

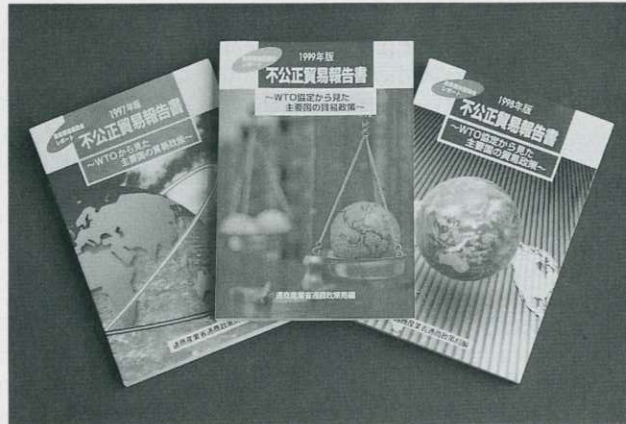
The 1999 Report on the WTO Consistency of Trade Policies by Major Trading Partners — A Comparison with the “Japan” Section of the 1999 U.S. National Trade Estimate Report

By Ishiguro Kazunori

Clarification of the Concepts of “Rule-based Approach” and the Notion of “Fairness or Unfairness”

The fundamental principles of the 1999 Report on the WTO Consistency of Trade Policies by Major Trading Partners prepared by the Industrial Structure Council, Japan, which has been published annually since 1992, have been consistent. Its “rule-based approach” has been defined as “fair,” other nations’ measures which are consistent with World Trade Organization agreements, bilateral agreements and customary international law, and those which do not conform to those rules are deemed “unfair”. This approach is based on the full awareness that it is essential to avoid unnecessary turmoil in actual trade frictions which arise sometimes when a country rejects another country’s practice as “unfair” merely because it is inconvenient to the trade policy of the former. In the 1999 annual report, Professor R. Hudec’s statement that “All are sinners” is no longer quoted. However, the report consists of the constructive proposal that all nations, out of a mutual recognition that each of them does have measures which need improvement from the viewpoint of the international norms mentioned above, should together aim for that improvement and contribute to the promotion of the WTO system.

From the fundamental principles included in the report, it is not possible to label as “unfair” a system of a certain country just because the system is unique among the nations of the world. If one reads the report in depth, one will realize that the description on points raised about



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other nations’ measures that fall out of the scope of international rules including WTO agreements are clearly differentiated from those within the scope of such rules.

The objective analysis of the report is highly regarded abroad. In order to indicate the consistency of Japan’s trade policy and the legitimacy of the “rule-based approach,” it is necessary that this report continue to be published annually for the future. I would like to emphasize that point here, from my perspective as vice-chairman of the subcommittee that prepared this report.

Moreover, I would like to call attention to the fact that while the central issues are presented in the main text of the report, there are even more significant issues raised in the appended chapters. For example, in an appended section of the 1994 report, addendum “Position Paper on Numerical Target-based Trade Policy,” one finds an important counterargument given regarding managed trade including such policies as voluntary import expansions (VIEs) which were at that time a major problem causing trade friction

between the U.S. and Japan. Also, in the 1995 report, appendix III “Position Paper on Direct Requests by Foreign Governments for Japanese Enterprises to Purchase Foreign Products” was aimed primarily to assert that, within the Japan-U.S. Autos and Auto Parts Talks, the U.S. attempt to make these requests without the formal agreement of the Japanese government was a violation of Japanese sovereignty. In passing, its summary is presented in a column of the 1999 report

and a repetition of such a problem has in this way been restrained. In the 1996 report, Appendix III “Issues Regarding the Extension of the Japan-U.S. Semiconductor Arrangement,” and in Part II of the 1997 report, “Results of the 1996 Japan-U.S. Talks Concerning the Semiconductor Arrangement,” the report clearly addressed that the dispute over semiconductors between Japan and the U.S. should be resolved under the WTO system. Similarly, Chapter 16 of the 1998 report titled “The Panel Report concerning the Japan-U.S. Film Dispute” provides an objective description of this dispute. The 1999 report has expanded such columns and from the same point of view introduces a variety of important matters. Not only is this report based on scrutiny of other nations’ measures in terms of the “rule-based” criteria based on the WTO Agreements but it is intended to provide an objective analysis of current trade disputes.

Problems in the “Japan” Section of the 1999 U.S. National Trade Estimate Report

It is most unfortunate that in contrast

to Japan's "rule-based approach," the 1999 U.S. *National Trade Estimate Report* continues to include unilateral criticisms not always based upon international rules and makes a number of points including numerous misunderstandings. In regard to the points related to Japan, the Japanese government has formally presented counterarguments to the U. S. government, and following are several basic problems that I would like to point out.

First of all, the U.S. has still not abandoned "result-oriented" criteria. This approach, which can be viewed as the polar opposite of the "rule-based" criteria used in the Japanese report, adheres to obtaining a designated share, for its own country's industries, of a trading partner's market and it aims for government-managed trade, which is contradictory to the spirit of the WTO system. This notion is clearly addressed, for example, in the section titled "Government Procurement" (particularly in regard to computer-related procurement) under the "Japan" Section of the 1999 *National Trade Estimate Report*. In the negotiations between the U.S. and Japan regarding government procurement, Japan has offered no guarantees to the U.S. regarding any raising of the percentage of government procurements of foreign products, including those of the U.S. However, the U.S. criticizes Japan because it notes that there has been no expansion of the U.S. share.

Secondly, a contradiction exists in that while the U.S. strongly demands the opening of Japan's markets, in areas where its industries have already achieved a major share in Japan, the U.S. demands to fix the current share. The section titled "Insurance" under "Services Barriers" contains a straightforward example of such assertions regarding avoiding radical change in the so-called third sector.

Thirdly, on issues where Japan and the U.S. have reached no governmental agreements, the U.S. says that an agreement has been

reached and criticizes Japan for having gone against this so-called agreement. Such criticisms are seen in the section on "Government Procurement," and can also be found in the points made under "Energy" in the section on "Sectoral Deregulation." Under "Consumer Photographic Film and Paper" in the section on "Other Barriers," the U.S. unilaterally contends that it views statements made in the Government of Japan's legal submissions to the WTO dispute settlement panel as "commitments" subject to monitoring to ensure their implementation, but that assertion is improper. (This issue is also pointed out in the 1999 Japan report.)

Fourthly, there are no small number of factual errors in the U.S. understanding. One can find instances of this, for example, under the "Import Policies" heading in the section on "Import Clearance Procedures." In 1998 the customs clearance time for air freight was reduced to 0.7 hours and that for sea freight to 5.6 hours and Japan has repeatedly called attention to this fact. Nonetheless, the U.S. perception has remained unchanged and this is problematic. Similar misconceptions are evident under the "Structural Deregulation" heading in points made in the section on "Transportation and Warehousing," under the "Standards, Testing, Labeling and Certification" heading in the sections on "Dietary Supplements" and "Food Additives," under the heading of "Government Procurement" in the section on the "NTT Arrangement" and further in "Investment Barriers" and "Anticompetitive Practices," and under the heading of "Other Barriers" in the sections on "Direct Marketing" and "Sea Transport and Freight." Numerous misconceptions can be found in other sections of the U.S. report. It seems as if the unilateral claims of U.S. enterprises are reflected directly in the U.S. report, whose standpoint is very different from the objective analysis of the Japanese report.

Fifthly, the U.S. report includes unilateral points that ignore fundamental differences between the U.S. and Japanese systems. One can find an example under the heading of "Sectoral Deregulation" in the section on "Medical Devices and Pharmaceutical Products." Overlooking the fact that in Japan all citizens are covered by the insurance system in contrast with the U.S., the U.S. asserts that Japan should introduce a market-based pricing system. If such a system were to be introduced, the low burden for patients, which is the fundamental social policy aspect of Japan's public medical treatment insurance, can no longer be maintained. The U.S. position is untenable, because the assertion of the U.S. is based solely on a viewpoint of U.S. enterprises participating in the Japanese market. Moreover, assuming that one's own national system is inevitably the most legitimate is an obstacle to true mutual understanding, just as is true of ordinary human relations.

Lessons from Japan-U.S. Trade Frictions to Date and the Future of the WTO System

Actually, the problematic assertions in the "Japan" section of the 1999 U.S. NTE Report appear to be in accordance with the problematic claims that the U.S. has repeatedly made throughout Japan-U.S. trade frictions. (See Ishiguro Kazunori, *Tsusho Masatsu to Nippon no Shinro*, [Trade Frictions and Japan's Future], 1996, and *Nippon Keizai Saisei he no Hoteki Keisho* [Legal Warnings Concerning Revitalizing The Japanese Economy : Against the Economic Fundamentalism], 1998, both published by Bokutaku-sha) This makes clear the fact that even after the establishment of the World Trade Organization, the U.S. stance towards Japan has fundamentally not changed at all. Consequently, it has become even more imperative that Japan continues to publish its annual report and to make persistent claims.

Under the leadership of chairman

Prof. Suzumura Kotaro, the subcommittee preparing the Japan report has strengthened its economics-based approach. It deserves special mention that the position of the WTO system from a viewpoint of economic theory has become ever more clear through these economics-based discussions. The free trade system under the WTO is based upon the premise that trade liberalization will lead to improving economic welfare. Therefore, it is extremely important that economic analysis be carried out on international rules under the WTO system. (One of the important aims in the drafting of the Japan report is to make it an advance-level textbook on both theory and actual business practices, and to provide theoretical in-depth analysis of international trade issues from both the legal and economic points of view.)

However, there are several major problems that call for concern. The WTO system to date has taken as its aim the "liberalization" of trade (as well as that of investment especially in the General Agreement on Trade in Services, GATS). In the course of emphasizing market entry from foreign countries, especially relying on the notion of the so-called market access, the situation of "reverse discrimination" has emerged in certain areas under the WTO rules themselves. One can find an example in "Understanding on Commitments in Financial Services, B. Market Access, 10. [Non-discriminatory Measures]" under GATS. Here, the problematic concept of market access is shown which goes beyond the "equality of opportunity" provided by national treatment and most-favored-nation treatment. As has been the case in trade frictions between the U.S. and Japan to date, there has been a phenomenon that appears as if the U.S. compels Japan to carry out "affirmative actions," under the premise that Japan has unfairly interfered with foreign access to the Japanese market. The problem is whether the U.S. claims regarding Japan are justifiable according to

WTO rules.

In this regard it should be pointed out that in the "Japan" section of the 1999 NTE Report, in the section of "Telecommunications" under the heading of "Sectoral Deregulation" the allegation is made that Japan has "inadequate safeguards against anti-competitive activities in basic telecommunications." The U.S. poses this claim against Japan based on the concept of "competitive safeguards", in the so-called "reference paper." This concept is based on the notion of "asymmetrical regulation" according to which, in this context, a country one-sidedly suppresses its major domestic service providers in order to improve market access from foreign countries. From the point of view of economic theory, however, further inspection should be made of circumstances in which such asymmetrical regulations can be justified. In the future development of Japan-U.S. trade frictions, it can easily be anticipated that the U.S. will criticize Japan and appeal to the WTO from the problematic stance against Japan that is indicated in the "Japan" sections of the NTE Report, relying on the notion of "competitive safeguards."

Concerning our approach to the next round of WTO negotiations, it is quite essential that we verify with detailed economic analysis the individual justifiability of the existing WTO rules as well as future rules to be established under the WTO, and prepare an advanced infrastructure for dispute settlement which reflect such an overall point of view. Along with trade liberalization, the liberalization of investments will come to be a major issue in the future. It was only recently that, in the negotiation of the Multilateral Agreement on Investment (MAI), too much emphasis was laid on protecting investments from foreign countries and foreign investors to the extent that it gave birth to problems involving true equality for people and societal justice, and the MAI negotiation had come to a fatal halt by French defiance representing

the opposition of European civil society. (Kondo Seiichi, *Sekai ha tan'itsu de ha nai — globalization ni idomu ikari no shimin* [The world is not one unit — the anger of civil society in defying globalization] in *This is Yomiuri*, March 1999, page 214 ff.) Unfortunately, there is a need for us to watch that the "further liberalization" under the WTO system does not bring the same problem to the WTO.

If the WTO should seek for liberalization of trade and investment alone, it would bring about various types of social and cultural problems. At the second WTO Ministerial Conference in 1998, one of the major issues was the "marginalization" of a number of nations from the international trade system. If the WTO simply continues to keep its own line without paying due attention to "non-trade concerns," it is possible that, even in the developed nations, "marginalization" might occur in their non-urban areas. The same is true of various social and cultural problems. As the WTO becomes more and more involved in too many issues, it is especially essential that it seek a new, more balanced approach. We cannot overlook this point considering the economic crises that have occurred in Asia and other countries since 1997.

And this perspective also has much to do with the Japan report. The "rule-based approach" presumes that international rules are rational and truly convincing. The problem here is what will happen if that presumption collapses. (See Ishiguro Kazunori, *Ho to Keizai* [Law vs. Economics] [1998, Iwanami Shoten] pp. 153 ff.)

Ishiguro Kazunori is a professor of International Trade Law at the University of Tokyo and has written many books on trade issues. He also serves as Vice-Chairman of the Subcommittee on Unfair Trade Policies and Measures, WTO Committee, Industrial Structure Council.