Chapter 5

ANTI-DUMPING MEASURES

1. OVERVIEW OF RULES

1) Background of Rules—What is Anti-Dumping?

"Dumping" in international rules is defined as a situation in which the export price of a product is less than its selling price destined for consumption in the exporting country. A discount sale, in the ordinary course of trade, is not dumping. Where it is demonstrated that the dumped imports are causing injury to the competing industry in the importing country within the meaning of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement" or "AD Agreement"), pursuant to and by investigation under that Agreement, the importing country can impose anti-dumping (AD) measures to provide relief to domestic industries injured[1] by dumped imports.

The amount of AD duty is determined by the margin of dumping (the difference between the export price of the product and the domestic selling price of the like product in the exporting country) as the upper limit. By adding the margin of dumping to the export price, the dumped price can be rendered a normal value.

When there are no or low volume of sales in the ordinary course of trade in the domestic market, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, or a "constructed normal value". A "constructed normal value" is the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Similarly, when the export price is found to be unreliable, the export price may be constructed as the price at which the imported products are first resold to independent buyers, or on a reasonable basis as the authorities may determine.

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[1] "Injury" exists where there is either: (1) material injury to a domestic industry; (2) threat of material injury to a domestic industry; or (3) material retardation of the establishment of such an industry.

Because AD measures are an exception to the Most-Favoured-Nation (MFN) treatment rule in principle, the utmost care must be taken when applying them. However, unlike safeguard measures (*see* Chapter 7), which are also instruments for the protection of domestic industries, the application of AD measures does not require the government to provide offsetting concessions as compensation or otherwise consent to countermeasures taken by the trading partner. This has increasingly led to the abuse of AD mechanisms. For example, AD investigations are often initiated based on insufficient evidence and AD duties may be continued without meeting the requirements for the continued imposition.

In light of this situation, one of the focal points of the Uruguay Round negotiations was to establish disciplines to rein in the abuse of AD measures as tools for protectionism and import restriction, which go beyond the definite purpose of "removing the injury effect of the dumping to the domestic industry". Although considerable progress was achieved during the negotiations, many countries still express concern over abusive practices.

2) Overview of Legal Framework

Overview of International Rules

The international AD rules are provided under: (1) GATT Article VI and (2) the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") under the WTO. Under the Uruguay Round negotiations, the Tokyo Round Anti-Dumping Code was revised to become the new AD Agreement.

The impetus for many countries seeking to amend the Code lay in the extremely technical and complex procedures for calculating the margin of dumping and finding injury to a domestic industry. The Tokyo Round Anti-Dumping Code also lacked sufficient detail to deal with the complexities of current international transactions. This resulted in a dearth of ineffective disciplines and exacerbated the tendency to abuse the AD measures. The following section summarizes the WTO Agreement regarding AD measures.

(A) GATT Regulations

The General Agreement on Tariff and Trade (GATT) 1947, Article VI (Anti-dumping and Countervailing Duties) defines AD duty as follows:

Article VI

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party

or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(*a*) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(*b*) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

(B) AD Agreements

Initially established as a result of the Kennedy Round, the AD Agreement has undergone several revisions, including during the Tokyo Round and the Uruguay Round. The latter revisions included: revising the criteria for finding injury to the domestic industry, clarifying procedures on investigating prices and costs for calculating the margin of dumping and adding the Sunset Clause, which were not stipulated in the Tokyo Round Anti-Dumping Code. The Uruguay Round resulted in the "Agreement on Implementation of Article VI of GATT 1994".

Negotiations have been held during the Doha Round to clarify and strengthen the disciplines in the Uruguay Round AD Agreement. Based on the discussions conducted to date, on November 11, 2007, the Chairman of WTO Rules Negotiating Group, Ambassador Valles released a Chairman's text (draft revision of the Rules Agreements) on rules including AD. However, since it lacked overall balance, such as including allowance of the zeroing method, many countries including Japan sought revision of the Chairman's text. In December 2008, the Chairman released a revision of Chairman's text. However, provisions related to zeroing and sunset were not included; the text simply listed the issues and the position of each country. Although a new Chairman's text on AD was released in April 2011 after the new Chairman of the WTO Rules Negotiating Group, Ambassador Francis, conducted discussions, there was no significant progress from the previous text.

Since there still are many points of contentions remaining, such as clarifying the prohibition on zeroing and strengthening the regulations on the sunset clause, Japan must continue asserting that AD regulations must be strengthened in order to contribute to the development of the multilateral trading system.

The current AD Agreement covers the full spectrum of AD investigations, from the initiation of an investigation to the application of measures. The following summarizes some of the key elements of an AD investigation:

Application for AD investigation

- An application must be submitted on behalf of a representative portion of the domestic industry (the domestic producers whose collective output constitutes 25 per cent or more of the total production of the like product produced by that portion of the domestic industry that expresses support for the application, and at the same time whose collective output exceeds that of the domestic producers expressing opposition to the application.)
- An application must include evidence of facts regarding the dumped imports and the injury to the domestic industry

Decision to initiate AD investigation

- Determination of dumping (compare net prices between "export prices" and "normal values" (domestic prices, third country prices or constructed normal values)
- Determination of injury (consider the imported volume of dumped products, price changes, effects on domestic prices, injury to domestic industries, causal relationship between injury and dumped import, and injury caused by other factors than the dumped imports)

Within 1 year (the maximum period is 18 months)

Provisional Measures

Provisional measures may be applied only if there is:

- Proper initiation and public notice of investigation (providing adequate opportunities for interested parties to submit information and make comments).
- Preliminary affirmative determination on dumping and injury to a domestic industry.
- Determination that provisional measures are necessary.
- Application no sooner than 60 days from the date of initiation.
- Generally no application in excess of four months (six months if requested by exporters or six - nine months when authorities, in the course of investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury.)

Price Undertaking

- After a preliminary determination is made, a price undertaking can be accepted from exporters, thereby suspending or terminating the investigation.

Final Determination

- Authorities shall publish a determination on imposing AD duties and detail the amount of the duties.
- Authorities must provide reasons and facts supporting a determination of dumping and injury
- Authorities must provide responses to comments submitted by interested parties

WTO / The Anti-Dumping Committee

The WTO holds two meetings of the Anti-Dumping Committee (AD Committee) each year to provide a forum for discussing anti-dumping measures. The AD Committee reviews: (i) AD implementing laws of WTO Members to determine conformity with the WTO Agreement; and (ii) reports by Members on AD measures.

The AD Committee has also organized two *ad hoc* forums for discussing specific points of contention. The first is the meeting of the Informal Group on Anti-Circumvention. Circumvention was an issue that was referred to the AD Committee for further study because no conclusions could be reached during the Uruguay Round negotiations. (*See* "Anti-Circumvention Issues" below.) The second is the Working Group on Implementation, which discusses ways to harmonize national discretion in the agreement where the interpretation is or could be vague. Japan must use these kinds of forums to ensure that the domestic laws of other Members are written and applied in conformity with the AD Agreement. Should legislation or discretion contravene the Agreement, Japan should report it immediately to the AD Committee and other GATT/WTO forums to seek appropriate remedies.

Therefore, if an anti-dumping measure is suspected of violating GATT and/or the AD Agreement, Japan should seek resolution through the WTO in dealing with the increased abuse of AD measures by certain countries; if resolution cannot be reached through bilateral consultations, the abuses should be referred to WTO panels.

In the past, there were two viewpoints regarding the dispute settlement system: first, that panels should have broad discretion in reviewing claims by Members; and, second, that certain standards of review (both objective and impartial) should be set for panel deliberations. The reasoning for the latter view was as follows. Since many cases for resolving disputes were expected to arise due to the newly introduced automaticity in the WTO dispute settlement system, it was considered necessary to specify standards of review for AD measures. As a result of the Uruguay Round negotiations, the AD Agreement also introduced new standards of review for factual determinations and legal

interpretations by the panel. How the standards of review are applied to procedures for resolving disputes depends on the level of discretion employed by the reviewing panel and on the panelists themselves. So far, Panels have made comparatively broad original decisions regardless of the decisions made by the investigating authorities. The issue was scheduled to be re-examined following the application of these standards over the first three years pursuant to a Ministerial decision adopted at Marrakesh,[2] but no examination has yet been done.

Anti-Circumvention Issues

"Circumvention" generally refers to an attempt by parties subject to anti-dumping measures to avoid paying the duties by "formally" moving outside the range of the anti-dumping duty order while "substantially" engaging in the same commercial activities as before. However, this has not yet been confirmed by any official decision of the General Agreement on Tariffs and Trade (GATT) or the WTO.

In the Uruguay Round negotiations, "circumvention" was classified into three types: (1) importing country circumvention, (2) third country circumvention and (3) "country-hopping"; and disciplines on measures to prevent these practices were discussed. However, conflicting opinions between Members prevented any final conclusion from being reached. The Marrakesh Ministerial Declaration merely states the desirability of the applicability of uniform rules in this area as soon as possible and refers the issue to the AD Committee. In light of the large amounts of time already spent negotiating the issue without success in reaching an agreement, the AD Committee began discussions by looking at approaches that could be used to seek a resolution. This has resulted for the first time in an agreement on the framework for future considerations (procedures and agenda). The three items on the agenda were: (1) "what constitutes circumvention"; (2) "what is being done by Members confronted with what they consider to be circumvention"; and (3) "to what extent can circumvention be dealt with under the relevant WTO rules."

Informal discussions began (in October 1998) during meetings of the Informal Group on Anti-Circumvention of the AD Committee (held twice a year), on "what constitutes circumvention", which was the first topic on the agenda. However, no agreement has been reached. Discussion began in May 2000 on "what is being done by Members confronted with what they consider to be circumvention," and in October 2001 discussions began on "to what extent can circumvention be dealt with under the relevant WTO rules," but there have been no conclusion so far.[3] Simultaneously, in the

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[2] "The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."

[3] Informal Group on Anti-Circumvention of the AD Committee (developments):
The number of proposals submitted by Member countries to the Informal Group on Anti-Circumvention of the AD Committee was 15 in 2001, but, following the start of rules negotiations in the Doha Round, the number dwindled to 6 in 2002, 3 in 2003 and 1 in 2004. Although there was only one proposal submitted in 2005, an agreement was reached to continue discussions.

Negotiating Group on Rules, proposals on anti-circumvention have been submitted by the US, EU, Egypt and Brazil.[4] The text by Chairman Valles released in December 2008 only included the item names and did not incorporate proposals regarding the provision (Note 3).

All member countries recognize that circumvention is an issue of concern. The basic conflict over anti-circumvention is between, on one side the United States, the European Union, and other Members that already have their own anti-circumvention rules and wish to legitimize them, and on the other side a large number of other Members including Japan who are wary of introducing these measures because they could restrict legitimate investment activities and potentially reduce and distort trade and investment. There are sharp differences of opinion on this issue, and no agreement is in sight.

In addition to independent anti-circumvention regulations, the US and the EU apply rules of origin and utilize anti-circumvention rules with the initial intent of expanding the product under consideration. As such, Japanese companies must take the utmost care not to infringe upon the anti-circumvention rules of various countries amidst an increase of the overseas operations of corporate production bases, including the transfer of production bases to importing countries. Many businesses report a lack of predictability as there are no clear and uniform anti-circumvention rules and the rules utilized by each country are different and ambiguous.

To formulate regulations on anti-circumvention, it is important to carry out discussions based on the reality that corporate activities are headed overseas and on the basic principles and goals of the WTO Agreements, which aim to promote trade liberalization. It is important to formulate measures that do not impair legitimate trade

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5 Discussions on establishment of a discipline on anti-circumvention during the rules negotiations (developments):

In the rules negotiations so far, the US has submitted proposals for establishing discipline on circumvention, but received criticism for the overly broad discretion of the authority and for a lack of precision and predictability. As with the discussions held during meetings of the Informal Group on Anti-Circumvention of the AD Committee, the difference of opinions among the Member countries regarding the modalities of specific rules remains great.

Anti-circumvention provisions are also included in the Chairman's Text released on November 30, 2007. According to the provisions, existing AD measures could be extensively applied to cases suspected as importing country circumvention, third country circumvention, or slightly modified product circumvention when substitution for products subject to AD is confirmed as a result of review. Further, numeric criteria (safe harbor where circumvention is not determined as long as the criteria are met) concerning the ratio of imported parts and added value in importing countries or third countries are defined to be 60% or more and 25% or less, respectively.

In subsequent rules negotiations, while several countries claimed the necessity of some provisions about circumvention since some Member countries like the EU and the United States have already implement measures to prevent circumvention based on their domestic rules, other Members stated that such provisions should not be included in the Chairman's text since there was still disagreement in the rules negotiations and several matters including the definition of circumvention were unclear. In February 2008, China, Hong Kong and Pakistan published a statement requesting deleting the provision of circumvention in the Chairman's Text. In the revised Chairman's Text circulated in December 2008, the provisions on circumvention were not included and only the title was inserted along with the opinions of Member countries (as was done for other items such as zeroing and sunset).

and investment, while still following the direction in which the regulations of the current AD Agreement will be strengthened. Should Members with domestic laws on anti-circumvention create barriers to legitimate commercial activities under the guise of anti-circumvention, or decide to impose measures that depart from GATT Article VI or the AD Agreement, they should be dealt with rigorously within the GATT/WTO context. Japan should have an awareness of relevant issues and participate in the ongoing discussions of the Negotiating Group on Rules for the formulation of unbiased, impartial and precise uniform regulations. (This also applies to the Chairman's text released in April 2011)

3. RECENT DEVELOPMENTS

Traditionally, the majority of AD measures are imposed by the United States, the European Union, Canada and Australia. This, in part, reflects the fact that developed countries have been quicker to implement AD regimes. However, in recent years, India and some developing countries have also begun to apply AD measures, including Brazil, China, and South Africa. (*See* Figure 5-1, 5-2.) There are many issues related to impositions by these countries, such as: 1) the lack of transparency of the AD investigation procedures; 2) insufficient explanation of the determination by investigation authorities; and 3) the lack of sufficient opportunities to present opinions by interested parties.

It is important to monitor the increased use of AD measures, as well as Members' application of AD measures to ensure that their procedures and methods comply with the AD Agreement. In addition, we should pay attention to those developing countries, while the decreasing tendency to bring AD cases before the WTO Dispute Settlement Body.

Figure 5-1
Number of Anti-Dumping Investigations by WTO Members

	1990 ~1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1995 ~2011 Total
USA	259	14	22	15	36	47	47	77	35	37	26	12	8	28	16	20	3	15	458
EC	183	33	25	41	22	65	32	28	20	7	30	24	35	9	19	15	15	17	437
Canada	99	11	5	14	8	18	21	25	5	15	11	1	7	1	3	6	2	2	155
Australia	260	5	17	44	13	24	15	24	16	8	9	7	11	2	6	9	7	18	235
India	15	6	21	13	28	64	41	79	81	46	21	28	35	47	55	31	41	19	656
China	—	—	—	3	0	7	6	17	30	22	27	24	10	4	14	17	8	5	194
Korea	19	4	13	15	3	6	2	4	9	18	3	4	7	15	5	0	3	0	111
Taipei, Chinese	22	1	4	6	8	7	3	3	0	2	0	0	5	0	0	1	2	0	42
Indonesia	0	0	11	5	8	8	3	4	4	12	5	0	5	1	7	7	3	6	89
Pakistan	0	0	0	0	0	0	0	0	1	3	3	13	4	0	3	26	10	7	70
Turkey	28	0	0	4	1	8	7	15	18	11	25	12	8	6	23	6	2	2	148
Mexico	139	4	4	6	12	11	6	6	10	14	6	6	6	3	1	2	2	6	105
Brazil	62	5	18	11	18	16	11	17	8	4	8	6	12	13	23	9	37	16	232
Argentina	60	27	22	14	8	23	43	28	14	1	12	12	11	8	19	28	14	7	291
South Africa	16	16	34	23	41	16	21	6	4	8	6	23	3	5	3	3	0	4	216
Japan	4	0	0	0	0	0	0	2	0	0	0	0	0	4	0	0	0	0	6
Others	105	32	34	40	59	50	34	40	60	26	28	29	37	19	16	29	22	31	586
Total	1271	158	230	254	265	370	292	375	315	234	220	201	204	165	213	209	171	155	4031

Source: WTO Semi-annual Report & Data of Fair Trade Center.

(AD investigations against the same items from multiple countries have been calculated as one case each).

Figure 5-2
Number of Anti-Dumping Duties in force against Japanese Products (As of 31 February 2012)

US	EU	Canada	Australia	Korea	China	Chinese Taipei	India
14	0	0	1	3	18	0	10
Thailand	**Indonesia**	**Malaysia**	**Mexico**	**Brazil**	**Venezuela**	**Argentina**	**Egypt**
2	0	0	1	0	0	1	0

Note: Figures include price undertakings.
Source: Data of Fair Trade Center.

4. ECONOMIC ASPECTS AND SIGNIFICANCE

Anti-dumping measures are considered special measures within the GATT/WTO framework. They enable the selective imposition of duties, and therefore, have the potential of being used as discriminatory trade policies. With respect to tariff rates, multiple rounds of trade negotiations have reduced average tariff rates on industrial goods in the United States, the European Union, Canada, Japan and other leading countries to below 5 percent. One backlash from this reduction has been that some of average AD duties over 40 percent. (Anti-dumping duty rates differ depending on the case and the companies involved.) For this reason, once an anti-dumping measure is applied, the volume of imports in question drops dramatically and, in some cases, ceases altogether (trade chilling effect). The impact on defendants and the relevant industries is enormous.

The Influence of Initiating Investigations

The mere initiation of an AD investigation will have a vast impact on exporters. When an AD investigation is initiated, products under consideration become far less attractive to importers already leery of having to potentially pay extra duties.

Initiation of an AD investigation also places significant burdens on the companies being investigated. They must answer numerous questions from the authorities in a short period of time and spend enormous amounts of labour, time and money to defend themselves. Such burdens obviously have the potential to impair ordinary business activities. Thus, regardless of their findings, the mere initiation of an investigation is in itself a large threat to companies exporting products. Because of the high cost of defending against AD investigations, the authorities should examine whether there is sufficient evidence to justify initiation of an investigation and any decision to go ahead with an investigation must be made with the utmost care.

We note that there are many cases where companies simply decline or partially respond to the questionnaires from the authorities because of the enormous burdens involved. In such cases, the rule of “facts available” (Annex II of the AD Agreement called “best information available (BIA)”) applies.

“Facts available” means the investigating authority may make their determinations solely on the material that the authority was able to collect in situations in which any interested party does not provide necessary information within a reasonable period or submitted information that could not be verified. “Facts available” set in force by the provisions of Article 6.8 and Annex II of the AD Agreement may apply in cases where the company was able to respond but did not do so for its own reasons. But, as we have noted, there are cases where companies are forced to relinquish their right to respond because the questions are so detailed and probing that the burden of response is too great. The paradox is obvious. Authorities, in their excessive zeal to collect detailed information and run rigorous investigations, end up

having to use “facts available” procedures instead. Such procedures, we note, are in contravention of Article 6.13 of the Anti-Dumping Agreement, which states, “The authorities shall take due account of any difficulties experienced by interested parties in supplying information requested, and shall provide any assistance practicable.”

Effects on Technology Transfers (Unfair Expansion of the Product Scope Subject to Anti-Dumping Duties)

Anti-dumping duties are imposed on “products” found by investigating authorities to be dumped in their domestic markets (Article VI of GATT). However, depending on how the scope of “products” is defined, there could be cases in which AD duties are imposed on products that are in fact different from the product subject to investigation without determining dumping and injury. When the definition of the range of products subject to dumping investigations is vague, we must take care with regard to products that could or will be developed in the future so that the definition cannot be expanded beyond those products “currently” causing injury (according to the parties filing the application).

In some cases, the product scope has been expanded to apply to future generation products not even existing at the time of the original investigation. Given the nature of these products and the wide differences between the original and current versions of the products, authorities should investigate whether or not the new products, in view of the differences in technology used and markets targeted, are having a detrimental impact on the domestic markets initially investigated. There are obvious problems in expanding the application of existing AD measures without conducting such an investigation. We have strong expectations for more appropriate administration in this regard.

If the scope of an investigation is unfairly expanded by reason of a “like product” definition, it would have an adverse influence on new product development, consumer choice and, ultimately, technological advancement. This is certainly the case in high-tech industries, like electronics. This problem affects the handling of later-developed products in circumvention cases. Suffice it to note here that all such cases demonstrate the potential impediment to technological progress that comes from facile expansions of the coverage of “like product” in AD proceedings.

Retarding the Benefits of Globalization of Production

As the economy becomes more global in scope, companies are transferring their production overseas to their export markets or to developing countries where costs are lower. However, when such transfers take place for products that are subject to AD duties, they are often assumed to be attempts at circumvention. Anti-circumvention measures that inadequately distinguish between production-shifting for legitimate commercial reasons and for circumvention purposes risk not only distorting trade but also shrinking investment.

Furthermore, as Japanese companies transfer their production overseas, or outsource to overseas companies in developing countries, cases are arising where third party countries begin to implement anti-dumping measures against the countries in question, targeting the products manufactured in such ways. Care must be taken in relation to this issue, which is one of the risks of the globalization of manufacturing. In this instance, since Japan is not the subject of the investigation, it is difficult for the Japanese government to respond. It is necessary for Japanese companies when they expand their operations overseas to sufficiently ensure that AD measures are imposed proactively by countries such as China and India.

Consequence of the Financial Crisis and Recent Trend

In 2008, confusion in global financial markets arose because the subprime loan problem in the United States had repercussion on the other countries that gave rise to slowdown of the whole world economy. Because of this, in addition to an increase in protectionist measures including export restrictions and increased tariffs, there was an increase of Anti-Dumping measures on the pretext of protecting domestic industry. In fact, the number of Anti-Dumping investigation in 2008 was increased compared to the number in 2007 by approximately 27%. The abuse of protectionist measures imposed under the pretext of overcoming economic depression has a bad influence on sound trade. Close attention therefore should be paid to such movements. The number of Anti-Dumping investigations in 2009 remained high as well as in 2008. The latest number took a downward turn, which shows that protectionist tension which arose from the financial crisis is being relaxed.

Conclusion

As the above discussion indicates, the economic effects of abusive anti-dumping measures can be substantial in terms of trade volume and critical to a wide range of business activities. Unfortunately, importing countries can easily resort to such practices because they can be accomplished under the guise of measures sanctioned by the GATT/WTO and the Anti-Dumping Agreement. For these reasons, application of AD measures as a means of restricting imports has increased substantially in recent years. It should also be noted that the most serious victims of abusive AD measures are the consumers and user industries in the importing country.

5. JAPAN'S ANTI-DUMPING ACTIONS

Japan's companion law and regulation to the AD Agreement is Article 8 of the Customs Tariff Law, the Cabinet Order on Anti-Dumping Duties and the Guidelines on Procedures for Countervailing and Anti-Dumping Duties. Prior to 1991, only three anti-dumping cases had been filed in Japan, none of which resulted in an investigation. With

regard to the application against ferro-silicon-manganese from China, South Africa and Norway, Japan determined that there was sufficient evidence to justify the initiation of its first AD investigation in October 1991. In February 1993, a final determination to impose AD duties on Chinese exporters was made after an affirmative finding of dumping and injury and a causal link between them (two of the Chinese exporters agreed to a price undertaking with the Japanese government). In January 1998, this measure was terminated under the sunset clause.

In December 1993, a dumping complaint was filed against imports of certain cotton yarns from Pakistan. The investigation was initiated in February 1994 and after a year and a half of impartial and rigorous investigation, it was found that dumped imports had in fact caused material injury to the domestic industry. An anti-dumping duty was therefore imposed in August 1995. This measure was terminated in July 2000 under the sunset clause.

In February 2001, an application for the initiation of an investigation was filed against imports of certain polyester staple fibers from Korea and Chinese Taipei. An investigation was initiated in April 2001. After a 15-month fair and impartial investigation, the authority concluded that dumping and injury were occurring. AD duties were imposed for the five-year period starting July 26, 2002 and ending June 6, 2007 (see Figure 5-3). On June 30, 2006, an application for extension of the period for continued imposition (an application for sunset review) of the AD duties was filed by domestic industry and an investigation was started on August 31 of the same year.
As a result, it was confirmed that injury might continue or recur and extension of the period for imposition of the AD duties up to June 28, 2012 was determined in June 2007.
In January 2007, a dumping complaint was filed against imports of electrolytic manganese dioxide from South Africa, Australia, China and Spain, and investigation was initiated in April.

Figure 5-3

Imposition of Anti-dumping Duties on Polyester Staple Fibers from Korea and Chinese Taipei

History	
28 February 2001:	Complaint (from five Japanese companies) to impose antidumping duties was accepted
23 April 2001:	Investigation was initiated
19 July 2002:	Investigation was completed
26 July 2002:	Antidumping duties were imposed (for five years until 30 June 2007)

30 June 2006:	Complaint (from three Japanese companies) to extend the period of Antidumping duties was accepted
31 August 2006:	Investigation was initiated for the extension of the period of dumping duties
1 July 2007:	Extended anti-dumping duties were imposed (for five years until 28 June 2012) **<Anti-dumping duty rates** **Korea:** Four companies: No duties; One company: 6.0%; Other companies: 13.5% **Chinese Taipei:** All companies: 10.3%

Figure 5-4

Imposition of Anti-dumping Duties on Electrolytic Manganese Dioxide from Australia, Spain, China and South Africa

History	
31 January 2007:	Complaint (from two Japanese companies) to impose antidumping duties was accepted
27 April 2007:	Investigation was initiated
14 June 2008:	Provisional Antidumping duties were imposed
22 August 2008:	Investigation was completed
1 September 2008:	Antidumping duties were imposed (for five years until 31 August 2013) **<Anti-dumping duty rates** **Australia:** All companies: 29.3% **Spain:** All companies: 14.0% **China:** All companies: 46.5%; One company: 34.3%; **South Africa:** All companies: 14.5%

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

Since the WTO was established, by 31 March 2012, there have been a total of 434 consultation requests under the dispute settlement procedures, and among those requests, 90 cases involved anti-dumping measures. (Five of these cases were brought by Japan.)

Reference

List of ongoing AD cases against Japanese products (as of March 31, 2012)

United States		
Product	**(top) initiation (bottom)imposition**	**Developments**
PC Steel Wire Strand	1977.11.23 1978.12.08	1999.02.03 continuance (from first "sunset review") 2004.06.25 continuance (from second "sunset review") 2009.12.11 continuance (from third "sunset review")
Carbon Steel Butt-Weld Pipe Fittings	1986.03.24 1987.02.10	2000.01.06 continuance (from first "sunset review") 2005.11.21 continuance (from second "sunset review") 2011.04.15 continuance (from third "sunset review")
Brass Sheet & Strip	1987.08.14 1988.08.12	2000.05.01 continuance (from first "sunset review") 2006.04.03 continuance (from second "sunset review") 2011.03.01 start of third "sunset review"
Ball Bearings	1988.04.27 1989.05.15	2000.07.11 continuance (from first "sunset review") 2006.09.15 continuance (from second "sunset review") Provisional abolition of measures effective July 16, 2011 (until the US court's verdict is given).
Gray Portland Cement & Clinker	1990.06.15 1991.05.10	2000.11.15 continuance (from first "sunset review") 2006.06.16 continuance (from second "sunset review") 2011.12.16 continuance (from third "sunset review")
Stainless Steel Bar	1994.01.27 1995.02.21	2001.04.18 continuance (from first "sunset review") 2007.01.23 continuance (from second "sunset review") 2011.12.01 start of third "sunset review"
Clad Steel Plate	1995.10.25 1996.07.02	2001.11.16 continuance (from first "sunset review") 2007.03.22 continuance (from second "sunset review") 2012.02.01 start of third "sunset review"
Stainless Steel Wire Rod	1997.08.26 1998.09.15	2004.08.13 continuance (from first "sunset review") 2010.06.17 continuance (from second "sunset review")
Stainless Steel Sheets	1998.07.13 1999.07.27	2005.07.25 continuance (from first "sunset review") 2011.08.11 continuance (from second "sunset review")
Small Diameter Seamless Pipe	1999.07.28 2000.06.26	2006.05.08 continuance (from first "sunset review") 2011.10.11 continuance (from second "sunset review")
large Diameter Seamless Pipe	1999.07.28 2000.06.26	2006.05.08 continuance (from first "sunset review") 2011.10.11 continuance (from second "sunset review")
Tin mill products	1999.11.30 2000.08.28	2006.07.21 continuance (from "sunset review") 2011.06.01 start of second "sunset review"
Welded Large Diameter Line Pipe	2001.02.23 2001.12.06	2007.11.05 continuance (from "sunset review")
Polyvinyl Alcohol	2002.10.01 2003.07.02	2009.04.13 continuance (from "sunset review")

China		
Product	**(top) initiation (bottom)imposition**	**Developments**
Coated Printing Paper	2002.02.06 2003.08.06	2009.08.04 continuance (from “sunset review”)
Phthalic Anhydride	2002.03.06 2003.08.31	2009.08.31 continuance (from “sunset review”)
SBR (Styrene Butadiene Rubber)	2002.03.19 2003.09.09	2009.09.08 continuance (from “sunset review”)
Polyvinyl Chloride (PVC)	2002.03.29 2003.09.29	2009.09.28 continuance (from “sunset review”)
TDI (Toluenediisocyanate)	2002.05.22 2003.11.22	2009.11.21 continuance (from “sunset review”)
Phenol	2002.08.01 2004.02.01	2010.01.31 continuance (from “sunset review”)
Ethanolamine	2003.05.14 2004.11.14	2010.11.14 continuance (from “sunset review”)
Optical Fiber	2003.07.01 2005.01.01	2011.01.01 continuance (from “sunset review”)
Chloroprene Rubber	2003.11.10 2005.05.10	2011.05.10 continuance (from “sunset review”)
Hydrazine Hydrate	2003.12.17 2005.06.17	2011.06.17 continuance (from “sunset review”)
Trichloroethylene	2004.04.16 2005.07.22	2010.07.21 start of first “sunset review”
Epichlorohydrin	2004.12.28 2006.06.28	2011.06.27 start of first “sunset review”
Spandex	2005.04.13 2006.10.13	2011.10.13 start of first “sunset review”
Catechol	2005.05.31 2006.05.22	2011.05.22 start of first “sunset review”
Electrolytic Capacitor Paper	2006.04.18 2007.04.17	
Bisphenol A (BPA)	2006.08.30 2007.08.29	
Methyl Ethyl Ketone	2006.11.22 2007.11.21	
Acetone	2007.03.09 2008.06.08	
Photographic paper and Photo Board	2010.12.23 2012.03.22	

Thailand		
Product	**(top) initiation (bottom)imposition**	**Developments**
Cold Rolled Steel Sheets	2002.02.15 2003.03.13	2009.03.19 continuance (from “sunset review”)
Hot Rolled Steel Sheets	2002.07.08 2003.05.27	2009.05.21 continuance (from “sunset review”)

South Korea		
Product	**(top) initiation (bottom)imposition**	**Developments**
Stainless Rods and Section Steel	2003.07.05 2004.07.30 (Partial price undertakings)	2010.02.24 continuance (from "sunset review") (three-year duration)
Ethyl Acetate	2007.09.17 2008.08.2 (three-year duration)	2011.4.28 start of first "sunset review"
Stainless Steel Plate	2010.04.28 2011.04.21	

Australia		
Product	**(top) initiation (bottom)imposition**	**Developments**
Polyvinyl Chloride (PVC)	1992.02.05 1992.10.22	1997.10.22 continuance (from first "sunset review") 2002.08.29 continuance (from second "sunset review") 2007.10.04 continuance (from third "sunset review")

India		
Product	**(top) initiation (bottom)imposition**	**Developments**
Acrylic Fiber	1998.01.07 1999.01.22	2004.12.21 continuance (from first "sunset review") 2010.08.30 continuance (from second "sunset review")
Aniline	1999.09.13 2000.10.06	2006.06.09 continuance (from first "sunset review") 2010.12.20 start of second "sunset review" (Jan. 17, 2012 recommendation to abolish measures.)
Caustic Soda	2000.05.26 2001.06.26	2006.09.13 continuance (from first "sunset review") 2011.09.02 start of first "sunset review"
Flexible Slabstock Polyols	2001.09.21 2002.10.31	2008.02.05 continuance (from "sunset review")
Pentaerythritol	2001.11.22 2002.10.31	2008.04.28 continuance (from "sunset review")"
Polyvinyl Chloride (PVC)	2006.06.28 (investigation ongoing)	
Peroxosulfates	2007.08.29	
Phenol	2009.08.11 2010.12.01	
1,1,1,2-Tetrafluoroethane	2009.08.19 2011.07.15	
Acetone	2009.09.03 2011.04.18	

Mexico		
Product	**(top) initiation (bottom)imposition**	**Developments**
Steel Tubing	1999.05.13 2000.11.10	2005.11.11 continuance (from first “sunset review”) 2010.11.03 start of second “sunset review”

Argentina		
Product	**(top) initiation (bottom)imposition**	**Developments**
Welded Steel Tubes	2000.12.15 2001.12.15	2008.06.12 continuance (from “sunset review”)

Source: Data of Fair Trade Center

7. MAJOR CASES

* See Part I for other major cases (in respect to WTO dispute cases in which Japan became a claimant country, see Part, I, Chapter 3 “United States”)

1) US Antidumping Act of 1916

<Outline>

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 law 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 Antidumping 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 damages for a private complainant 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 (WT/DS162).

Despite the recommendations of the WTO Panel and the Appellate Body, the US let the December 2001 implementation deadline pass 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 lawsuit 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. Because of this, 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 them under the 1916 Act. The bill was enforced on December 8, 2004.

Meanwhile, in October 2004, a bill was submitted to the US Congress 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.

<Japan's action>

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 asking for an injunction to prevent the Japanese company from filing suit under the Special Measures Law in Japan. In response, the District Court issued a preliminary injunction prohibiting the Japanese company from filing a suit in Japan to obtain relief under Japan's Special Measures Law. The Japanese company 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 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.

In June 2007, the US Court of Appeals upheld the position taken by the Government of Japan in its amicus brief and issued a decision that the preliminary anti-suit injunction should be vacated. The US companies that had lost the case were dissatisfied with the appeals court's decision and lodged an appeal with the US Supreme Court in October 2007 (resubmitted in November 2007), but in June 2008 the US Supreme Court rejected these companies' motion for appeal, thereby upholding the decision by the US federal appeals court that annulled the interim injunction in the litigation.

Japan had requested the annulment of the interim injunction in the litigation to ensure that sovereign acts by Japan and the legitimate right of Japanese companies to receive fair trials were not infringed, and considers the ruling by the US Supreme Court to sustain the aforementioned decision on annulment to be an appropriate one. Nevertheless, a number of US Senators in July 2008 submitted to Congress a bill that would effectively nullify Japan's Damage Recovery Act and sent a letter to the Secretary of State asking that the US companies in this case be protected. Developments in this regard will need to be monitored and all necessary steps taken.

In August 2007, in response to the US Court of Appeals' dismissal of the US company's claim, the Japanese company filed a suit against the US company with the Tokyo District Court based on the Special Measures Law. However, it was announced in August 2009 that the Japanese company and the US company had reached an amicable settlement and all the disputes under the 1916 AD Act were terminated.

References:

o 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.

o 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 implemented its Council Regulation 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:

(i) Creation of the right to claim damage recovery

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.

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

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.

2) Changed circumstances review and sunset review on large newspaper printing presses

<Outline>

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 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 against the Japanese company 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 for large newspaper printing presses 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, that 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 of 59.67% against the Japanese company between 1997 and 1998; (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 provided no basis to change the rate of the AD duty against the Japanese company. Therefore, if the DOC reconsiders the sunset review, restores and continues the AD measures, and makes them retroactively applicable, such action lacks reasonable grounds and harms legal stability.

Furthermore, the preliminary decision applied to all large newspaper printing presses and components originating in Japan, and unreasonably resulted in restoring AD

measures against companies not subject to the changed circumstances review. Therefore, this decision seriously harmed not only legal stability, but also predictability for companies.

< Japan's action>

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:

(i) The initiation of the reconsideration of the sunset review is ripe for judicial review prior to the final determination.

(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.

In response to the decision, the DOC announced that it was discontinuing its reconsideration of the sunset review on February 24, 2007. However, DOC and the US manufacturer appealed to the US Court of Appeals on March 20, 2007, and this Court issued a decision on June 2008.

The key points of the decision are:

(i) DOC intrinsically has the authority to re-examine administrative reviews.

(ii) Having done nothing more than to decide to initiate a re-examination of sunset reviews, the DOC cannot be said to have taken final agency action and thus judicial examination would not yet be appropriate. The CIT ruling that this decision would be subject to judicial examination was in error.

Based on these results, the DOC launched its re-examination of the sunset reviews in October 2008, and in November 2008 it presented a final decision in its re-examination of the 2002 sunset review that acknowledged the possibility of continued/resumed dumping. The Japanese Government had continuously kept watch on the trends of this case so as to ensure that the abolished AD measure would not be restored. This case was terminated without the abolished AD measure being restored since the US manufacturer withdrew from the sunset review in August 2009.