Hilmer Doctrine).

2) Trademarks Systems (WT/DS176; US Omnibus Act 211)

<Outline of the measure>

Section 211 of the Omnibus Act of 1998 prohibits US courts from approving and executing ownership on behalf of Cuban nationals of trademarks, *etc*., that are related to assets confiscated by the government of Cuba.

<Problems under International rules>

This provision has problems in terms of the national treatment and most-favored-nation obligations of the TRIPS Agreement. Such unilateral measures by the United States are fundamentally inconsistent with the multilateral trading system and WTO principles. They distort trade and should be immediately improved.

The EU requested bilateral WTO consultations regarding the matter in July 1999.

After that, dissatisfied with the report of the Panel, the EU and the United States appealed the case to the Appellate Body. On January 2, 2002, the Appellate Body partially overturned the panel report, finding that Article 211(a)(1), which could disadvantage non-US national successors over US national successors, was inconsistent with national treatment and MFN treatment.

The Appellate Body and panel reports were adopted on February 1, 2002, and the United States informed the panel of its intention to adhere to its WTO obligations.

<Recent developments>

The EU and the US agreed on the end of December 2002 as a reasonable period for the implementation of reforms to the US legal system; however, multiple extensions were made because of a lack of implementation. On 1 July 2005, the US and the EU reached an understanding to reserve their rights to take countermeasures. Now that a final judgment has been made in WTO Dispute Settlement proceedings, the US should move quickly to modify systems that are not in compliance with the Agreement. Japan will monitor US efforts in this regard. It is of note that the legislation for omnibus reforms introduced to the Senate and House in 1998 died since it was not enacted prior to the adjournment of the 109th Congress

3) Copyright and Related Rights

a) Clarification of video-game rental rights

<Outline of the measure>

Article 11 of the TRIPS Agreement provides for copyright holders to grant rights to commercially rent copyrighted computer programs to the public. Article 106(3) and Article 109(b)(1)(A) of the US Copyright Act grant rental rights for computer programs in general, but Paragraph (b)(1)(B) of the same article exempts videogames, which are inseparable from the game machine, from the granting of program rental rights.

<Problems under International rules>

This restricts the protection of rental rights for videogame programs, and would appear to violate Article 11 of the TRIPS Agreement, which requires the granting of rental rights to computer programs in general.

<Recent developments>

In a document presented by Japan to the United States in December 2006 ("Recommendations by the government of Japan to the government of the United States regarding Regulatory Reform and Competition Policy Initiative"), Japan requested the United States to promptly revise its domestic copyright law to specifically grant rental rights for all videogame programs.

b) Copyright Exception (WT/DS160; US Copyright Act 110(5))

<Outline of the measure>

Section 110(5) of the US Copyright Act allows some exceptions to the public transmission rights of the copyright holders. In subparagraph (a), it grants exceptions for a single reception device of a commonly used variety (for example, a television, radio, *etc*.); in subparagraph (b), for a store with small floor space or in a store using only a small television or speaker.

<Problems under International rules>

The EU claimed that Section 110(5)(a) and (b) of the Copyright Act violates Articles 9 and 13 of the TRIPS Agreement, and made two points:

1) Article 9.1 of the TRIPS Agreement is based on Articles 1-12 of the Berne Convention, and Article 11 of the Berne Convention grants exclusive rights to

the copyright holder to agree to public transmission of music and other copyrighted works. The Berne Convention customarily allows limitations on copyrights within the scope of "minor reservations" as exceptions to this, but the US copyright law provisions do not correspond to other exceptions to the Berne Convention, including minor reservations.

2) Article 13 of the TRIPS Agreement allows members to limit the exclusive rights of the copyright holder in "certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." The US provisions do not correspond to this exception and violate Articles 9 and 13 of the TRIPS Agreement.

At the request of the EU, a panel was established in May 1999 (Japan, Australia, Canada and Switzerland are participated as third parties).

On June 15, 2000, the panel found that that Section 110(5)(a) of the Copyright Act constituted a minor reservation under the Berne Convention and a legitimate exception under Article 13 of the TRIPS Agreement, and was therefore, consistent with the agreements. On the second point, however, the panel found that the US measures did not constitute legitimate exceptions under the TRIPS Agreement, and thus, must be brought into conformity.

<Recent developments>

In January 2001, the arbitrator ruled that the United States had 12 months from the panel report to implement the recommendation; in other words, until July 2001.

When the United States made no move to amend the Copyright Act as required, the case was referred to arbitration to determine appropriate compensation and countermeasures. In June 2003, the US and the EU reached a temporary agreement under which the United States would compensate the EU a total of $3.3. Although the agreement was in effect until December 21, 2004, the situation had not improved. The US has not modified its law. This also raises issues regarding the effectiveness of panel recommendations, and continued scrutiny is needed.

c) Expansion of the Subjects Protected by Performers' Right

<Outline of the measure>

Article 1101 of the US Copyright Act protects only live sounds or sounds and images of "musical" performances. The US Copyright Act does not provide any protection for live performances other than musical ones. As a result, if a Japanese actor performs a play or "rakugo" (a traditional Japanese performance) in the United States, it would not be protected under the US Copyright Act.

<Problems under International rules>

There are doubts regarding compliance of Article 1101 of the US Copyright Act with the TRIPS Agreement, as Article 14 of the TRIPS Agreement does not limit the protection of live performances to "musical performances" .

<Recent developments>

Live performances in the US by Japanese performers are likely to increase, and appropriate protection will be needed for the rights of these artists. Japan, during the Japan-US Regulatory Reform and Competition Policy Initiative in December 2006, requested that the United States expand the subjects protected by the US Copyright Act to include all live sound and audio-visual performances; and reinforce the protection of performers' rights as soon as ones closely related to the copyright.

4) Section 337 of the Tariff Act of 1930

<Outline of the measure>

Section 337 of the Tariff Act of 1930 targets unfair import practices by excluding from the United States imports that infringe upon valid US-registered intellectual property rights. The Omnibus Trade and Competitiveness Act of 1988 removed the requirement of injury in cases involving the infringement of patents, trademarks, copyrights, and layout-designs of integrated circuits. This removal of the injury requirement in 1988 simplified the burden of proving a violation of Section 337, and thus made Section 337 an easily accessible remedy for US domestic industries (*See* Figure 1-5).

<Problems under International rules>

Under certain circumstances, Article XX(d) of the GATT establishes an exception permitting the exclusion of imports that infringe upon patents and other intellectual property rights. In November 1989, however, the GATT Council adopted a panel report that concluded that Section 337 procedures violated the national treatment provisions of Article III:4 of the GATT and could not be justified by Article XX(d). Despite such a clear and definitive statement of inconsistency with the GATT, the United States did not immediately abide by the panel's decision. With respect to the relatively short and fixed time limits for the completion of proceedings under Section 337, which were found to be inconsistent with GATT, the TRIPS Agreement expressly prohibits the setting of unreasonable time limits on procedures for the enforcement of intellectual property rights.

<Recent developments>

In its Uruguay Round implementing legislation, the United States significantly amended Section 337 so that it more fully complied with the GATT Council's recommendations. The deadline for final relief has been eliminated, though the ITC still establishes a "target date" for final determination in each investigation within 45 days of the initiation of an investigation, depending on how it is administered, could result in discriminatory treatment of imports. On January 14, 2000, the EU requested bilateral consultations regarding this provision. Japan should continuously monitor developments closely.

Figure 1-6

Number of Investigations Initiated under Section 337

Year	Total Number of Cases	Cases Involving Japan
1990	13	0
1991	12	3
1992	13	2
1993	15	3
1994	6	1
1995	11	2
1996	12	3
1997	13	2
1998	12	3
1999	9	2
2000	17	5
2001	24	5
2002	17	2
2003	18	2
2004	26	4
2005	28	3
2006	33	2

GOVERNMENT PROCUREMENT

US Buy American Legislation

<Outline of the measure>

1) "Buy American" Federal Legislation

(a) Buy American Act of 1933 at the Federal Level

The Buy American Act of 1933 provides the US legal basis for discriminating against foreign products at the federal level of the US government. It directs federal agencies to purchase, for public use, only "un-manufactured articles, materials and supplies . . . produced in the United States", and "manufactured articles, materials and supplies . . . manufactured in the United States substantially from . . . materials . . . produced or manufactured . . . in the United States" (41 U.S.C. § 10(a)-(d)). For products or materials to be considered "produced" or "manufactured" in the United States, at least 50 percent of their content must be of domestic origin. (This provision pertains to the place of manufacture or production and not to the nationality or ownership of the contractor. Therefore, products manufactured in the United States by foreign affiliates, for example, are eligible under the Buy American Act.)

The Act permits the purchase of foreign products only under certain circumstances. For example, foreign products may be purchased when purchasing a US product is not in the public interest. The statute also permits purchasing foreign products when the price of a US product is at least six percent higher than that of a comparable foreign product, making its procurement "unreasonable." The purchase of foreign products is also allowed when the required product is not produced in the United States.

The guarantee of procedural transparency does not alter the fact that the Buy American Act contains provisions that expressly discriminate against foreign products. Thus, preferential treatment for domestic products is a basic policy of federal government procurement.

The Trade Agreements Act of 1979, as amended by the Uruguay Round Agreements Act, to some extent mitigated the discriminatory treatment mandated by the Buy American Act. As a result, federal procurement procedures were rendered transparent and national treatment was accorded to countries that acceded to the Agreement. US law allows the President to refrain from applying the "Buy American" restriction to countries that: (1) have acceded to the 1994 Agreement; and (2) provide appropriate reciprocal procurement opportunities for US products and US suppliers. With respect to other countries, however, and to fields not covered by the Agreement, "Buy American" legislation remains essentially unchanged.

In Articles 812 and 842 of H.R.5122, known as the John Warner National Defense Authorization Act of FY2007, the Buy American Act was amended and now requires federal government agencies to complete the following items:

(1) Present an outline of the funds used to pay for the procurement of goods, materials and supplies produced in the US;

(2) Present an outline of the total funds used to pay for procurement of goods produced outside of the US; and

(3) Submit a table of specified product categories which are exempt from application of the Buy American Act.

This act was signed into law on October 17, 2006 (PL109-364).

Acts that provide preferential treatment for domestic products other than the Buy American Act are outlined below.

(b) The US Federal Agency Annual Budget Appropriations Acts

US federal agency budgets are provided under annual appropriations acts passed by the Congress. Those acts include many provisions restricting government procurement of a wide range of foreign products and services.

For example, the Department of Defense Appropriations Act, 2007 (H.R.5631), a budget-related law of FY2007, provides that budgets allocated by this law can be used by the Department of Defense only where the details of expenditure are in accordance with the provisions of the Buy American Act. In addition, when goods are purchased using these budgets, the Congress urged the Department of Defense to purchase American-produced products if American-produced products are competitive in terms of price and performance and are easy to obtain (*see* Sec. 8036). (However, for countries with which the United States has concluded procurement agreements for national defense material, specified products are exempt from application of this law.) In addition, the Department of Homeland Security Appropriations Act, 2007 (H.R.5441) of provides that expenditures based on this law must not violate the Buy American Act irrespective of the nature of the purchase (*see* Sec. 512).

(c) The Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005[3]

There are two types of Buy American provisions in this Act:

I. Buy American Provisions Governing the Federal Transit Administration

1 This law was passed by Congress in August 2005, as a replacement of the Transportation Equity Act for the 21st Century .

For states to receive federal funds from the Federal Transit Administration for mass transit projects, including the purchase of mass transit “rolling stock”, Buy America provisions require that procurement be restricted to steel, iron and other manufactured products that are made in the United States. In addition, the cost of the domestic components of any vehicles or rolling stock purchased must comprise more than 60 percent of the cost of all of the components of the rolling stock（for all parts including railroad cars, motors, brakes, air conditioners, doors, and seats, the cost of US-manufactured products must constitute at least 60% of the combined cost of the parts purchased by a railroad car manufacturer from a sub-contractor and the manufacturing performed by the railroad car manufacturer itself） and the final assembly of the rolling stock must occur in the United States.

II. Buy American Provisions Governing the Federal Highway Administration

In order for states to receive federal funds from the Federal Highway Administration for federal-aid highway projects, all steel and iron used in a project must be manufactured in the United States.

(d) The Rail Passenger Service Act

The national passenger rail service provider, Amtrak, which is funded by the US government, is obligated to purchase domestic goods when procuring goods worth $1 million or more.

2) Problems at the State Level (“Buy American”, “Buy State” etc.)

The United States also maintains procurement laws at the state and local level that contain “Buy American” and “Buy Local” provisions similar to those imposed under the Buy American Act. These provisions accord preferential treatment to government procurement of goods produced domestically and locally. Since 1995, some state-level governments, such as California’s, have amended their laws to prevent preferential treatment. Nonetheless, many local and state governments, including California, continue to maintain laws which provide preferential treatment.

In August 1999, the California state legislature passed a bill requiring the state government to sign contracts with businesses providing US or California-made products for public works undertaken with state funds and valued at $50,000 or more. The bill was vetoed by the state governor that September and never became a law. However, because California is among the sub-central government institutions “offered” as part of the Agreement on Government Procurement, this legislation serves as an example of a potential violation of the Agreement’s national treatment provisions.

In September 2000, the California State Legislature passed a law (SB 1888) requiring businesses delivering goods and services to the state government to attest that they were not produced with forced labour and the like. The purpose of the law is to eliminate from government procurement foreign materials, goods and services produced

with forced labour, prison labour and child labour. Similar, regulations are put into practice in Illinois, where businesses are required to specify that foreign products provided under contracts with the state government were not produced with child labour. These laws, however, have the potential to violate the Agreement on Government Procurement depending upon the procurement amounts involved. Japan will continue to monitor the legislation.

<Problems under international rules>

The Federal Buy American Act may not necessarily violate the Agreement on Government Procurement because it generally applies only to entities not covered under the Agreement. However, its influence on free trade is significant. All forms of discriminatory treatment *vis-à-vis* foreign products should be eliminated and Japan reiterated this position during negotiations to expand the scope of the Government Procurement Agreement.

With respect to US state Buy American laws, the Agreement on Government Procurement covers only 37 states. Procurements by US state governments account for 50% of total US government procurement and have as great an influence on trade as procurement by the Federal Government. Incorporating the remaining 13 States into the Agreement will be a major issue in the negotiations to expand coverage under the Agreement.

<Recent developments>

In the Japan-US Deregulation Talks started in 2001, Japan demanded that the US government should review the Buy American systems at the federal and state levels and give equal opportunities to US and foreign companies. In the initial request in December 2004 regarding the negotiations for the expansion of the WTO Agreement coverage, Japan demanded that the US should include the remaining 13 states in the coverage. There have been bilateral negotiations on the matter.

UNILATERAL MEASURES

1) Related to Section 301 of Trade Act of 1974

Various provisions of US law direct or permit unilateral measures against other countries to counter perceived unfairness in other countries' laws, policies, and practices. The primary legal authority for such action is Section 301 of the Trade Act of 1974 ("the 1974 Act"). Section 301 and its related provisions were amended by the Omnibus Trade and Competitiveness Act of 1988 ("the 1988 Act"), and later by the Uruguay Round Agreements Act of 1994. The 1988 Act strengthened the 1974 Act and

added “Super 301”, “Special 301”, as well as special provisions applicable to telecommunications products and government procurement.

The sections below consider each of these provisions in greater detail and discuss how they have been applied by the US government in recent cases.

a) Section 301 of the Trade Act of 1974

<Outline of the measure>

Section 301 of Trade Act of 1974 authorizes the United States Trade Representative (USTR) to investigate and take action against unreasonable, unfair or discriminatory practices or violations of international agreements. The 1988 amendments transferred authority for recognizing unfair practices and invoking unilateral measures from the President to the USTR, theoretically divorcing actions from other political considerations and thus making them easier to invoke. In addition, through the amendments, sanctions became mandatory in certain instances, affording the USTR less discretion.

Amendments in the Uruguay Round Agreements Act have, on the whole, clarified existing provisions, delineating the scope of the unilateral measures to be taken and the priorities to be operated under. They also added some interpretive information on what constitutes “unreasonable actions, policies, and practices,” that may trigger unilateral measures. Finally, they enhanced the requirements for invoking unilateral measures against infringements of intellectual property rights and anti-competitive behavior.

Investigation Procedures

USTR engages in the following investigation procedures under Section 301: (a) initiates investigations into trade practices based on complaints from interested parties or on its own authority; (b) simultaneously enters into consultations with the country in question as prescribed in the GATT or other international arrangements; (c) determines what action USTR should take, within a set period of time (for violations of trade agreements, 30 days from the conclusion of dispute settlement procedures or 18 months from the beginning of investigations, whichever comes sooner; for others, 12 months from the beginning of investigations); and (d) implements the action, in principle, within 30 days of the decision (USTR may delay action for not more than 180 days).

Unilateral 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 United States; or (b) is unjustifiable and burdens or restricts US commerce.

For discretionary action (Section 301(b)): the USTR may take action in cases where the act, policy, or practice of a foreign country place is unreasonable or discriminatory and burdens or restricts US commerce and notification by the United States is "appropriate".

The Scope of USTR Authority

Section 301 provides that the USTR may: (a) suspend, withdraw, or prevent the application of benefits of trade agreement concessions; (b) impose duties and import restrictions on goods; or (c) levy or impose other restrictions on services (restrictions on market entry for companies from the offending country).

<Problems under international rules>

The US Section 301 Panel

In November 1998, the EU requested WTO consultations with the United States because Section 301 procedures require USTR to reach a decision on sanctions within 18 months of the initiation of investigations (Section 304). These procedures could potentially permit unilateral measures by the US government without waiting for a WTO panel decision. 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 EU's position.

The panel report on Section 301 of the US Trade Act was adopted in the DSB meeting on January 2000. The panel found that: (1) the wording of Section 304 of the US Trade Act seemed to contravene the WTO Agreement, but (2) when read in conjunction with the interpretative guidelines for the Trade Act prepared by the US President and other statements by the US government, the United States has instructed its officials to administer Section 301 in a manner that does not violate the WTO Agreement and therefore Section 301 procedures on their face are not WTO violations. The panel decision is based on the assumption that the United States will adhere to commitments it made during the panel meetings. We therefore expect, and will watch for, faithful administration of the US statement. We also note that the panel essentially found sanctions pursuant to Section 301 that did not comply with the WTO procedures would be in violation of WTO obligations. The United States should consider this as a serious warning. The Special 301, telecommunications provisions and government procurement provisions (Title VII) were formulated based on the intentions and procedures of Section 301. The United States should administrate these measures in conformance with the WTO Agreement. Japan will continue to vigilantly monitor trends in the United States in this area.

Super 301, which had strong unilateral characteristics and required automatic launching of investigations, terminated in 2002. However, the possibility of establishing similar laws and regulations still exists and it is necessary to monitor US

trends. For example, legislation was introduced early 2004 in the US Congress that, if passed and signed into law, would have renewed Super 301 authority. (For the history surrounding Super 301, please refer to Part I, Chapter 1 "USA" of 2003 Unfair Trade Report, and Part II, Chapter 14 "Unilateral measures" of 2002 Unfair Trade Report.)

<Recent developments>

According to the US 2001 Annual Report, 121 investigations were initiated under Section 301 (including those pursuant to "Super 301" and "Special 301"). In recent years, the number of cases has decreased. Of the investigations initiated, 11 resulted in sanctions; sanctions mostly involved tariff increases, although there have been examples of import restrictions (*e.g.*, import restrictions imposed on the EC in response to measures adopted by the EC following the accession of Spain and Portugal). Since the WTO was established in 1995, no sanctions have been instituted purely on Section 301 grounds.

b) Special 301

<Outline of the measure>

"Special 301"[4] is noteworthy for two reasons. First, "Special 301" is limited in scope to the protection of intellectual property rights. "Special 301" requires the USTR to identify as "priority foreign countries:" (a) countries that "deny adequate and effective protection to the intellectual property rights"; and (b) countries that "deny fair and equitable market access to United States persons that rely upon intellectual property protection."

Second, "Special 301" calls for a short, six-month period of investigation and requires USTR to initiate investigations under Section 301 within sixty days after submitting the annual "National Trade Estimate" report to Congress. As stated earlier, Section 301 generally requires that investigations be concluded within 12 months or, in the case of violations of agreements, within 30 days following the deadline established by the treaty for the settlement of disputes or within eighteen months, whichever is earlier.

In the Uruguay Round Agreements Act of 1994, the investigation period for TRIPS Agreement items was lengthened from six months to 18 months, the same as under ordinary Section 301 procedures (though it remains six months for items not covered under the TRIPS Agreement).

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[4] Section 182 of the Trade Act of 1974 as Amended by Section 1303 of the Omnibus Trade and Competitiveness Act of 1988.

<Problems under international rules>

The United States claims that even if a country is in full compliance with the TRIPS Agreement, it will be designated as a priority country if it is found to infringe on US intellectual property rights in areas outside the scope of the Agreement. This stance reflects the US position that unilateral measures can be imposed without resorting to WTO dispute settlement procedures for items not covered by the WTO Agreement. We have already discussed the problems inherent in this position.

<Recent developments>

In USTR's April 30, 2006 Special 301 Report', Ukraine, the sole country designated as a "priority foreign country" because of the lack of measures against the infringement of optical media copyrights and implementation of intellectual property laws up to the previous Round, subsequently improved its intellectual property rights protection activities and thus was lowered from a "priority foreign country" to the "priority watch list." Subsequently, the US lifted the $75 million sanction against Ukraine implemented on January 23, 2002 and application of the Generalized System of Preferences was restored.

The 2005 Special 301 Report also designated 13 countries and regions under the Priority Watch List (Argentina, Belize, Brazil, Egypt, India, Indonesia, Lebanon, Pakistan, Russia, China, Israel, Venezuela and Turkey), and 34 countries, including EU, under the Watch List. Additionally, the report continued the designation of Paraguay under the Section 306 Monitoring provision (countries that do not fully implement bilateral agreements).

With respect to China, the Chinese government recently successfully prosecuted the online music site Baidu and the shopping mall Silk Road Market—famous for selling fake brands—for violation of intellectual property laws. Although the violators who received the verdict were conspicuously late in complying, China was viewed favorably as having improved its overall respect for intellectual property rights. Japan is not designated under any watch list.

c) Telecommunications Provisions

<Outline of the measure>

The telecommunications provisions[5] have two main features. The first is the mandate for negotiations under threat of unilateral measures. The USTR is required to identify as "priority foreign countries" those countries that deny "mutually advantageous market opportunities" to US telecommunications equipment and services. After receiving the USTR's report, the President is directed to initiate negotiations to conclude

[5] Sections 1371-1382 of the Omnibus Trade and Competitiveness Act of 1988: The "Telecommunications Trade Act of 1988.

bilateral or multilateral agreements that ensure market opportunities for US products and services. Should an agreement not be concluded after a set period of time (the law specifies 18 months, or in the case of additional designation, one year from the date of designation), an array of measures are open to the President, including abrogation of US obligations regarding imports and government procurement of telecommunications equipment.

The second feature is the "review of trade agreement implementation." The USTR is required to review annually the operation and effectiveness of each telecommunications trade agreement in force between the United States and other countries. In the review, the USTR determines whether or not any act of a foreign country that entered into the agreement is in compliance with the terms of the agreement, or otherwise denies mutually advantageous market opportunities to US telecommunications products and services. An affirmative determination under section 1377 must be treated as an affirmative determination under Section 301.

<Problems under international rules>

Even if the issues in question under the above provisions are beyond the scope of the WTO Agreements, the unilateral measures taken may be in contradiction with the WTO Agreements, as already discussed.

<Recent developments>

On April 6, 2006, USTR issued its annual Section 1377 report on telecommunications trade barriers. (The report is prepared pursuant to the Omnibus Trade and Competitiveness Act of 1988.) According to the report, the USTR pointed out the following three points as major issues:

・High interconnection rates for mobile communications networks;

・Restrictions on connection to and utilization of lease lines and submarine cables;

・Restrictions on market participation in the universal service program

In addition, specified remarks were made regarding Egypt, Australia, China, Germany, and India .

(Outline of major issues according to USTR)

(1) High interconnection rates for mobile communications networks

As in 2005, despite progress in globalization, countries with high cellular phone connection fees (especially Japan and Germany) were mentioned for the following unfair practices.

- Despite intense competition in the telecommunications market, Japan continued to charge high cellular phone connection fees. The Japanese

Government has not investigated the cellular phone connection service market, and has refused an investigation by the USTR. For this reason, the Government cannot study the appropriateness of charges or breakthrough policies. Although NTT DoCoMo, which has a high share of the market in Japan, reduced charges by 2.6% in 2006, the lowest reduction rate in the past 10 years, the tendency to lower charges in the market is slowing down. However, due to the start of cellular phone service by newly participating companies, it is estimated that fee competition will accelerate in 2007.

- Despite being mentioned for its high cellular phone connection fees as a result of an investigation based on the EU's 3rd Frame Plan, Germany has implemented no countermeasures at all. The German Federal Network Agency has not given sufficient study to the introduction of appropriate fees and competition principles.

(2) Restrictions on connection to lease lines and submarine cables

Unreasonable or discriminatory treatment is observed in connection to and utilization of lease lines and submarine cables. This practice undermines service providers' capability to provide competitive services. Specifically, problems are as follows: provisioning time for lease lines is too long; price level of lease lines is too high; and methods to provide lease lines are potentially discriminatory. Germany, India and Singapore are likely to have these problems.

(3) Restrictions on market participation in the universal service program

Services that should strive for fair and stable provision of subscriber telephones and other services nationwide are hindered by markets that are crowded and lack transparency and neutrality. Countries which have aroused concern include Jamaica, Japan and India.

With respect to Japan, NTT East Japan and West Japan have a monopoly over service. Concern has been expressed regarding the shared service system between NTT East and NTT West. It has been pointed out that provision of monetary support by NTT East Japan to NTT West Japan puts competing companies in the western area of Japan at a disadvantage.

(Additional remarks)

① Egypt

Telecom Egypt continues to hold a monopoly and differentiates itself from overseas companies. Although several companies have formed mutual connection agreements with TE, the largest telecommunications company in the US has been in a position where it has not been able to conclude a mutual connection agreement for more than six years.

② Australia

The largest telephone company, Telstra, continues to hold a monopoly on the market, and government measures against this monopoly have been inadequate.

③ China

Despite agreement through the US-China Joint Commission on Commerce and Trade (JCCT), the Chinese Government has not taken any market opening measures against the high entry authorization fees in the telecommunications sector (US$240 million, as opposed to the normal fee of less than US$1 million).

④ Germany

Telekom continues to hold a monopoly due to subsidies from the German Government and market participation by companies of other countries is difficult.

⑤ India

The Indian Government has established a limit on international telecommunications lines in order to promote use. It has also reduced the service fees for participation by new international long-distance carriers in order to increase competition in the entry of overseas companies into the market. However, concerns remain since India imposes restrictions in areas including long-distance operation of telecommunications networks outside of India, transportation routes, accounting systems, carrier switching by users, and infrastructure information networks.

d) Provisions Involving Government Procurement: Title VII

<Outline of the measure>

Under Title VII[6], the President is required to provide an annual report to Congress outlining discrimination against US products and services under a foreign government's procurement laws and practices. USTR is required to immediately enter into consultations based on the report's findings.

Prior to 1995, if the offending practices were not rectified within 60 days after the commencement of consultations, and the practices were violations of the Agreement on Government Procurement, the practices were initially handled in accordance with the dispute settlement procedures provided by that Agreement. Failure to achieve

[6] The Federal Buy American Act as amended by Section 7003 of the Omnibus Trade and Competitiveness Act of 1988.

settlement within one year required mandatory unilateral measures. For other discriminatory practices, bilateral talks were initiated and if the offending practices were not rectified within 60 days of the commencement of consultations, necessary unilateral measures would be imposed.

Therefore, under the prior provisions, although violations of the Agreement on Government Procurement were initially handled in accordance with that Agreement, failure to achieve a settlement within one year or the failure of the foreign country to take corrective measures resulted in the exclusion of such countries (including agreement signatories) from future awards of US government procurement contracts. US unilateral measures under these provisions in cases involving signatories to the Agreement on Government Procurement violated the national treatment and non-discriminatory treatment obligations established in Article II of that Agreement. The US Uruguay Round Agreements Act amended these provisions to extend the period from the initiation of investigations to the invocation of unilateral measures from a year to 18 months, the same as for Section 301.

The United States regarded the government procurement sector as one of the three priority sectors in the US-Japan Economic Framework Talks and identified Japanese public sector procurement of telecommunications and medical technology as discriminatory. The two countries continued negotiations on the issue and finally reached an agreement before the deadline to invoke unilateral measures expired at the end of September 1994.

<Problems under international rules>

Sanctions imposed in cases that fail to resolve the dispute within 18 months may be in violation of the unilateral measure ban under DSU Article 23.

<Recent developments>

The US April 30, 2002 announcement under Title VII did not designate any discriminatory government procurement practices, but did note the following four areas for monitoring: (1) Japan’s public works; (2) Chinese Taipei’s discriminatory government procurement practices and procedural obstructions; (3) state government procurement practices in Canada; and (4) the German government’s “protection clause”.

Japan will continue to monitor Title VII administration for consistency to the WTO Agreements.

Figure 1-7

Practices Found to Be Discriminatory under Title VII

Country	Issue
Germany	Heavy electrical equipment, telecommunications equipment
Republic of Korea	Bidding on the airport construction project April 1999 Designation as discriminatory government procurement June 1999 Establishment of panel under the Government Procurement Agreement

e) The Carousel Rule on Amending Items Subject to Retaliatory Measures

<Outline of the measure>

The US African CBI Law, passed in May 2000 (Trade and Development Act of 2000) includes a "carousel provision" that obligates USTR to rotate the items subject to retaliatory measures every 180 days (like a "carousel") in order to guarantee the effectiveness of sanctions imposed for cases in which the WTO panel's recommendation is not implemented. The purpose of this provision is to increase the effectiveness of sanctions and to place pressure on trading partners when measures are not implemented quickly, as in the cases lost by the EU involving beef hormones and bananas.

<Problems under international rules>

Rotating items subject to sanctions is inappropriate because of the potential for trade sanctions to exceed the suspension of obligations originally envisioned when sanctions were approved. The measure likely violates several WTO provisions, including Article 22.4 of the DSU (equivalency). As of this writing, the "carousel provision" had not been applied, but vigilance must be maintained so that this measure is not administered in ways that would lack conformance to the WTO/DSU.

<Recent developments>

The EU requested WTO consultations over this position in June 2000; Japan requested to participate as a third party, but the United States refused to allow Japan's participation. Japan sent a letter of protest to the United States charging discriminatory treatment that allowed some countries to participate, while barring others.

2) Others

The United States has certain internal laws that provide for the application of unilateral measures to natural and jurisdictional persons outside the United States for trade or security reasons. Many of these laws, setting penalties for enterprises that invest in the targeted country, constitute serious barriers to the activities of enterprises, such as direct investment. Although they do not constitute "unilateral measures" as defined in this chapter, they nonetheless are similar in that they use domestic laws to determine whether foreign companies are "violating" the rules according to their own criteria. Here, we look very briefly at what these laws contain and some of the problems with such individual measures.

a) The Helms-Burton Act

<Outline of the measure>

The United States has imposed economic sanctions against Cuba since the Cuban Revolution of 1959. These sanctions were strengthened with the Cuban Democracy Act of 1992. After small private American aircraft were shot down by the Cuban military, new legislation took effect in March 1996. Besides the indirect financing prohibition (Section 103), and the importation safeguard against certain Cuban products (Section 110) in Title I of the law, the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996) regulates the following areas:

1. Title III provides that "any person that, after the end of the three-month period beginning on the effective date of this title, traffics in property which was confiscated by the Cuban Government on or after 1 January, 1959, shall be liable to any United States national who owns the claim to such property for money damages." This section, in effect, allows US nationals to sue for damages in US courts.
2. Title IV specifies that "the Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States, any alien who the Secretary of State determines is a person who, after the date of the enactment of this Act, has confiscated or has directed or overseen the confiscation of property, a claim to which is owned by a US national."

With respect to Title III, the Clinton Administration suspended implementation of this section for six months at a time since it took effect in August 1996. The Bush Administration has continued this tradition. In July 2004, the US decided to suspend implementation of this measure for six months beginning in August 2004.

With respect to Title IV, reportedly a Canadian mining and resources company and a Mexican telephone company were among the recipients of Title IV notices.

<Problems under international rules>

Countries around the world, including Japan, have expressed strong concerns about the actions taken by the United States, particularly regarding the fact that the act applies to non-US companies. In addition, the EU enacted new regulations in November 1996 barring all natural persons and companies within the region from following third-country measures. Canada and Mexico have also formulated similar blocking statutes.

In May 1996, the EU requested WTO consultations with the US over the Helms-Burton Act. As no progress was made in the consultations, a panel was established in November 1996. In April 1997, the EU agreed to suspend the WTO panel on the condition that the US government called upon Congress to grant the President the authority to waive Title IV. The panel's April 1998 deadline lapsed without any progress.

<Recent developments>

At the US-EU Summit in May 1998, they agreed to the "Understanding with Respect to Disciplines for the Strengthening of Investment Protection." In this Understanding, the US administration promised to continue intensive consultations with Congress to attempt to obtain authority for the President to waive Title IV of the law. However, Helms-Burton supporters within Congress strengthened their opposition to the agreement, and there was no move by Congress to amend the law, nor was there any discussion between the US and the EU. In 1999, the Congressional Foreign Affairs Committees went even further in irritating the EU by putting pressure on the Department of Commerce to apply Title IV to a Spanish hotel company (operating 12 hotels in Cuba); to date, no action has been taken.

The Helms-Burton Act contains some WTO inconsistencies. Because it is applied to enterprises in third countries, it may comprise extraterritorial application, contrary to international law. The United States should administer the sanctions law with caution and in a manner that conforms to international law. In particular, we urge the United States to refrain from applying the sanctions law to companies from third countries. In February 2001, the ITC reported to Congress that the US sanctions on Cuba were having a limited effect on the US and Cuban economies.

b) Myanmar Sanctions Act

(*See* "Government Procurement" in Chapter13 of Part II)

c) Iran and Libya Sanctions Act (ILSA: Iran and Libya Sanctions Act of 1996)

<Outline of the measure>

The United States has another domestic law similar to the Helms-Burton Act: the Iran and Libya Sanctions Act (also known as the "D'Amato Act"). The United States enacted this law in 1996 to strengthen US sanctions against Iran and Libya as an anti-terrorist measure. It applies to both foreign and US companies (though existing contracts were excluded). The Act took effect in August 1996.

The sanctions cover parties "investing" in excess of $20 million, a sum that, in the judgment of the President, contributes directly and markedly to the development of oil resources in Iran and Libya. The President must impose at least two of the following sanctions:

(1) Denial of Export-Import Bank assistance for exports

(2) Denial of US export licenses

(3) Prohibition on US financial institutions providing loans or credit to the sanctioned party in excess of $10 million a year

(4) Prohibition on the designation of financial institutions as primary dealers in US government debt instruments

(5) Denial of access to US government procurements

(6) Restrictions of imports with respect to a sanctioned person, in accordance with the "International Emergency Economic Power Act"

The Iran and Libya Sanctions Act expired in August 2001, and US industry came out in clear opposition to an extension on the grounds that the legislation not only deprived US business opportunities but was also hampering reform efforts in Iran. Congress, however, had a majority in favor of an extension and in August 2001, a bill for a five-year extension (through August 2006) was signed into law with the following amendments:

(1) The minimum value for investment in Libya subject to sanctions was lowered from US$40 million to US$20 million;

(2) Between 24 and 30 months after the new law entered into force, the President must report to Congress on the following issues: the effectiveness of sanctions, the humanitarian impact of the measure on the people of the country under sanction, and the impact on the relationship between the US and countries other than those under sanction. In addition, the President also should include in the report his views on whether the law should be abolished or amended.

<Problems under international rules>

Of the six types of sanctions above, the second and sixth may violate Article XI of the GATT (general elimination of quantitative restrictions), while the fifth may violate

Articles 3 (national treatment and non-discrimination) and 8 (qualification of suppliers) of the Agreement on Government Procurement; it is also unlikely to be justified as a security exemption (GATT Article XXI, GPA Article 23). The sanctions above may also fall under extraterritorial application, as may the Helms-Burton Act. No sanctions have as of yet been actually imposed, but if foreign companies were to be exempted from such measures, it would be incumbent upon the United States to similarly exempt companies from Japan and elsewhere.

<Recent developments>

As stated above, the Iran and Libya Sanctions Act, scheduled to expire in August 2006, was extended to September 29, 2006 by Congress. Afterwards, a bill to extend the Act until November 17 was submitted by Senator Harry Reid (Democrat, Nevada).

However, due to rising concerns about Iran's nuclear capability, bills to amend the Act for the purpose of imposing sanctions on Iran were submitted by many Congressmen and Senators. A bill which withdraws sanctions from Libya and continues sanctions against Iran was signed into law on September 30 as the "Iran Liberalization Freedom Act" aimed at promoting democracy. This law would extend sanctions against companies that invest in Iran's oil resources development by five years, until the end of 2011, and add sanctions against individuals and organizations that support acquisition or development of weapons of mass destruction or massive conventional weapons in Iran. The bill thus strengthened the existing sanctions.

Due to recent efforts by Libya to normalize relationships with Western countries by disposing of Weapons of Mass Destruction (WMDs) and allowing inspectors to monitor progress, the US on April 23, 2004, lifted most of its economic sanctions imposed under the International Emergency Economic Powers Act (IEEPA). The United States also repealed its provisions relating to Libya under the Iran and Libya Sanctions Act. This has enabled Libya to resume commercial, financial and investment transactions, as well as oil trade with the US. On September 28, 2005, President Bush announced revocation of two Arms Exports Control Act sanctions that restricted exports of defensive weapons to Libya. This enabled US companies to participate in Libya's efforts to destroy chemical weapons and to repair transport planes which Libya had purchased.

During the exchange of requests in the US–Japan Regulatory Reform and Competition Policy Initiative of December 2006, Japan touched on the three sanctions laws—as it did the year before—, and requested the US to "ensure consistency of these acts with international laws and implement them cautiously".

d) US Re-export Control Regimes

<Outline of the measure>

The US re-export control regime requires permits from the US government for all exports, even from Japan, in cases of: (i) US made products (cargoes, software, technologies); (ii) products including US-made products over a certain level (built-in product); (iii) specified direct products produced by using US-made technologies and software; and (iv) products produced at a plant with US direct products as major parts. These rules are applied even to exports that have passed through the export control procedures of the government of Japan, which adheres faithfully to all international agreements on export controls.

<Problems under international rules>

The US re-export control regime has long been considered a potential violation of international law because it entails broad — even by US standards — extraterritorial application of domestic laws. In addition, US exporters are not obliged to provide sufficient information on commodities exported from the U.S. (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.

< 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 2002, Japan pointed out the possibility of excessive exterritorial application of US domestic laws, and requested that the U.S. 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: (i) to establish a Japanese web site that lets Japanese companies understand the details of the legislation; (ii) and to allocate export control expert(s) at the US Embassy in Japan for consultation service; and (iii) 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 April 2003, the US 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 June 2003. 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 U.S.

Based on these points, in December 2006, at the Japan-US Deregulation Initiative, Japan presented a formal request to the US government, demanding that: Japanese importers (re-exporters) be exempt from the US re-export regulations and, as a provisional measure in cases where exemption from re-export regulations involves difficulty, US exporters should be obliged to provide Japanese importers (re-exporters) with sufficient commodity information such as the Export Control Commodity Number (ECCN) when the US export control authority will grant licenses.