

JAPAN

LAW AND PRACTICE:

p.3

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CONTENTS

1. Anti-Dumping	p.4
1.1 Anti-Dumping Measures	p.4
1.2 Public Interest Considerations	p.4
1.3 Provisional Anti-Dumping Duties	p.5
1.4 Retrospective Anti-Dumping Duties	p.5
1.5 Access to Confidential Information	p.5
1.6 Basis for Normal Value	p.5
1.7 Constructed Normal Value	p.5
1.8 Claims for Level of Trade Adjustments	p.5
1.9 Anti-Dumping Duty	p.6
1.10 Non-Market-Economy Countries (“NMEs”)	p.6
1.11 Section 15(a)(ii) of the Protocol of Accession of China	p.6
1.12 Maximum Period of Validity of Anti-Dumping Measures	p.6
1.13 The Acceptance of Price Undertakings	p.6
2. Anti-Subsidy	p.6
2.1 Concurrent Anti-Subsidy and Anti-Dumping Investigations	p.6
2.2 Subsidy Schemes	p.6
2.3 Benefit Calculation in Case of NMEs	p.7
3. Safeguards	p.7
3.1 The Safeguards Instrument	p.7
3.2 Unforeseen Circumstances	p.7
3.3 Article XIX:1(a) of GATT 1994	p.7

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Nishimura & Asahi advises both private companies and governmental agencies with regard to international trade laws, such as World Trade Organization (WTO) agreements and regional trade agreements including the TPP. N&A's lawyers have extensive experience as outside and in-house counsel to companies, governmental agencies and the WTO. As a pioneer in the practice of trade remedies in Japan, the team has an extensive knowledge base and, therefore, invaluable information from when they have acted on behalf of Japanese industries and for-

eign companies who file for and defend against anti-dumping and countervailing investigations by the Japanese authorities and on behalf of supporting Japanese companies facing trade remedies investigations initiated by foreign authorities. N&A further provides analysis and information that advises management's decisions regarding export strategy, supply chain management and technology transfer based on custom tariffs, rule of origin, and the investment environment.

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Kojiro Fujii handles many Japanese and overseas cases on behalf of various industries with regard to anti-dumping (AD) and countervailing duties (CVD) proceedings. While he served as deputy director of the Ministry of Economy,

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Sakuya Yoshida has experience handling a number of recent trade remedy investigations in Japan on behalf of petitioners. She also advises private companies and several governmental agencies on a range of different issues related to international trade laws, including advice on WTO dispute settlement procedure.

1. Anti-Dumping

1.1 Anti-Dumping Measures

The Customs Tariff Act (the "Act") does not incorporate the "lesser duty rule", ie, it does not oblige the investigating authority to set the level of the measure only at the level necessary to eliminate the dumping margin, nor to lower the level if such lower level is sufficient to eliminate the injury caused by the dumping imports.

However, the text of the Act provides that the investigating authority may lower the level of the amount by stipulating that an anti-dumping duty in an amount "equal to or less than the dumping margin may be levied." Therefore, it is

possible for the investigating authority to impose an anti-dumping duty in an amount less than the dumping margin, at its discretion.

1.2 Public Interest Considerations

The text of the Act leaves the imposition of an anti-dumping duty to the investigating authority's discretion, by using the word "may". However, the Act does not explicitly require the investigating authority to take the public interest into account, and the investigating authority has not stated in prior cases that the imposition of the anti-dumping measure was in the public interest.

1.3 Provisional Anti-Dumping Duties

In practice, provisional anti-dumping duties are normally imposed ten to 14 months after the initiation of the investigation.

The Act provides that provisional anti-dumping duties may be imposed if there is sufficient evidence that imports were dumped and caused material injury to a Japanese industry, and if it is deemed necessary in order to protect the Japanese industry concerned. The preliminary determination criterion is whether there is sufficient evidence to presume the above facts, and the Guideline for Anti-Dumping Duty provides that the preliminary determination is normally made eight months after the initiation of the investigation. Therefore, the provisional anti-dumping duty is normally imposed at least eight months after the initiation of the investigation, although the Act itself provides that it may be imposed 60 days after the date of the initiation.

Provisional anti-dumping duties are normally imposed for four months. However, this may be extended to six months if it is made clear that an examination will be carried out to determine whether an anti-dumping duty lower than the dumping margin is to be levied, or if exporters of the products covered by the provisional measure request – in advance – a period exceeding four months. If both of these circumstances exist, the period of time may be extended to nine months.

The interested person will be directly notified of a preliminary affirmative decision and the facts that form the basis for such decision, and such will also be published in the official gazette. In addition, the investigating authority generally prepares an interim report on the facts that formed the basis for the decision, which is published on its website. Provisional measures are imposed after a preliminary affirmative decision.

1.4 Retrospective Anti-Dumping Duties

An anti-dumping duty is imposed retrospectively, beginning 90 days before the day on which the provisional measure was imposed or the day on which the investigation was initiated, whichever is later, if the following conditions are met:

- if the dumped product has been dumped in the past and caused injury as a result, or if the product was dumped and the importer was or should have been aware that the importation of the dumped product would cause a material injury to a Japanese industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry; and
- if the product is found to have caused a material injury to a Japanese industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry due to a massive number of imports

within a short period of time and if levying an anti-dumping duty on the product after a definitive measure, without more, would be considered insufficient for preventing the recurrence of such an injury.

1.5 Access to Confidential Information

Interested parties, including their legal counsels and agents, do not have access to confidential information submitted by other interested parties, nor to documents prepared by the investigating authorities. They can only submit opinions regarding the confidentiality of the information to the investigating authority, such as the specific information should not be considered confidential, or its non-confidential summary is not sufficient for the parties to determine whether or not the information should actually be treated as confidential.

1.6 Basis for Normal Value

When there are no sales of a like product in the ordinary course of trade in the domestic market of the exporting country or when such sales do not permit a proper comparison because of the particular market situation or the low volume of sales in the domestic market of the exporting country, the export prices to a third country or constructed prices can be used.

The Cabinet Order on Anti-Dumping Duty and the Guideline for Anti-Dumping Duty do not state how the third country should be selected but, in some prior cases, the investigating authority has stated in its reports that it chose a particular third country because the export quantity to that country was the largest, and the price was comparable and representative.

1.7 Constructed Normal Value

The Act, the Cabinet Order on Anti-Dumping Duty and the Guideline for Anti-Dumping Duty do not state explicitly what kind of records can be used as a foundation in calculating the costs, but, as the Guideline for Anti-Dumping Duty provides that the procedure for imposition of an anti-dumping duty is governed by the ADA as well as domestic laws and regulations, the costs will normally be calculated based on the records kept by the exporter or producer under investigation.

The investigating authority used out-of-country data to calculate the costs in a case where the suppliers did not provide the necessary data to allow the investigating authority to calculate the normal value, and the investigating authority was not able to acquire published data to calculate the normal value based on the domestic prices or the export prices to a major import country.

1.8 Claims for Level of Trade Adjustments

The Act provides that the investigating authority is obliged to make adjustments to the price difference as necessary due to

differences in factors that affect price comparability, including the level of trade.

The details of the claims regarding the price comparability are not publicly available. However, the investigating authority has explained that it adjusted for the level of trade when comparing the normal value and the export price in a recent case.

1.9 Anti-Dumping Duty

The Act, the Cabinet Order on Anti-Dumping Duty and the Guideline for Anti-Dumping Duty do not explicitly provide what the treatment should be for anti-dumping duties paid upon importation in interim reviews.

1.10 Non-Market-Economy Countries (“NMEs”)

For imported products originating in China or Vietnam, the domestic price, the export price or the constructed price of like products in a country at a stage of economic development comparable and closest to these countries may be used as a normal value.

If the producer of such a product can clearly show that the market economy conditions prevail in the industry producing the like product with regard to the production and sale of that product, the prices of the analogue country cannot be used. According to the Guideline for Anti-Dumping Duty, such facts include the following:

- that decisions by producers regarding prices, costs, production, sales and investment are made based on market economy principles, and without significant government interference;
- that the costs of major inputs reflect market prices;
- that wage rates are determined by free negotiations between labour and management;
- that means of production are neither owned nor controlled by the government; and
- any other facts that the Minister of Finance considers appropriate and notifies the producers of upon the initiation of an investigation.

In addition, in past instances, the Minister of Finance has notified parties that it will consider the fact that accounts are processed appropriately in accordance with international accounting standards or an equivalent method, and the fact that the financial conditions of the industry are not distorted by non-market factors upon initiation of an investigation.

1.11 Section 15(a)(ii) of the Protocol of Accession of China

The Guideline for Anti-Dumping Duty previously provided that the provision that allows the investigating authority to use the prices of third countries for products that originate in China was effective until 10 December 2016, pursuant to

the conditions provided for in Section 15(d) of the Protocol on the Accession of China, but this provision was recently abolished. The Japanese government has been reported as continuing to treat China as an NME, even after the expiry of the Section 15(a)(ii) of the Protocol of Accession.

1.12 Maximum Period of Validity of Anti-Dumping Measures

The maximum period of time for imposing an anti-dumping duty is five years, extendable for five years through successive expiry review; the same applies when that extended period is further extended. The Act, the Cabinet Order on Anti-Dumping Duty, and the Guideline for Anti-Dumping Duty do not limit the number of times the period for an anti-dumping duty can be extended.

1.13 The Acceptance of Price Undertakings

Investigations are not frequently concluded by the acceptance of price undertakings. In a prior case, the investigating authority accepted the price undertakings offered by two Chinese exporters of the ferro silicon manganese.

In a case involving a violation of the undertaking, provisional measures can be imposed if imports have been presumed to have been dumped, and a material injury to a Japanese industry, a threat of a material injury to a domestic industry or a material retardation of the establishment of such an industry has been presumed to have been caused by such imports, and if it is found necessary in order to protect the Japanese industry, based on the best information available. If a provisional measure has been applied due to the violation of undertakings and the importation of the product is found to have caused material injury to a Japanese industry, an anti-dumping duty may be levied on imports from 90 days prior to the day on which the provisional measure was taken or the day on which such undertaking was violated, whichever is later.

2. Anti-Subsidy

2.1 Concurrent Anti-Subsidy and Anti-Dumping Investigations

There has been no precedent in which anti-subsidy and anti-dumping investigations targeting the same products and origins were initiated concurrently.

2.2 Subsidy Schemes

The Guideline for Procedures relating to Countervailing Duty provides that, if it is found to be appropriate to modify the matters indicated in a public notice of the initiation of an investigation, such as suppliers of the product under investigation, such finding shall, in principle, be handled by amending said notice. Although the guideline does not specifically address a situation in which subsidy schemes not

mentioned in the notice of initiation were discovered in the course of the investigation, the text does not seem to prohibit the investigating authority from including the newly found subsidy scheme by amending the notice of the initiation. However, the investigating authority has only implemented countervailing measures in one case to date, and has not yet dealt with or publicised any policy regarding situations in which it discovers a newly found subsidy scheme during an investigation. Therefore, it is not clear how the investigating authority would handle such an event.

2.3 Benefit Calculation in Case of NMEs

There are no provisions regarding the benefit calculation in case of NMEs, and there has been no anti-subsidy investigation against NMEs.

3. Safeguards

3.1 The Safeguards Instrument

To date, there has only been one case in which safeguard measures were taken. In that case, the provisional measures were applied to three kinds of products for about six months

in 2001, but a final measure was not applied. In its decision, the investigating authority explained that, because Japan and China reached a common understanding regarding the promotion of orderly trade, the urgent need to protect the national economy had disappeared.

3.2 Unforeseen Circumstances

The Act states that “a decline in the overseas price” is an example of an “unforeseen development”, but it does not provide any more specific criteria. Regarding a product that is subject to a concession in the WTO Agreement, it has been interpreted that the development must be unforeseen at the time of the concession.

3.3 Article XIX:1(a) of GATT 1994

Neither the Act, the Cabinet Order on Emergency Duty, etc, nor the Guideline for Procedures Relating to Emergency Duty, etc, provides an interpretation of the “effect of the obligations incurred by a contracting party under this Agreement” contained in Article XIX:1(a) of GATT 1994. Also, the investigating authority did not express its interpretation of this requirement when applying the provisional safeguard measures in 2001.

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