

Realizing Free, Open Trade and Investment under
COVID-19
Targeting an Inclusive and Resilient Framework
(Provisional translation)

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I. The COVID-19 Pandemic and Future Policies

1. Current State of the World Economy

In this century, the world has become increasingly globalized, and the global economy has continued to grow steadily through the seamless cross-border movement of natural persons, goods, capital, and services. Global nominal GDP, which was approximately \$33.6 trillion in 2001, reached around \$84.9 trillion in 2018¹. In particular, the total value of global trade on an export value basis has more than tripled from about \$6.2 trillion at the beginning of this century to around \$19.3 trillion in 2018², constituting nearly a quarter of global nominal GDP, and is a major driver of the continuous economic growth. In addition, total foreign direct investment (FDI) amounted to \$36.5 trillion in 2019, compared with \$7.4 trillion in 2000³. Especially in emerging economies that have succeeded in attracting large amounts of investment in new production bases, a virtuous cycle has been created with the rise of middle-income groups and the expansion of consumption.

However, the world is now facing an unprecedented crisis in the form of the COVID-19 pandemic. Due to measures such as lockdown, aimed at preventing the spread of infection, the global economy is now slumping into recession. According to the IMF, global GDP in the year 2020 is projected to be -4.9% from the previous year, even if the pandemic has settled in the second quarter of this year⁴. In particular, global trade is expected to decline significantly this year, by between 13% and 32%, due to supply chain disruptions⁵. FDI, which supports the global economy, had already been on a downward trend in terms of flows even before the spread of COVID-19⁶, but it is also expected to decline significantly this year, by 40%⁷. In order to restore the world economy to a growth path, it is essential to immediately restructure the trade and

¹ IMF

² IMF Data, Direction of Trade Statistics, <https://data.imf.org/>

³ UNCTAD World Investment Report 2020, p. 242

⁴ IMF World Economic Outlook Update, June 2020, p. 1

<https://www.imf.org/en/Publications/WEO/Issues/2020/06/24/WEOUpdateJune2020>

⁵ https://www.wto.org/english/news_e/pres20_e/pr855_e.htm

⁶ FDI flows continued their slide in 2018 (falling by 13%) and in 2017 (falling by 23%) (UNCTAD World Investment Report 2019, p. 2)

⁷ UNCTAD World Investment Report 2020, p. 2

investment framework according to the policies described below.

2. Trade and Investment Policies under COVID-19

(1) Recover and Maintain Free Cross-border Movement of Natural Persons, Goods, Capital, Services, etc.

It is urgent for each country to achieve the free movement of natural persons, goods, capital, services, etc., and in particular, to secure the movement of people who are engaged in the transfer of essential goods and the delivery of services that are indispensable for socioeconomic activities, provided that such free movement is compatible with preventing COVID-19 infection. Considering the possibility of second and third waves of infection, an international consensus is urgently required on the groups of natural persons who should be exempted from the immigration restrictions and quarantine/self-isolation measures, and the procedures to be followed.

(2) Addressing Digitalization

The establishment of international rules on digitalization, especially the realization of Data Free Flow with Trust (DFFT) has been a top priority prior to the spread of COVID-19. DFFT is indispensable for the international expansion of “Society 5.0 for SDGs,” as advocated by Keidanren, which aims at fusing cutting-edge technologies with human imagination and creativity, and thereby achieving the United Nations Sustainable Development Goals (SDGs) adopted in 2015. In the context of COVID-19, international data exchange among researchers is needed for the development of medicine and vaccines. It is also essential to consider how personal data could be protected during such cross-border data flow.

(3) Contribution to Solving Environmental Issues

The spread of COVID-19 taught us the lesson that we should begrudge no investment aimed at preventing infection and enhancing the capacity to respond before it spreads. However, infectious diseases are not the only threat to human-beings: there is also a growing sense of crisis over environmental problems such as climate change.

To fulfill our responsibility to future generations, it is necessary to develop policies that enable trade and investment to contribute to solving environmental problems.

(4) Inclusion of Developing Countries

The pandemic has hit vulnerable parts of society, including the low-income group and areas with inadequate medical systems. The impact on developing countries in particular should not be overlooked. It is necessary to create a framework that embraces genuinely developing countries with a stronger awareness than ever that “no one should be left behind”, as stated in the SDGs.

(5) Maintaining a Multilateral, Free, Transparent, and Open Framework

COVID-19 has made the environment for trade and investment increasingly unclear, with protectionism and national particularism becoming evident in some countries. It is therefore important to get back to the basic philosophy of maintaining a multilateral, free, transparent, and open framework based on fair rules. It is essential to carry out necessary reforms so that the World Trade Organization (WTO), the core of the multilateral framework, can function as it should.

(6) Complementary Bilateral/Regional Frameworks

In order to build a resilient international trade and investment framework, it is essential for each country to pursue bilateral and regional economic partnership agreements and investment-related treaties to complement the WTO-centered multilateral system. In a situation where a company forms a global supply chain through FDI, it is not only agreements involving the company’s own country that are important, but also agreements between third countries and regions⁸.

⁸ For example, the UK’s withdrawal from the EU makes the UK-Japan Economic Partnership Agreement (EPA) necessary. In addition, given the large number of Japanese companies operating in the EU, the UK-EU Agreement needs to be implemented. Even under this pandemic, negotiations should be conducted without delay, and both FTAs need to be concluded before the end of the Brexit transition period at the end of this year and entered into force by no later than 1 January 2022.

II. Revitalizing the Global Economy through Facilitating Trade and Investment

1. Trade

(1) Recover and Maintain International Logistics Functions

Recovering and maintaining the international logistics functions that are restricted under COVID-19 is urgent. To this end, it is necessary for each country to respond in a coordinated manner based on common guidelines regarding the movement of natural persons. For example, as described in the “Joint ICAO-ILO-IMO Statement on Key Worker Designation”⁹, personnel in charge of transporting essential goods (seafarers, marine personnel, aviation/air cargo supply chain personnel, etc.) should be designated as “key workers.” Cross-border movement of the “key workers” for the purpose of crew changes and repatriation must be facilitated by relaxing the requirement for self-isolation measures, provided that this is compatible with prevention of the spread of infection.

Humanitarian considerations are particularly important for seafarers in order to prevent them from remaining onboard continuously for a long period of time. Also, international medical provision, including medical treatment undertaken by coastal countries, should be established to ensure prompt medical care for seafarers infected while at sea.

Non-infection certificates and immune passports should be promptly issued not only to “key workers”, but also to other natural persons necessary for the resumption of economic and social activities. To this end, it is essential for each government to work in cooperation with the private sector to improve administrative capabilities, including the development of a system that can smoothly and extensively implement PCR and antibody tests, and the digitalization of procedures necessary for immigration and travel. Providing assistance to developing countries in this area is also vital.

As a result of the lockdowns to prevent the spread of COVID-19 , the shortage of personnel involved in customs clearance work is now significant. To make up for this, trade should be facilitated by further simplifying and digitalizing customs procedures.

⁹ https://www.ilo.org/sector/Resources/WCMS_745870/lang--en/index.htm

The WTO Trade Facilitation Agreement, which entered into force in February 2017, stipulates that electronic copies of supporting documents be accepted with a view to decreasing and simplifying import, export, and transit documentation requirements (Article 10 1.1 and 2.1). WTO Members are advised to take steps to implement the Agreement¹⁰. Meanwhile, capacity building in developing countries to promote digitalization in customs procedures is essential.

(2) Avoid Excessive Export Restrictions and Achieve WTO Compatibility

i) Notification to the WTO

To meet the growing demand for medical supplies such as protective clothing, face masks, and ventilators associated with the spread of COVID-19, more than 80 countries have implemented export restrictions and export licensing for these items¹¹. Some countries have also introduced quantitative quotas for food exports¹². Transparency of these measures should first be achieved by notifying the WTO of the items covered and the period for which the restrictions will be implemented¹³.

The requirements for notifying the WTO should also be established as soon as possible, assuming a second wave of infection. For example, if such notification is delayed, reasons for the delay and the anticipated time-frame for notification should clearly be explained. Application of penalties could be considered if a notification is not submitted by a certain deadline. In addition, the monitoring function of each WTO Council and Committee should be strengthened¹⁴.

ii) Prompt Lifting of Export Restrictions

¹⁰ Japan announced the Smart Customs Initiative 2020 in June 2020 as a mid-term vision. The Initiative aims at automating customs inspection, introducing AI for big-data analysis, utilizing RPA to enhance efficiency of routine tasks, etc.

¹¹ Countries include Argentina, Australia, Brazil, the European Union, India, Korea, and the United States.

https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm

¹² Countries include Russia, Thailand, and Vietnam.

https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm

¹³ 216 items involving 83 Members have been notified to the WTO as of 3 July, 2020.

¹⁴ Keidanren, *Call for the Realization of Trade Policies for the New Era - Focus on Reform of the World Trade Organization (WTO)*-, January 22, 2019, p. 10
http://www.keidanren.or.jp/en/policy/2019/004_proposal.pdf

As noted in the Statement on COVID-19 and the Multilateral Trading System by Ministers Responsible for the WTO (5 May, 2020), “trade restrictive emergency measures aimed at protecting health, if deemed necessary, shall be targeted, proportionate, transparent and temporary, not create unnecessary barriers to trade or disruption to global supply chains, and be consistent with WTO rules¹⁵.” Actually, the General Agreement on Tariffs and Trade (GATT) Article 11.2 (a) allows only export prohibitions or restrictions *temporarily* applied to prevent or relieve critical shortages of products essential to the exporting party. Long-term measures are not justified under this Article¹⁶. Therefore, these measures should be lifted as soon as possible.

Strong justification is needed especially for export restrictions on food, because unlike medical supplies, food is not directly related to tackling COVID-19. It is also necessary to consider consistency with Article 12.1 (a) of the WTO Agreement on Agriculture, which provides that any Member instituting an export prohibition or restriction shall give due consideration to the effects of such measure on importing Members’ food security.

If there is no choice but to institute long-term export restrictions in order to address chronic shortages of medical supplies, etc., those restrictions should meet all the requirements to be justified as measures necessary to protect human, animal, or plant life or health as provided under GATT Article 20 (b)¹⁷.

iii) Sharing Emergency Supplies through Bilateral/Regional Frameworks

Assuming that the battle against COVID-19 could be prolonged, it is also important to establish a scheme to share and exchange emergency supplies internationally. For example, Article 8.7 of the Japan-Australia Economic Partnership Agreement (EPA) provides that the parties shall, in accordance with their respective laws and regulations

¹⁵ See para. 1.2 of the Statement

¹⁶ *China- Measures Related to the Exportation of Various Raw Materials*, Reports of the Panel, WT/DS394/R, WT/DS395/R, WT/DS398/R, 5 July, 2011, paras. 7.346-7.349

¹⁷ A measure would not be found necessary unless it is apt to make a material contribution to the achievement of its objective. Also, it would not be justified when a less trade-restrictive alternative is reasonably available. Furthermore, a measure must not be applied in a manner that constitutes “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” as provided in the Chapeau of GATT Article 20. See *European Communities- Measures Prohibiting the Importation and Marketing of Seal Products*, Reports of the Panel, WT/DS400/R, WT/DS401/R, 25 November, 2013, paras. 7.631-7.650

and subject to their available resources, promote cooperation to strengthen stable and mutually beneficial relationships in the energy and mineral resources sector. A scheme for international cooperation could be launched by adopting an analogous provision for medical supplies and food. In addition, Article 7.3 of the Japan-Australia EPA stipulates that each party shall endeavor not to introduce or maintain any prohibitions or restrictions on the exportation of any essential food to the other party as set out in GATT Article 11.2 (a). Meanwhile, Article 2.24 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) requires export restriction measures to be terminated within six months. It is anticipated that similar provisions would be introduced in future EPAs.

(3) Elimination of Protectionist Tariffs

As economic activity shrinks and domestic demand declines due to the spread of COVID-19, some countries have raised tariffs on steel and other products to protect domestic industries. Raising tariffs within the scope of the bound tariff rate is not immediately incompatible with WTO rules. However, to prevent a chain reaction of protectionist measures from spreading as a result of COVID-19, and to maintain and expand free and open trade, such measures must be avoided.

(4) Strengthening Discipline on Market Distorting Subsidies

Subsidizing specific industries under the guise of economic stimulus measures could result in distorting the market. In this regard, Japan, the United States, and the European Union have agreed upon strengthening existing WTO rules on industrial subsidies. The current list of prohibited subsidies provided for in Article 3.1 of the Agreement on Subsidies and Countervailing Measures should be revised to include unlimited guarantees, etc. Also, a reversal of the burden of proof should be considered for certain types of subsidies so that the subsidizing Member must demonstrate that there are no serious negative trade or capacity effects¹⁸.

¹⁸ Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January, 2020, paras. 1 & 2

(5) Disseminating IT Products

As technology progresses, the list of goods in the Information Technology Agreement (ITA), which provides for the elimination of tariffs on IT products, should be continuously updated, and the member countries should be increased. In particular, consideration should be given to the inclusion of medical devices based on the lessons learned from the spread of COVID-19. It should be noted that the ITA plays a significant role in maintaining and continuing negotiations on a plurilateral basis, given the difficulty of reaching an agreement among all WTO Members.

2. Foreign Direct Investment

(1) Investment Facilitation and Liberalization

FDI not only expands business opportunities for investors, but also brings benefits to the country receiving investment, such as the introduction of innovative technologies and business models, while it could also trigger revitalization of the world economy. In particular, FDI is likely to contribute through job creation and technology transfer to the economic recovery of developing countries seriously affected by the coronavirus crisis.

Currently, interested Members are participating in the WTO Dialogue on Investment Facilitation, focusing on issues such as improving regulatory transparency and predictability, streamlining and speeding up administrative procedures, enhancing international cooperation, resolving investors' grievances, and establishing an ombudsperson system.¹⁹ As stated in the B20 Tokyo Summit Joint Recommendations, the business community supports this initiative²⁰.

Current investment discussions under the WTO, however, focus only on facilitation, and do not cover issues that form the basis of investment-related agreements, such as market access, prohibition of performance requirements, and investor-state dispute

¹⁹ https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm

²⁰ *B20 Tokyo Summit Joint Recommendations "Society 5.0 for SDGs"* (15 March, 2019), p. 12
https://www.keidanren.or.jp/en/policy/2019/020_Recommendations.pdf

settlement (ISDS). Therefore, in addition to investment facilitation under the WTO, it remains important to form high-level investment rules in terms of both investment liberalization and protection by concluding bilateral or multilateral investment agreements. Granting national treatment in both the pre-investment stage (abolition of restrictions on foreign investment and entry) and the post-investment stage (elimination of restrictions on sales, liquidation, withdrawal, etc.) in major manufacturing, service and infrastructure sectors would provide a stable institutional basis for revitalizing FDI in the sluggish global economy²¹. Furthermore, the liberalization of investment such as cross-border R&D investment in the medical sector (vaccine development, etc.) should be promoted as a means of preventing the spread of COVID-19.

(2) Protection of Intellectual Property Rights

In promoting FDI, it is important to protect the intellectual property rights of investors. This issue has already been discussed at the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union²², and it is anticipated that the discussion will lead to rule-making under the WTO.

(3) Appropriate Investment Control

While stepping up efforts to establish an open investment market, it is important to identify technologies that are critical in terms of national security and implement appropriate investment controls to prevent their outflow. In Japan, for example, the amended Foreign Exchange and Foreign Trade Control Law came into effect on May 8 2020, revising from 10% to 1% the threshold at which foreign investors are required to file prior notification when acquiring shares of listed companies in designated industries.

²¹ Keidanren, *Policy Proposal on Investment Treaties*, October 15, 2019, p. 4
https://www.keidanren.or.jp/en/policy/2019/082_proposal.pdf

²² The ministers discussed possible elements of core disciplines that aim to prevent forced technology transfer practices of third countries and the necessity of reaching out to and building consensus with other WTO Members on the need to address forced technology transfer issues. They also discussed their commitment to effective means to stop harmful forced technology transfer policies and practices, including through export controls, investment review for national security purposes, their respective enforcement tools, and the development of new rules. See Joint Statement, *supra*, footnote 18

Also, companies involved in advanced medical devices, including pharmaceuticals and ventilators, were added to the list of industries subject to prior notification²³. The European Commission has also issued guidelines for screening FDI in companies and critical assets located in the European Union, including those in the fields of health, medical research, biotechnology, and infrastructures deemed essential for security and public order. The guidelines call on member states to make full use of existing FDI screening mechanisms and take fully into account the risks to critical health infrastructures²⁴. It is essential that like-minded countries collaborate in this manner to prevent the outflow of technology critical to national security.

3. Cross-border Data Flow

(1) Realization of the WTO Electronic Commerce Agreement

Discussions on concluding the Electronic Commerce Agreement are underway at the WTO²⁵ as one of the intergovernmental efforts to realize Data Free Flow with Trust (DFFT).

The Agreement should provide for free cross-border data flow, prohibition of various measures requiring data localization, prohibition of requirements for disclosure of source codes, etc., and non-discriminatory treatment of digital products, with reference to existing EPAs and other disciplines²⁶. In view of the fact that the absence of tariff barriers in the digital sector has served as the basis for the rapid development of today's digital economy, a permanent moratorium on customs duties on electronic transmissions is essential.

(2) Personal Data Protection

Free cross-border data flow goes hand in hand with personal data protection.

²³ Effective from July 15, 2020

²⁴ Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 25, 3, 2020

²⁵ 84 countries are participating in the negotiation, including the United States, China, the EU, and many other developing countries. India and South Africa are not participating.

²⁶ CPTPP Chapter 14

Appropriate measures are particularly needed in fields such as medical care and electronic payments where personal data needs to be handled with utmost caution. In realizing DFFT, the future WTO scheme should be complemented by bilateral/regional regulatory cooperation, such as promotion of mutual recognition taking into account the level of personal data protection under each domestic law.

i) Mutual Recognition Based on Adequacy

The EU protects personal data as a human right under the General Data Protection Regulation (GDPR), while Japan has enacted the Act on the Protection of Personal Information. Despite the difference between the two legislations in terms of the legally protected interests, free flow of personal data has been established between Japan and the EU under the mutual recognition that both legal schemes are sufficient to ensure personal data protection. Such efforts based on reciprocity should be accumulated.

ii) PTAs: Preferential Trade Agreements

It is important to develop high-level rules among interested countries, such as the e-commerce chapter of CPTPP, and to implement them in accordance with the domestic laws of each participating country.

iii) Interoperability of International Data Transfer Mechanisms

Ensuring the interoperability of different international data transfer mechanisms, such as the mutual recognition between APEC's Cross Border Privacy Rules (CBPR) and the EU's GDPR, is also effective in striking a balance between personal data protection and free data flow covering a wide range of regions.

Capacity building plays an important role in legislating personal data protection in developing countries. Provided that robust information management measures are implemented, it is also necessary to establish international standards to enable the distribution of personal data to third parties, such as national institutions, without the consent of individuals, when it is particularly necessary for public-interest purposes²⁷, such as preventing the spread of COVID-19.

²⁷ In Japan, it is stipulated in Article 16 (Paragraph 3) and Article 23 (Paragraph 1) of the Act on the Protection of Personal Information.

4. Trade and the Environment

Taking urgent action to combat climate change and its impacts is an important pillar of the SDGs²⁸ and a top priority in building a sustainable economy. Free, open trade and investment are also required to contribute to tackling climate change. In this context, the Environmental Goods Agreement (EGA) aiming at dissemination of environment- and climate-friendly goods through tariff elimination would play a vital role. Negotiations on the EGA, started in July 2014 among the interested Members under the WTO scheme, should be resumed.

At the same time, it is important that multilateral efforts are complemented by bilateral and regional agreements. For example, the Japan-EU EPA explicitly states that both parties recognize the importance of strengthening their economic, trade, and investment relations, in accordance with the objective of sustainable development in the economic, social, and environmental dimensions. It also refers to the facilitation of trade and investment in goods and services of particular relevance to the environment and climate change mitigation, as well as the encouragement of corporate social responsibility to promote voluntary efforts by the private sector (Article 16.5). Based on these provisions, it would be beneficial for the public and private sectors to promote efforts to disseminate environmental goods.

Meanwhile, measures aimed at tackling climate change should not result in violations of the WTO Agreement or protectionist/trade-distorting effects. Nor should they aggravate the stagnation of global trade due to the spread of COVID-19. In this regard, careful consideration should be given to a Carbon Border Adjustment Mechanism, whereby a carbon tax rate or similar tariff is added to products imported from countries with insufficient regulations on greenhouse gas emissions.

²⁸ SDGs Goal No.13

III. Strengthening Multilateral Frameworks through WTO Reform

1. Flexible Rule-making

As mentioned above, multilateral frameworks, with the WTO at the core, have a significant role to play in rectifying protectionism and national particularism, as well as in forming a free and open international economic order. In particular, the WTO needs to fully exercise its functions of rule-making, implementation, monitoring, and dispute settlement in order to reconstruct the world economy while preventing the spread of COVID-19.

However, it is difficult to form a consensus among the 164 WTO Members due to their various conflicting views. While the ultimate goal is to make decisions based on consensus, therefore, we should seek ways to establish rules among interested Members, as is the case in the ongoing discussion on the WTO Electronic Commerce Agreement. The approach of forming a critical mass by gradually increasing the number of participating Members after reaching plurilateral or open-plurilateral agreement among interested Members could also be effective in strengthening disciplines concerning market-distorting industrial subsidies and forced technology transfers.

Consideration should also be given to the possibility of establishing trade and investment standards through steadily implementing bilateral/regional EPAs, expanding the number of participating parties, and thereby elevating the EPA disciplines to the level of global rules by incorporating them into the WTO Agreements²⁹. For example, CPTPP member countries should work together to reflect the contents of the CPTPP's e-commerce chapter in the rule-making discussion on e-commerce currently underway at the WTO. Another idea would be to resume discussions on investment liberalization³⁰ among interested Members at the WTO and gradually increase the number of

²⁹ Keidanren has proposed that the WTO Secretariat should conduct a comparison and analysis of the disciplines under the various EPAs/FTAs and other agreements, and the relevant committees should conduct research of possible draft provisions. Keidanren "Call for the Realization of Trade Policies for the New Era" (January 2019) <https://www.keidanren.or.jp/en/policy/2019/004.html>

³⁰ Japan and other developed countries promote the expansion of the WTO's scope from trade to investment. As stated in the Doha Ministerial Declaration (2001), "we agree that negotiations will take place after the Fifth Session of the Ministerial Conference (MC5, Cancun, Mexico, 2003) on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations." However, due to opposition from developing countries, it did not become an official agenda item at the Doha Round.

participating Members based on the Japan-EU EPA chapter on trade in services and investment liberalization and the CPTPP chapter on investment. This will pave the way for the WTO to take the initiative in future, not only in trade but also in investment.

2. Review of Special and Differential Treatment for Developing Countries

The special and differential treatment (S&D), currently accorded to developing Members of the WTO, needs to be reviewed in order to include genuinely developing Members in the global trade and investment framework. Some Members that have achieved rapid economic growth since the launch of the WTO and are no longer regarded as developing countries still enjoy the S&D and are not undertaking the obligations they are supposed to fulfil. Since developing countries are greatly affected by the spread of COVID-19, if this situation is left unaddressed, genuinely developing countries will be placed at a competitive disadvantage to countries that would otherwise have to graduate from developing country status. In other words, the S&D originally intended to alleviate the “North-South problem” would cause a “South-South problem.”

Each WTO Member should fulfill the obligations commensurate with its economic size and competitiveness. In fact, Members such as Brazil, Costa Rica, Korea, Singapore, and Chinese Taipei have graduated from the status of developing countries in recent years, and it is essential to accelerate such moves.

3. Immediate Restoration of Dispute Settlement Functions

WTO dispute settlement has played an important role as the “last resort” to ensure the implementation of WTO rules. However, since December 2019, dispute settlement has ceased to function because the necessary number of Appellate Body Members have not been appointed. Under COVID-19, protectionist measures that may violate WTO Agreements, such as export restrictions on certain goods and raising of tariffs on the grounds of domestic economic stagnation, are likely to be referred to WTO dispute settlement. Therefore, the paralysis of the Appellate Body’s functions may become an even more serious issue.

As an interim measure to address this, the EU is promoting arbitration under Article

25 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)³¹. The European Commission is also proposing an amendment to the EU enforcement regulation to enable the EU to impose countermeasures in situations where the other party refuses to settle the dispute by appealing to a non-functioning Appellate Body (appealing into the void)³². However, these should be regarded merely as interim measures because they do not necessarily lead to the fundamental solution of the Appellate Body issue. Countermeasures, in particular, might not be explicitly incompatible with the DSU. However, prudence is required when enacting countermeasures in light of Article 23 (1) of the DSU, which stipulates that Members shall have recourse to, and abide by, the rules and procedures of the DSU when they seek redress for violation of obligations under WTO Agreements.

It is assumed that the United States has been blocking the appointment of Appellate Body Members because it regards the Appellate Body as overstepping the authority and procedures entrusted to it by member states pursuant to the DSU. For example, the US perception of the problem includes the tendency of the Appellate Body Reports to issue advisory opinions or *obiter dicta* not necessary to resolve disputes and to reinterpret facts and domestic law, as well as the tendency for the reports to be treated as precedent³³. In response, a proposal to establish a mechanism for regular dialogue between the Appellate Body and the General Council is under discussion. If the Appellate Body Reports are subject to review by the Members, the Appellate Body's overreach and judicial activism could be dispelled to some extent. Taking the above proposal into account, concrete discussions should be advanced among the Members with a view to immediately restoring the functions of the Appellate Body.

³¹ The interim arrangement proposed by the EU would enable arbitration under Article 25 of the DSU to be conducted in a manner as close to the proceedings of the Appellate Body as possible, instead of appealing to the Appellate Body. It is defined as an "optional procedure" to be used when the EU and the other country agree to use the measure by a fixed deadline. At the World Economic Forum Annual Meeting in Davos in January 2020, 17 countries, including Australia, Brazil, Canada, China, Colombia, Korea, and New Zealand, endorsed the measure.

³² In December 2019, the European Commission proposed an amendment to the EU enforcement regulation to allow the EU to impose its own countermeasures in situations where a partner does not accept the WTO dispute settlement panel. Countermeasures can take the form of increased custom duties, quantitative restrictions, or public procurement restrictions.

³³ USTR, 2018 Trade Policy Agenda (February 28, 2018), p. 24-28

IV. Conclusion

In order to rehabilitate and revitalize the global economy through expanded trade and investment, it is necessary to establish a framework to put the brakes on protectionism and national particularism, which have been accelerated by the spread of COVID-19. At the same time, there is an urgent need to establish a framework to deal with rapidly advancing digitalization and environmental issues. Meanwhile, free, open trade and investment are facing a crisis, as various forms of rule-making stagnated and the WTO's dispute settlement function was disabled prior to the pandemic. Under these circumstances, it is not easy to formulate new rules and implement reform of the WTO, including the dispute settlement system. Therefore, it is necessary to find mutual interests among the countries that share common values such as freedom, democracy, and the rule of law, and to propose concrete measures. This is essential for broadly embracing countries and regions at different stages of economic development and with different political systems.

Under the tripartite partnership among Japan, the United States, and the EU, which share common values, Japan has been promoting discussions on industrial subsidies and regulations on technology transfer, and has contributed to the creation of a multilateral framework under the WTO, including taking the initiative in formulating the Electronic Commerce Agreement. At the same time, Japan aims to create a multi-layered and effective framework by continuing to focus on the creation of bilateral/regional rules, such as realization of the Regional Comprehensive Economic Partnership for East Asia (RCEP) among 16 countries, the expansion of CPTPP, and the establishment of an economic partnership between Japan and the United Kingdom. At this time when the global economy has been hit hard by COVID-19, it is necessary to further strengthen such efforts to establish an inclusive, resilient trade and investment framework and to achieve concrete rule-making.