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**Working Group on the Interaction  
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### The Contribution of Competition Policy to Achieving the Objectives of the WTO, including the Promotion of International Trade

#### **I. OBJECTIVES OF THE WTO AND COMPETITION POLICY**

One of the major objectives of the WTO, as stated in the preamble of the Agreement Establishing the World Trade Organization, is "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services". Briefly, a major objective is to realize "expanding the production of and trade in goods and services" for the development of the global economy.

The Working Group on the Interaction between Trade and Competition Policy decided to take up "The Contribution of Competition Policy to Achieving the Objectives of the WTO, including the Promotion of International Trade" as an agenda for its future study. Therefore, we will consider in this paper how competition policy can contribute to "expanding the production of and trade in goods and services" for the development of global economy, a major objective of the WTO.

#### **II. EXISTING WTO AGREEMENT AND COMPETITION POLICY**

It has already been recognized that the introduction of competition policy perspectives to WTO agreements is necessary for the achievement of WTO objectives. In point of fact, the TRIPS and GATS include competition-related clauses to regulate anti-competitive conducts by private companies.

As the trade liberalization that has achieved so far a reduction of the trade barriers on border, it is then natural that the domestic anti-competitive conducts by private companies should be focused on as a factor impeding the expansion of the production of and trade in goods and services. However, while those anti-competitive conducts by private companies can be dealt with by introducing and implementing national competition laws, government actions are naturally excluded from the application of national competition laws even if they impede competition in the domestic market. Moreover, in case a government regulates competition in the domestic market through a regulatory scheme, it is possible to introduce competition policy perspectives into it by the participation of the competition authority in policy making, insisting on competition advocacy. National competition laws, however, have no counter measure to trade restrictive measures taken by the government itself, even if those measures directly impede competition with foreign competitors.

In this context, this paper intends to verify the anti-competitive effects of trade measures allowed under the existing WTO agreements and to consider the possibility of introducing competition policy perspectives to those agreements, if needed.

### **III. IMPORT RESTRICTIONS ALLOWED BY THE EXISTING WTO AGREEMENTS**

#### **1. Exceptions to General Prohibition of Quantitative Restrictions**

Quantitative import and export restrictions against WTO Members are prohibited under GATT Article XI:1. GATT provisions, however, provide some exceptions for quantitative restrictions applied on a limited basis. Those exceptions explicitly provided for in the WTO Agreement include the exceptions noted in Article XI, the exceptions for non-economic reasons in Article XX and Article XXI, and the exceptions for economic reasons in Article XVIII and Article XIX. There is no question from the viewpoint of competition policy about the general exceptions in Article XI and the exceptions for non-economic reasons in Article XX and Article XXI. Rather, it is the exceptions for economic reasons in Article XVIII and Article XIX that come into question in terms of competition policy, and particularly the Article XIX safeguards.

#### **2. Principles on Tariffs as Legal Measures to Protect Domestic Industries**

At the same time, GATT Article XI bans in principle the use of quantitative restrictions as a means of protecting domestic industries but does allow tariffs to be used for this purpose because quantitative restrictions are considered to have a greater distorting effect on trade than tariffs. Also, GATT Article II prohibits Members from applying tariff rates higher than their bound rate. Exceptions to these principles include "counter measures to unfair trade", such as anti-dumping measures. The anti-competitive effect of these measures should be also considered.

### **IV. SAFEGUARDS AND ANTI-DUMPING MEASURES**

GATT Article XIX provides the rules on safeguard measures as emergency measures to prevent domestic industry from being injured by a sudden surge of imports. It permits Members to restrict imports under certain conditions. On the other hand, GATT Article VI defines dumping as an export at a price below normal value and allows Members to take counter measures, since dumping is to be condemned in case it has injured domestic industry. Here, the problem is that since the safeguard measures require the government to provide offsetting concessions or consent to counter measures taken by trading partner, import restrictions that should take the form of safeguards are often invoked as trade measures against "unfair trade", which need the far lower requirement.

In addition, safeguards requires the adherence to the WTO principle of Most-Favored-Nation Treatment and Non-Discriminatory Administration of Quantitative Restrictions for its implementation, while anti-dumping measures are allowed to take selective use departing from the basic WTO principle of Most-Favoured-Nation Treatment. Anti-dumping measures therefore are considered to have greater distorting effect on trade than safeguards.

Because of this, and in light of the fact that the number of safeguards being applied is in decline worldwide, we believe that discussions should focus on anti-dumping measures.

## **V. PROBLEMS THAT ANTI-DUMPING MEASURES INVOLVE**

### **1. Definition of Dumping in GATT Article VI**

Anti-dumping measures were originally intended to regulate "predatory pricing" in the international context just like domestic competition laws do in domestic markets (see the Japanese contribution paper to the Fifth WTO Working Group on the Interaction between Trade and Competition Policy: WT/WGTCP/W/92).

GATT Article VI, however, defines price discrimination in international transactions as dumping, and provides anti-dumping measures as countermeasures against it.

The problem is that anti-dumping measures should regulate "predatory pricing" in international transactions, but what GATT Article VI restricts is international "price discrimination", which causes a disparity between the original objectives of anti-dumping measures and those shown in the wording of the agreement. This disparity makes the purpose of anti-dumping measures ambiguous and enables a broad interpretation, and then results in the abuse of anti-dumping measures. In other words, certain conducts that should not be condemned as dumping originally are broadly restricted as dumping in fact.

### **2. "Price Discrimination" and "Predatory Pricing" in Competition Law**

"Predatory pricing", whose possibility to realize may be in question, is regulated in the competition laws of the United States and the European Union.

Both the US and the EU competition laws also cover "price discrimination". "Price discrimination" itself, however, is not unlawful under both of the laws. In case "price discrimination" deteriorates market competition, it will be a matter of competition laws. In fact, "price discrimination" itself is not illegal under the US competition law, but it matters only in the context of "predatory pricing" (Brooke Group Ltd. vs. Brown & Williamson Tobacco Corp, 1993). EU has no specific laws on "price discrimination" and it will matter in a case of "predatory pricing" like the US (AKZO, 1991).

Therefore, both the US and EU are only concerned with "price discrimination" in the context of "predatory pricing" and "price discrimination" itself is not a problem under both competition laws. Also, some economists, such as Samuelson, criticize strongly the "Robinson-Patman Act," one of the US antitrust laws, that regulates "price discrimination" specifically. Such a view is affecting the recent application of those competition laws to "price discrimination".

On the other hand, anti-dumping provisions condemn "price discrimination" between normal value and an actual export price as "dumping". As a result, the application of anti-dumping measures based on the current provision sometime may result in restricting "price discrimination" that would not be illegal under domestic competition laws, other than "price discrimination" as a means of achieving "predatory pricing".

## **VI. ANTI-COMPETITIVE EFFECTS OF ANTI-DUMPING MEASURES: A CASE STUDY IN THE STEEL INDUSTRY**

In addition to the problem on philosophy of anti-dumping described above, the trade distortion effects of filing anti-dumping suit also cause serious matters as a more real-life problem. The steel anti-dumping suit filed by the US steel industry, which is currently at issue between Japan and the United States, provides a good example about this issue.

## **1. Background of Export Increase from Japan**

During the January-June 1998 period, US steel consumption increased by 6.4 per cent in year-on-year terms, an increase of about 4.5 million tons in volume. This expansion in steel demand, which itself was driven by the robust US economy, was covered with increased supplies from the domestic industry and with increased imports. In point of fact, the US steel industry shipped about 55 million tons during the period in question, up 4.6 per cent from a year earlier and representing a volume increase of about 2.5 million tons. The remainder of market expansion, about 2 million tons, was covered by imports, and Japanese steel exports to the United States increased by about 1.5 million tons at this time.

As it should be clear from this review, the domestic shipping volumes of the US steel industry rose during the first half of last year, and the percentage of US steel consumption occupied by imports increased only slightly. This indicates that domestic US steel-making capacity was insufficient to keep up with strong US steel demand and the shortfall was being covered by imports.

## **2. The Anti-dumping Suit Filed by the US Steel Industry and its Effects**

Last June, General Motors, one of America's largest users of steel, went on a strike, which changed atmosphere in the US steel market overnight. Owing to this strike in combination with some other reasons, US steel-makers saw their business take a sharp turn for the worse. During the April-June quarter, operating profits at the Big Six steel-makers declined by 47 per cent compared to the same quarter a year earlier, and this was what provided the impetus for the anti-dumping suit.

On 30 September 1998, twelve US steel-makers and two steel labour unions filed an anti-dumping suit against imports of hot-rolled carbon steel flat products from Japan and two other countries and on 15 October, Department of Commerce made a decision to initiate its investigation. This led to a decline in exports from the Japanese steel industry. Especially, after November, exports from Japan virtually stopped. November was the deadline for Japanese steel export companies which wanted to avoid the imposition of deposit requirement after the preliminary determination by DOC, which was initially scheduled in February 1999, because the time required between the signing of contracts and the arrival in the US needed to be taken into consideration. Also, the determination of "critical circumstances" by the US government at an unusual timing had a significant impact on Japanese exports. Actually, Japanese steel exports to the US showed a continuous decline for the five months from October 1998 to February 1999 and also a decrease on a year on year basis for three consecutive months, from December 1998 to February 1999. As a result, Japanese exports to the US in February were less than the 1997 monthly average in volume, the exact volume expected by the United States. Japanese exports of hot-rolled steel, the subject of the anti-dumping suit, were down by 99.5 per cent in February 1999 compared to February 1998.

## **3. The Reasons for the Sharp Decline in Japanese Steel Exports**

As described above, the anti-dumping suit filed against hot-rolled steel by the US steel industry at the end of September 1998, in combination with the decline in demand and consequently in price in the US steel market, caused the rapid and significant decline of Japanese steel exports. What we should underscore here, however, is the fact that this anti-dumping suit is still being investigated and the US government has not yet made a final determination of whether "dumping" regulated by the GATT Article VI occurred.

One might assert that the Japanese steel industry took voluntary export restraints measures after the anti-dumping suit filed by the US steel industry. In fact, no customer, however, is willing to bear the deposits followed by the preliminary determination to import the Japanese products in

question and, if the deposits are included, Japanese products lose their price-competitiveness entirely. As a result, the truth is that it became impossible to maintain exports to the US.

Indeed, after the US steel industry filed the anti-dumping suit last September, most of Japanese steel export companies announced their intention to give up immediately future export transactions with the US. Then, the Japanese government has explained the movements of those companies to the US government and has asked to deal with the anti-dumping suit rationally and calmly.

## **VII. REVIEW OF ANTI-DUMPING REGIMES**

As stated above, the current anti-dumping regimes contain two serious problems; one is the problem of their philosophy from the competition policy view. The another is that of trade distortion effects brought by the filing of anti-dumping suits. In the following pages we describe an idea for a concrete review of anti-dumping regimes at the moment.

First, we need to prevent the abuse of anti-dumping measures stemming from the discrepancy between the purpose implied in the wording of the agreement and the original purpose to regulate "predatory pricing", as described Section 5. Therefore, the purpose of anti-dumping measures should be stated as the regulation of "predatory pricing", not the regulation of "international price discrimination". To do this, the following should be considered.

### **1. Introduction of Competition Policy Perspectives to the Concept of "Normal Value"**

"Marginal cost or average variable cost" could be used as a basis for the definition of "normal value" in GATT Article VI as the "Areeda-Turner Test" suggests in the enforcement of the US competition law against "predatory pricing." Since sales at price below "marginal cost or average variable cost" may realize the unfair elimination of competitors by low price sales and the recoupment of losses with subsequent price hikes, "marginal cost or average variable cost" is considered as a criterion of whether predatory pricing exists in the US. "Marginal cost or average variable cost", however, is not the absolute standard for the determination of anti-dumping.

### **2. Introduction of the Conditions of Competition in the Market of the Importing Country**

Since the original purpose of anti-dumping measures is to prevent "predatory pricing", the proof of the probability of future success in predation by low price exports in a rational period should be required before applying anti-dumping measures. Therefore, the condition of competition in the market of the importing country needs to be considered in the anti-dumping investigation.

In addition, we should note that Caterpillar, GM, and other large steel users in the United States have verbally criticized the US steel industry that it filed anti-dumping suits at a time when the Big Six steel-makers made operating profits of total US\$580 million in the first half of last year.<sup>1</sup>

Therefore, stricter determination of "injury to domestic industry" in the investigation and, in addition, the introduction of the concept of "impact on the domestic economy as a whole" could be considered for the review of anti-dumping regimes.

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<sup>1</sup> "GM supports the steel industry's right to pursue trade remedies, such as using current dumping laws and safeguard actions. However, it is critical that such trade remedies be applied only when conditions truly warrant it, in order to avoid an unintended effect on other industries. [The statutory injury requirement] leads me to question whether in fact the data or statements that the steel industry has made can be substantiated. I don't think that's the case". Mustafa Mohatarem, Chief Economist, General Motors, 11 February 1999.

### 3. Introduction of the concept of "Impact on the Domestic Economy as a Whole"

When considering the application of anti-dumping measures, each country should take into consideration not only producer interests by focusing only on "injury to domestic industry", but also consumer benefits that are expected to increase with the help of low-priced imports and which otherwise would suffer from the application of anti-dumping measures. The application of anti-dumping measures should be examined from the viewpoint of the impact of low-priced imports on the domestic economy as a whole.

Based on the above discussions, the addition of a few words in the following manner would make the GATT Article VI better correspond to its objective:

"The contracting parties recognize that dumping, by which products of one country are introduced unfairly into the commerce of another country at substantially 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 and impairs competition in the market of a contracting party and deteriorates the overall economic welfare of the contracting party."

### 4. Introduction of Competition Policy Perspectives into the Filing of Anti-dumping Suits

As described in Section 6, the mere initiation of an anti-dumping investigation will have a vast impact on exporters. When an anti-dumping investigation is initiated, the potential surfaces for anti-dumping duties to be imposed at some point in the future. This results in products becoming far less attractive to importers. Initiation of an anti-dumping investigation also places significant burdens on the companies being investigated. They must answer numerous questions from the authorities in a short period of time, spending enormous amounts of labour, time and money to defend themselves. The legal costs involved are particularly high. For example, in one case involving high-volume exports to the United States, the legal fees alone were US\$1 million a year. Such burdens obviously have the potential to impair ordinary business activities. Thus, regardless of their findings, the mere initiation of an anti-dumping investigation is in itself a large threat to companies.

Therefore, when anti-dumping regimes are reviewed from the perspectives of competition policy, not only the trade distortion effects by the application of anti-dumping measures, but also those by the filing of anti-dumping suits should be considered.

One of the prominent scholars in this field suggests that, as a means to introduce competition policy perspective into the filing of anti-dumping suits, it is worth consideration to require anti-dumping petitioners to meet standards more like those faced by a plaintiff in an antitrust action, e.g. the requirement to prove "standing to sue".<sup>2</sup> US antitrust law requires a plaintiff to prove "injury to

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<sup>2</sup> Robert A. Lipstein (1997). "Using Antitrust Principles to Reform Antidumping Law". In *Global Competition Policy*, ed. by Edward M. Graham and J. David Richardson. Washington: Institute for International Economics. He also writes about the competition distortion effects of the petition of antidumping. Those are "After all, one may reason that no antidumping measures will be imposed unless Commerce is satisfied that the imports under investigation are being sold at less than fair value and the ITC concludes that such LTFV imports are injuring the domestic industry. Such a simplistic view, however, ignores the real-world consequences of an antidumping proceeding. One need look no further than the recent round of steel cases (Flat-Rolled Carbon Steel Products case: 1993) to appreciate the tremendous impacts that the pendency of an antidumping case has on supply and pricing. Shortly after the steel cases were initiated, domestic steel producers increased prices on flat rolled products, even though the ITC eventually found imports of such products not to be causing material injury and did not impose duties. With each milestone in the case, the domestic industry hiked price again. After the preliminary LTFV determination, many foreign suppliers virtually abandoned the United States as a market, rather than risk millions of dollars in antidumping duty

business or property" stemming from the violation of US antitrust law as "standing to sue". In anti-dumping suits, a petitioner's action must be on behalf of the domestic industry that produces the product under investigation. Injury to the whole domestic industry is necessary to be proved because anti-dumping measures can only relief the whole industry itself. Therefore, it is suggested that it deserves consideration to require a petitioner to identify each and every domestic production source that is engaged in the manufacture of the products under investigation and to produce written evidence from those manufacturers supporting commencement.

Another prominent scholar suggests that the application of the legal doctrine of "sham litigation" as found in US anti-trust laws to anti-dumping regimes be also considered to be useful for the prevention of the abuse of anti-dumping petitions. "Sham litigation" refers to abuse in the form of groundless litigation merely for the purpose of impeding competitors, and such litigation is considered a violation of US antitrust laws. The introduction of the principle of "sham litigation" to antitrust regimes could be an effective remedy to the practice of abusing anti-dumping statutes and other trade laws for anti-competitive purposes.<sup>3</sup>

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liability. Talk of shortages arose as the cases drew to a conclusion and, despite the negative injury determinations, price increases were not rolled back.

<sup>3</sup> Toshiaki Takigawa (1994). "Trade Frictions and Competition Laws". Tokyo: Yuuhikaku.