

# *Chapter 1*

# CHINA

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# Uniform Administration, Transparency, and Judicial Review

## Commitments upon Accession

Since its accession to the WTO, China now has obligations under the provisions of Article X of the GATT and Article VI of GATS to administer all measures in a reasonable, objective and impartial manner. China has specifically committed in the Protocol to: (1) apply the WTO Agreement to the entire customs territory of China; (2) observe its WTO obligations not only within the central government but also in local governments; (3) apply and administer the laws, regulations and measures covering trade in goods and services, TRIPS and management of foreign exchange in a consistent, transparent, and reasonable way; (4) implement only such laws, regulations, and measures which have been published and can be easily accessed by other WTO member countries; (5) have all administrative actions affecting trade subject to review by a judicial body independent of the agency entrusted with administrative enforcement; and (6) establish a mechanism for the petitioning of complaints in cases of inconsistent application of trade-related systems and regular official publications with an inquiry point to ensure transparency.

## Status of Implementation and Points to Be Rectified

### *1) Transparency*

#### <Status of Implementation>

Previously, many laws and regulations had been unpublished and even those that were published, particularly regulations at the local level, were difficult to obtain. Moreover, in many cases, the time from promulgation to implementation was so short that companies could not adequately prepare to respond to the new systems.

In recent years, China has made considerable efforts to improve the transparency of trade-related policies and measures, such as: (i) the active disclosure of laws and regulations through the Internet and the Official Gazette; (ii) the establishment of “the World Organization Notice Enquiry Center (World Trade Organization Notification Enquiry Center)” at the Ministry of Commerce; and (iii) the promulgation of Orders by the State Council in December 2001, to introduce a comment period and to allow the holding of a public hearing prior to the actual promulgation of laws and orders.

On the legislative front, the Government Information Disclosure Ordinance (State Council) came into force in May 2008. This Ordinance stipulates that certain information – including information on the establishment of organizations within government institutions and their functions, administrative processes, etc. – should be made public through the Official Gazette, government websites or other means easily accessible to the general public. Moreover, some central government agencies and local governments (provinces and cities) have disclosed financial budget information. On the judicial level, in December 2009, the Supreme People’s Court promulgated the “Notice of Six Provisions on Judicial Transparency” and the “Certain Provisions on Acceptance by the People’s Courts of Supervision by the Media and Public Opinion,”

thereby requesting that courts at levels make public the prosecution process, court proceedings, executions, public hearings, records and proceeding-related clerical work, and proactively accept supervision by media opinions.

### **<Problems under international rules>**

The progress seen in public disclosure since the Government Information Disclosure Ordinance went into effect has been inadequate, however, due to the absence of an administrative system for the dissemination of administrative instructions and such and to claims by local city governments that the information requested either qualifies as state secrets or is not available. Furthermore, even though public comments are solicited, other issues are observed, such as the fact that the period for hearing opinions is inadequate or the existence of a public hearing is not widely known. If these issues relate to matters falling under the jurisdiction of the WTO Agreements, it is possible that they conflict with the provisions of GATT Article X and GATS Article VI, which provide for securing objectivity and impartiality of the measure, and Article 2 of the Accession Protocol, which provides for ensuring transparency.

### ***Short Notice of Changes in Export Value-Added Tax Refund Rate***

China has frequently adjusted the rate of the value-added tax refund at the time of exports. In view of the financial crisis, in particular, China has moved to raise its VAT export refund rates, promulgating and effectuating regulations on very short notice; the decree promulgated on November 17, 2008 on export refund rates for 3,770 goods was promptly put into force on December 1, and the “Notice on Increases in Export Refund Rates for Certain Machinery and Electrical Products by the Ministry of Finance/State Tax Bureau” promulgated on December 29 became effective on January 1, 2009.

In 2009, China also raised its VAT export refund rates for products four times. The period between the promulgation and coming into effect of these laws and regulations is short, four days at most. In one case, the effective date was earlier than the date of promulgation -- the Ministry of Finance announced, on February 5, 2009, that it would be raising the VAT export refund rate for textile products and clothing from 14% to 15%, while making the rate applicable retroactive to February 1, 2009. Under such circumstances, companies cannot respond to policy changes well in advance. With regard to the abolition of the export value-added tax refund for some goods, which entered into force on July 15, 2010, related laws and regulations were promulgated on June 22; the period between the promulgation and coming into effect of these laws and regulations was up to 20 days. The situation is better than before. However, the period between promulgation and coming into effect still is not long enough.

As such sudden changes in the regulations and measures undermine business predictability and could produce a serious impact on corporate management; there is growing awareness of this issue as an investment risk. Japan raised this issue in the Japan-China Economic Partnership Consultations in December 2006 and October 2007. Japan believes that China's economic and trade policies should be conducted in ways to secure transparency and predictability.

In addition, because reimbursement of indirect taxes is not deemed to be a subsidy

under the Agreement on Subsidies and Countervailing Measures (ASCM), a refund of the value-added tax does not formally violate the ASCM. Because the refund rate has frequently been adjusted as described above, however, it could be argued that in actuality the value-added tax is arbitrarily controlled as part of industrial policies. It is therefore not consistent with the spirit of the ASCM Agreement, or the destination principle (which provides that the destination country, where the final consumers reside, has the right to tax), and can possibly be challenged under the ASCM as being in reality export subsidies.

## ***2) Uniform Administration***

### **<Status of Implementation>**

Considering the business of the foreign companies, China needs to develop laws and orders that are consistent between the Ministries, Committees and Governments of central, provincial and local levels. Even under consistent laws and orders, foreign-owned companies may find barriers against inter-regional business development due to discretion in the application of laws and orders or inconsistency in their interpretation. Moreover, due to the greater autonomy of local government in China, foreign-owned companies often face regulations and costs imposed only in a certain locality.

In recent years, China has instituted “vertical management” reforms in important sectors like customs, tax services, and finance, as well as sectors where the interests of the central and local governments tend to be at odds with one another. The country has also improved the inefficiency of administration caused by the lack of administrative consistency at each level to a certain extent. What is more, efforts at the local level towards introducing “vertical management” have been noted in the environmental conservation sector. The central government and some local governments have undertaken to simplify/merge government institutions.

“Vertical management” has made little to no progress, however, in relations between the central and local governments. Indeed, the vertical control system for foods and medicines, for instance, has been abolished below the ministerial level in line with the wishes expressed by the central government to give local governments greater responsibility for the oversight of foods and medicines. In addition, there are still cases of non-uniform administration within the central government. For example, the Ministry of Culture and the General Administration of Press and Publication conflicted over the scope of permission and the right to punish. Specifically, when the General Administration of Press and Publication decided to punish an operating company with regard to the authority of supervision and administration of online games, the Ministry of Culture gave permission for operation, deeming the decision made by the General Administration of Press and Publication to be an act beyond its authority. Thereafter, the General Administration of Press and Publication promulgated eight administrative measures regarding online games. They required examination by and permission from the General Administration of Press and Publication in order to operate domestically produced online games on the Internet. On the other hand, the Ministry of Culture promulgated the “Provisional Online Game Administration Method” (June 2010), which provided that examination by, permission from, and registration with the Ministry of

Culture shall be required for operating imported and domestically produced online games. Therefore, conflict between them has yet to be resolved. Therefore, domestic and foreign online games are placed under duplicate examinations, permissions, and administrations, causing burdens in terms of both time and costs.

#### **<Problems under international rules>**

As described above, inconsistent interpretation/operation exists between the central government and local governments, and this may be a violation of Item 2, Article 2 (A) of the Accession Protocol, which provides for uniform application and operation of laws, regulations, and measures between the central government and local governments.

### **3) *Judicial Review***

#### **<Status of Implementation>**

Some improvement was seen in the judicial review systems, as China incorporated a rule designating that administrative decisions could be the subject of judicial review (for example “Anti-Dumping Regulation” and “Patent Law” *etc.*) and established the Chinese International Economy and Trade Arbitration Committee (CIETAC) as a court to arbitrate any disputes over commerce. In 2007 the CIETAC promulgated the enforcement order of Law on Administrative Reconsideration, which provided the protection of vested interests, aiming for the improvement of the judicial review system. The number of administrative lawsuits has increased in recent years and, as evidenced by a judicial interpretation handed down by the Supreme People’s Court in January 2008 prescribing in detail the jurisdiction for administrative lawsuits and addressing the issue of lawsuit withdrawal, institutional improvements have been made.

However, WTO member countries expressed their strong concern at the Accession Working Party on the neutrality and precision of Chinese legal judgments, as well as the sound and steady execution of judgments and rulings. For example, in implementing the Administrative Procedure Law (1990) of China, local courts for various reasons often refuse to accept administrative cases that they should accept. To deal with this problem, the Supreme People’s Court issued the “Opinions on Protection of the Right of Action of Parties to Administrative Litigation” in November 2009, thereby strictly prohibiting courts of all levels from restricting the scope of cases they accept and from setting conditions for acceptance in violation of the law. However, the authority to refuse to accept a case still is restricted by the “Supreme People’s Court’s Provisions on Several Issues Concerning the Proceedings of Administrative Permission Cases,” which sets out where the court should accept administrative litigation. Continued improvement is desired with regard to judicial review in China.

#### **<Problems under international rules>**

Undue refusal to accept administrative cases by courts as described above may be a violation of Item 2, Article 3 (D) of the Accession Protocol, which ensures the right to appeal administrative decisions to a court.



## EXPORT RESTRICTIONS

### *1) Imposition of Export Tax*

#### **<Outline of the measure>**

On November 1, 2006, China put into effect a table of provisional export tariff-rate adjustments. Of the 110 items listed in the table, only 13 (including but not limited to ferromanganese, ferrochrome, crude steel, anode copper for electrolytic refining and copper and aluminum scrap) are included in Annex 6 of the WTO Accession Protocol, which is a list of products exempted from the ban on taxation on exports under Item 3, Article 11 of the Protocol. Export tariffs have also been imposed on steel products, as well as rare earths, tungsten and molybdenum, coal, chemical fertilizers, and raw materials used in their production; and export restrictions have been strengthened from 2007 onward. Export tariffs are newly imposed on Strip Cast Alloys from 2012.

The Appellate Body decision regarding China's measures relating to nine types of raw materials (DS394, 395, 398, for which the United States, the EU and Mexico requested the establishment of a panel in 2009; see (4) of 4. "Major Cases", Chapter 3 in Part II for details), released at the end of January 2012, concluded that imposition of export taxes and export restrictions by China violated the WTO Agreements. In response to the recommendations in this report, on January 1, 2013 (the time limit for complying with the recommendations was December 31, 2012) China eliminated export taxes on seven raw materials (bauxite, coke, fluorite, magnesium, manganese, silicon metal and zinc) and adjusted the tax rate on yellow phosphorus to fall within the range set forth in the Accession Protocol.

In addition, the Appellate Body in DS431, 432 and 433 (China's measures relating to the export restrictions on three items including rare earths: see (5) of 4. "Major Cases" in Chapter 3, Part II for details) issued a report on August 7, 2014, concluding that China's export restriction measures (export tax and quantitative export restrictions, etc.) on rare earths, tungsten, and molybdenum violate the WTO Agreements. In response to this report, China made an announcement on April 23, 2015 that it would lift export taxes on rare earths, tungsten, and molybdenum on May 1; it did so on May 1 as announced.

#### **<Problems under international rules>**

Under Item 3, Article 11 of its WTO Accession Protocol, China committed itself to abolishing all taxes and surcharges imposed on exports except in the case of taxation on products listed in Annex 6 or where taxation is allowed under GATT Article VIII. Therefore, if China imposes export taxes on products other than those listed products, such measures may be in violation of the commitment of the WTO Accession Protocol. For example, since products such as coal and nonferrous metals on which provisional export tariffs were imposed are not included in Annex 6, the measures of the Chinese Government violate the Accession Protocol. (See Section II, Chapter 3 (Reference))



“Export Restrictions” with regard to other laws pertaining to export restrictions.)

**Figure 1-1-1 Products Subject to Export Tax at China's Accession and Tax Rates**

Principal products	Export tariff rate
Young freshwater eels	20%
Bone meal	40%
Lead	30%
Zinc and zinc products	30%
Tin	50%
Tungsten	20%
Antimony	20%
Alloy pig iron and non-alloy pig iron	20%
Ferromanganese	20%
Ferrosilicon	25%
Ferrochrome	40%
Scrap	40%
Copper products	30%
Nickel products	40%
Aluminum products	20%

Total: 84 products

\* Prepared by the Ministry of Economy, Trade and Industry using Annex 6 to China's Protocol on Accession. Details of products are listed on the basis of their 7-digit HS number.

**<Figure 1-1-2> New Changes in the 2010 Export Tariff Taxation Measures**

No.	Name of Policy	Implementation Date	Principal Contents
1	“2010 Tariff Implementation Plan” (Tariff Regulations Committee, State Council)	Jan. 1, 2010	<p>(i) Maintained the export tariff rates set in the “Export Tariff Regulations”</p> <p>(ii) Continued to impose provisional export tariffs on certain export goods, such as young freshwater eels, but adjusted provisional export tariff rates on certain goods as below</p> <ul style="list-style-type: none"> <li>• Abolished provisional export tariffs on all food goods, aluminum sand ores and ore concentrates, sulfuric acids and fuming sulfuric acids, brown corundum, and other potassium nitrates</li> <li>• Lowered provisional export tariff rates on goods containing hydrofluoric acid, certain raw materials for chemical fertilizers, molybdenum powder and compounds, tungsten compounds, metallic fluorides, and metallic indium</li> <li>• Imposed 2010 provisional export tariffs on phosphoric acids, ammonia and ammonia water, and certain raw materials for chemical fertilizers</li> </ul> <p>(iii) Continued to impose special export tariffs on certain chemical fertilizers, etc., but imposed special export tariffs only on eight raw materials for chemical fertilizers, compared to the 2009</p>

No.	Name of Policy	Implementation Date	Principal Contents
			<b>Tariff Implementation Plan</b>
2	“2010 Notice on Adjustment of Export Tariffs on Chemical Fertilizers” (Tariff Regulations Committee, State Council)	Dec. 1 –31, 2010	Imposed a special export tariff of 75%, as well as a provisional export tariff of 35%, on urea, diammonium phosphate, ammonium dihydrogenphosphate, and mixtures of ammonium dihydrogenphosphate and diammonium phosphate (Tariff codes: 31021000, 31053000, and 31054000)
3	“2011 Tariff Implementation Plan” (Tariff Regulations Committee, State Council)	Jan. 1, 2011	(i) Maintained the export tariff rates set in the “Export Tariff Regulations” (ii) Continued to impose provisional export tariffs on certain export goods, such as young freshwater eels, and also increased the number of rare earth products subject to tariffs and raised tariff rates on certain rare earth products (iii) Continued to impose special export tariffs on certain chemical fertilizers, etc. that are the same as those subject to tariffs set in the 2010 Tariff Implementation Plan
4	“2012 Tariff Implementation Plan” (Tariff Regulations Committee, State Council)	Jan. 1, 2012	From Jan. 1, 2012, an export tariff of 20% will be imposed on Strip Cast Alloys (HS code: 72029911, product name: neodymium iron boron permanent magnet).
5	“2013 Tariff Implementation Plan” (Tariff Regulations Committee, State Council)	Jan. 1, 2013	Regarding the nine items judged as violations as a result of dispute decisions in cases brought by the US, EU and Mexico, either export tariffs were abolished or were changed to the maximum tax rate within the range stipulated in Annex 6 of China’s WTO Accession Protocol.

Data sources: Compiled and prepared using General Administration of Customs (China) website and tax legislation

## **2) Export Restrictions on Raw Materials**

### **<Outline of the measure>**

On January 1, 2002, China issued the “FY 2002 Catalog of Issuance of Licenses Based on Classification of Products Controlled with Export License” and a notice regarding related issues, which established an institute for issuing export licenses, as well as 54 items subject to export licenses. The “FY2015 Catalog of Goods Subject to Export License Administration” lists 591 items as subject to export licenses.

China thus continued to enforce quantitative restrictions on exports of raw materials and intermediate goods even after its accession to the WTO. GATT Article XX(g) stipulates that quantitative restrictions on exports may be permitted on an exceptional basis for measures “relating to the conservation of exhaustible natural resources”. However, where the design and structure of the China’s export restriction measures for the raw materials and the intermediate products are preferential treatment to Chinese domestic industry, then, the measures do not meet the criteria of “relating to the conservation of exhaustible natural resources.”. GATT Article XX(g) also requires these restrictions be accompanied by “restrictions on domestic production or consumption”; it is not entirely clear whether such domestic restrictions had been put into place within China.

The Chinese Government has issued export licenses for many raw material products to exercise control over the parties permitted to export these products and the quantities that can be exported.

### **<Problems under international rules>**

GATT Article XX(g) stipulates that quantitative restrictions on exports may be permitted on an exceptional basis as measures “relating to the conservation of exhaustible natural resources”. However, where the design and structure of the China’s export restriction measures for the raw materials and the intermediate products is preferential treatment to Chinese domestic industry, then the measures do not meet the criteria of “relating to the conservation of exhaustible natural resources”. GATT Article XX(g) also requires these restrictions be accompanied by “restrictions on domestic production or consumption”; it is not entirely clear whether such domestic restrictions have been put into place within China. China’s compliance with GATT Article XI and Article XX(g) is thus in question.

### **<Recent developments>**

In June 2009, the United States and the EU filed a request for consultations with the WTO (Mexico also requested consultations in August), claiming that China’s quantitative restrictions on exports and imposition of export taxes on nine raw materials (bauxite, coke, fluorite, magnesium, manganese, silicon metal, silicon carbide, yellow phosphor and zinc) are not consistent with Article XI of the GATT and China’s WTO Accession Protocol. The consultations failed to settle the dispute, and the three countries requested establishment of a panel. A panel was established on December 21, 2009 (DS394, 395, 398). (Japan participated as a third-party country). In July 2011, a panel report was issued, which stated that China's quantitative restriction on exports and China's export tariffs are not consistent with the WTO agreements. Although China appealed in August 2011, at the end of January 2012, the Appellate Body report was made public. It supported most of the conclusions of the panel. The RPT (Reasonable Period of Time for implementation) for the case was set by December 31, 2012. As of January 2013, export tariff on six items (bauxite, coke, fluorite, magnesium, manganese, silicon metal) were eliminated and the tariff rates of yellow phosphor and zinc were changed to the range stipulated in the Accession Protocol. In addition, the quantitative restrictions on export on bauxite, coke, fluorite, silicon carbide and zinc were abolished.

In March 2012, Japan, jointly with the United States and EU, requested WTO consultations with regard to China's export restriction measures (quantitative restrictions on exports, export tariffs and a minimum export price) on rare earths, tungsten and molybdenum. However, the consultations failed to settle the dispute, and so in July 2012 the three countries requested establishment of a panel. A panel (DS431, 432 and 433) was established on July 23 2012, and a panel report, which fully upheld the claims of Japan, the United States, and the EU that China’s export restrictions (export duties, quantitative export restrictions, and restrictions on rights to trade) on rare earths, tungsten, and molybdenum violated GATT and China’s WTO Accession Protocol, was released on March 26, 2014. China objected to the Panel’s decision and appealed to the Appellate Body in April of the same year, but an Appellate Body report, which fully

supported the Panel's decision, was released in August of the same year. The Panel report and the Appellate Body report were both adopted at the DSB meeting in the same month. In addition, Japan, the United States, the EU and China agreed to set the reasonable period of time (RPT) at May 2, 2015; therefore China had to implement measures complying with the DSB recommendations by this date. In response, China lifted the quantitative export restrictions on rare earths, tungsten, and molybdenum on January 1, 2015 (these items are deleted from the 2015 list of items covered by quantitative export restrictions announced on December 31, 2014).

## **RIGHT TO TRADE (APPROVAL SYSTEM FOR TRADING)**

### **<Outline of the measure>**

In July 2004, China revised for the first time in 10 years the "Foreign Trade Law." The revised Foreign Trade Law is based on China's accession commitments that the foreign trade approval system should be abolished within 3 years of China's WTO accession. As revised, only registration is required for foreign trade operations; the application and approval process has been abolished. Japan will continue to monitor Trading Right issues.

However, publications (*i.e.*, books, newspapers, magazines, audio, video products) are allowed to be imported only by state-owned enterprises authorized by the State Council under the Council's ordinance concerning control on publications.

### **<Problems under international rules>**

Under Article 5 of China's WTO Accession Protocol, the country is due to: (1) grant all domestic companies rights to trade concerning all goods (except for some agricultural products) within three years after accession; and (2) provide fair treatment to all foreign people and companies compared with domestic companies. Therefore, the import restriction on publications is deemed inappropriate.

### **<Recent developments>**

In April 2007 the United States requested consultations with China pursuant to the WTO on the import and distribution restrictions pertaining to copyrighted works. The consultations did not reach a resolution, and a panel was established at the WTO Dispute Settlement Body (DSB) in November 2007 (with Japan and the EU participating as third-party participants). For its accession to the WTO, China had promised that it would recognize the right of foreign companies to engage in importing and distribution operations related to publications (books, newspapers) and audio-visual products (DVDs) within three years of its accession. Yet, China continued to limit those engaged in this business to Chinese state-run companies and companies in which China maintains the majority of capital, a fact which the United States viewed as problematic.

A Panel report issued in August 2009 found China's measure to be inconsistent with the WTO Agreement, accepting most of the US assertions. China appealed this to the Appellate Body in September 2009, but in December 2009 the Appellate Body

upheld the Panel's conclusion in full, except with respect to certain points, and China's violation of the obligation under the Agreement became final and conclusive (China is under an international obligation to rectify the measure). The time limit for complying with the DSB recommendations was set to March 19, 2011. Meanwhile, in the "Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011)" (promulgated on December 24, 2011, and effective on January 30, 2012), which provides for policies concerning investment activities of foreign companies in China, the National Development and Reform Commission, the Ministry of Commerce removed importation of books, newspapers, magazines, audio-visual products and digital publications from the list of banned items. Since they no longer are included in the list of restricted items, they are now considered as permitted items; but it may require close monitoring of implementation hereafter to ensure that they no longer are restricted.

Additionally, at the meeting of the WTO Dispute Settlement Body held on February 22, 2012, China announced that it had fulfilled the majority of the DSB's recommendations, and that both the United States and China had reached a memorandum of agreement on February 19, 2012, to settle the dispute. According to the joint communication issued on May 9 of the same year submitted to the chairperson of the DSB, the memorandum includes: the importation of at least 14 titles of IMAX and 3D, high-definition films in addition to those 20 titles already within the frame of the annual distribution restrictions for foreign films; raising profit distribution for film producers to 25%; allowing private enterprises to enter the market of foreign film distribution; and the holding of a conference between the United States and China in five years regarding the major elements of the memorandum to discuss issues about China's DSB recommendations. At the meeting of the WTO Dispute Settlement Body held on May 24, 2012, China declared that all DSB recommendations had been fulfilled. The United States, on the other hand, said that the memorandum agreed between the US and China constituted important progress but was not a final, complete resolution.

The United States has announced that it will continue to monitor this situation.

Japan continues to follow the development of this situation between the United State and China, and make efforts to further ease restrictions on foreign investment via bilateral policy discussions and WTO service negotiations.

## TARIFFS

### *1) Tariff Structure*

**\* This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.**

### **<Outline of the measure>**

Upon accession to WTO, following negotiations with Japan, the United States and the EU, as well as within the Working Party, China submitted a schedule of tariff concessions which reduced tariffs on a broad range of items.

China committed to reduce the tariff rate on all bound items (7,151 items) and the simple average tariff rate of 13.6 % (at the time of accession in 2001) to 9.8% by 2010. The reduction was scheduled to be conducted, from 19.3% to 15% on agricultural products (977 items) and from 12.7% to 8.9% on mining products (6,174 items).

In addition, China joined the Information Technology Agreement (ITA) and committed to reduce tariffs on almost all chemicals and chemical products to the harmonized level.<sup>1</sup>

### **<Concerns>**

From January 1, 2002, by an amendment to the Tariff Law, China reduced tariffs on 73% of all bound items (over 5,300 items). On January 1, 2008, China released the seventh revision of its tariff schedule since accession, and as a result its simple average tariff has been reduced to 15.2% for agricultural products, 8.9% for non-agricultural products and 9.8% in total.

China's current binding coverage on all products is 100%. The average bound rate for non-agricultural products is 9.2% and the average applied tariff rate in 2012 was 8.7%.

For some items, though, the final bound tariff rates remain still high, such as photographic films (up to 47%), motorcars (25%), television reception apparatus (30%), monitors (30%), motor cycles (up to 45%), and projectors (30%).

With regard to China's commitment to participate in the Information Technology Agreement (ITA), its participation was approved by the WTO ITA Committee in April 2003. There remain some concerns on its implementation of ITA, for example, China imposes multifunction machines or projectors that are peripherals for computers.

### **<Recent developments>**

Negotiations regarding market access for non-agricultural products are ongoing in the Doha Round negotiations; they include negotiations on reducing and eliminating tariff rates.

In addition, with the aim of increasing the number of items subject to elimination of tariffs on IT products, ITA expansion negotiations have been taking place since May 2012 outside the Doha Round negotiations (see 2. (2) "Information Technology Agreement (ITA) Expansion Negotiation", in 5. of Chapter 5, Part II for details).

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<sup>1</sup> The Chemical Tariff Harmonization Agreement established tariff reductions on chemicals and chemical products (in principle HS 28~39; final tariff rates of 0-6.5%) for participating countries, including Japan, the United States and the EU. This was agreed to as a part of the tariff negotiations during the Uruguay Round.

## ***2) Violation of Bound Tariff Rate on Photographic Roll Films, etc.***

### **<Outline of the measure>**

In some cases, China has imposed non-ad valorem duties on items that were subject to concessions with ad valorem duties at the time of its accession to the WTO. For example, non-ad valorem duties at the applied tariff rate of 67 yuan per square meter are imposed on some photographic films (tariff code: 37023190), for which the bound tariff rate is 40%; the equivalent average ad valorem tariff rate calculated based on the export volumes for the last few years is approximately 47-75% and thus exceed the bound tariff rate.

### **<Problems under international rules>**

This may violate GATT Article II because non-ad valorem duties that are imposed on items subject to concessions with bound ad valorem duties at the equivalent ad valorem tariff rate are higher than the bound tariff rate.

### **<Recent developments>**

In October 2013, Japan requested relevant Chinese authorities to switch to ad valorem duties at a rate consistent with the bound tariff rate, or to set an upper limit not to exceed the bound tariff rate in case non-ad valorem duties were retained. In response to this, the tariff rate of the films was reduced to 56 yuan per square meter in the 2014 revision of Chinese tariff rates, which was made public in December 2013. The equivalent ad valorem tariff rate calculated based on exchange rates and prices of films in 2013 fell to approximately 40-42%, almost the same level as the bound tariff rate, but it may still exceed the bound tariff rate depending on trends in exchange rates and product prices. Japan will therefore continue to pay close attention to this issue.

In 2011, non-ad valorem duties at the rate of 15 yuan per square meter were imposed on photosensitive dry films for printed circuit boards (tariff code: 37013029), which were subject to concessions with ad valorem duties at 10%. The equivalent ad valorem tariff rate calculated based on exchange rates and film prices at the time was approximately 22%, so there was a possibility of violation of the bound tariff rate. Japan requested that China remedy this problem, and this resulted in the Chinese government switching non-ad valorem duties to ad valorem duties at the same rate as the bound tariff rate of 10%.

Furthermore, in the 2014 revision of tariff rates, non-ad valorem duties were raised on items other than the above-mentioned photographic films (tariff code: 37023190). Japan will therefore pay close attention to future developments and request relevant Chinese authorities to remedy the situations where necessary.

## **ANTI-DUMPING AND COUNTERVAILING MEASURES**

### **Commitments upon Accession**

Upon accession, China committed to bring its regulations and procedures on anti-

dumping and countervailing measures into conformity with the Anti-Dumping (AD) Agreement and the Agreement on Subsidies and Countervailing Measures.

It was agreed that China, as a non-market economy, would receive special treatment regarding price comparisons and subsidies amounts when another WTO Member conducts an investigation concerning anti-dumping or countervailing measures on Chinese products. (For instance, sales prices and production costs of an appropriate third country can be used for the calculation of the normal value for 15 years following its accession. Another example is that, for calculation of the amount of a subsidy in terms of the benefit to the recipient, the benefit can be calculated by considering the conditions offered in an appropriate third country and not those of China.)

## **Status of Implementation**

### ***1) Rules and Regulations***

The Foreign Trade Law of China defines AD measures the same as in GATT Article VI, and provides that China conduct investigations to determine whether or not to take trade remedy measures, including AD measures, and take appropriate trade remedy measures based on the results of the investigation. It also provides that notice must be given in initiating investigations and that authorities have obligations regarding confidential information acquired in the course of investigations.

The “Regulations of the People’s Republic of China on Anti-Dumping”, established pursuant to the Foreign Trade Law, stipulates in detail, in conformity with the AD Agreement, definitions of terms (dumping, injury to domestic industry), methods for calculating the margins of dumping, methods for injury determination, procedures for AD investigations, procedures for imposing anti-dumping duties, price undertakings and producers for notifications. In addition to the Regulations on Anti-Dumping, various implementing rules on injury investigations, questionnaires, on-the-spot investigations, price undertakings, interim reviews, initiation of investigations and public hearings, etc. have been enacted.

The Countervailing Measures Regulation defines “subsidies” and includes provisions relating to countervailing measures. Implementing rules have also been issued. During the China TRM of 2002, Japan requested that China notify these rules to the WTO. They were notified in 2003 and subsequent revisions have also been notified. Japan will continue to encourage China to provide notice of any changes made to laws, regulations, and their application, in accordance with obligations under the WTO Agreements.

### ***2) Enforcement of the AD measures***

#### **<Outline >**

In China, the State Economy and Trade Committee (SETC) used to be responsible for the injury investigations. Now, the Bureau of Industrial Injury Investigation in the Ministry of Commerce (MOFCOM) is responsible for investigations of injury and the Bureau of Fair Trade for Import and Export (also in MOFCOM) is in charge of enacting laws and regulations related to trade remedy such as anti-dumping, countervailing and



safeguard measures, as well as investigations of dumping and subsidies.

After its accession to the WTO, as of the end of January 2015 China initiated investigations in 84 cases based on the “Regulations of the People’s Republic of China on Anti-Dumping”. At this time, the majority of products targeted for investigations were those produced by raw material industries, especially chemical products and steel products. This trend underscores the concentration of the application of AD measures in a small number of industries.

Among the investigations initiated by China, including those that had been investigated before its accession to the WTO, 38 cases involve Japanese products as targets of the AD measures. As a result of final determinations, AD measures were imposed in 29 of these cases. Anti-dumping duties have been continued to be imposed in 17 of these cases (see reference data attached at the end of Part II Chapter 6 Anti-Dumping Measures).

### **<Problems under international rules>**

With respect to the Anti-Dumping Agreement or general international practice, there remain problems. It is necessary to continue to seek further improvement in the following areas:

(1) MOFCOM must properly assess the impact on domestic industries caused by factors other than dumped imports in determining injury (and a causal relationship). It should provide adequate explanation of its method of analysis of the effects after it “separates” and “distinguishes” the effects caused by dumped imports and other factors (Articles 3.1, 3.2, and 3.5 of the AD Agreement).

Note: The Appellate Body report (DS184) concerning the AD measure against Hot-rolled Steel Products determined that: a) the investigating authority must “separate” and “distinguish” the injurious effects of other causal factors from the effect of dumped imports; and b) the injuries caused by these factors must not be attributed to the dumped imports. In addition, the WTO Panel report on the AD measures on high-performance stainless steel seamless tubes (DS454) pointed out the difference in main-line grades between imported products from Japan and products produced in China, and then determined that China’s measures were inconsistent with the Agreement, because the basis for China’s determination that dumped imports were causing injury to the domestic industry were not sufficiently explained in the evaluation of whether there was a causal link even though most domestic products are of lower grade than imported products (Article 3.5 of the AD Agreement).

(2) In order for the interested parties to defend their interests, MOFCOM must provide a full explanation of the reasons and the methodologies used in calculating the margin of dumping, and indicate the source of the facts available used in it in its disclosure of the essential facts and final determination (Articles 6.9 and 12.2 of the AD Agreement).

Note: The WTO Panel report on the AD measures on high-performance stainless steel seamless tubes (DS454) determined that the disclosure of essential facts was insufficient because of non-disclosure of (a) the dumping margin calculation methods and (b) the methodology of the price comparison and the price data of imported and domestically manufactured products regarding demonstration of the price effect.

### <Recent developments>

Japan addressed the above issues in China's TRM at the AD Committee meeting in October 2011 (it also addressed the same issues at China's TRM in 2009). In addition, at the AD Committee meetings in April and October of 2013 and October of 2014, Japan also raised issues concerning individual AD investigation procedures by China.

Furthermore, as described below, Japan initiated a WTO dispute settlement proceeding regarding AD measures on Japanese high-performance stainless steel seamless tubes, thereby making efforts to improve China's implementation of AD measures.

Similarly, the United States and the EU also began utilizing the WTO dispute settlement procedures with regard to China's AD measures. Japan has been participating in each dispute as a third-party and submitted written submissions arguing that investigations/measures by China were inconsistent with the AD Agreement.

The United States requested consultations regarding AD measures on grain oriented flat-rolled electrical steel (GOES) produced in the US in September 2010, and requested the establishment of a panel in February 2011. A panel report was circulated in June 2012, and the panel report and Appellate Body report were adopted at the meeting of the Dispute Settlement Body (DSB) in November 2012 (DS414). In this case, China's disclosure of the essential facts (Article 6.9 of the AD Agreement), public notice of final determination (Article 12.2.2 of the AD Agreement), and confidential information handling (Article 6.5.1 of the AD Agreement) were determined to be inconsistent with the AD Agreement, showing that transparency of China's AD investigation procedures was insufficient. Furthermore, China's price effects analysis was found to be not based on an objective examination and was determined to be inconsistent with Articles 3.1 and 3.2 of the AD Agreement. China made a redetermination with respect to this case on July 31, 2013 (the time limit for complying with the DSB's recommendations), and decided to maintain the AD measures. Therefore, in February 2014 the United States requested the establishment of a compliance panel, and Japan has been participating in this process as a third party. The United States also utilized the WTO dispute settlement procedures with regard to AD measures on US broiler products (DS427) and US automobiles (DS440). In the former case, a Panel report was adopted at the DSB meeting in September 2013. In the latter case, based on similar issues as in the GOES case, China's AD measures were determined to be inconsistent with the AD Agreement in June 2014.

The EU requested consultations regarding AD measures on EU X-ray security equipment in July 2011, and a Panel report concluding that China's AD measures were inconsistent with the AD Agreement was adopted at the DSB meeting in April 2013 (DS425). As described above, Japan, in cooperation with the United States and the EU through various channels, has been making efforts to improve the enforcement of AD measures by China.

Japan will continue to pay close attention to ensure that Chinese investigating

authorities enforce their AD regime in a manner consistent with the WTO Agreements, and urge them to remedy any problematic enforcement or individual cases by utilizing the WTO.

## **Individual Measures**

### ***1) AD measures / changed circumstances review on Japanese-made chloroprene rubber***

#### **<Outline of the measure>**

China has imposed anti-dumping duties on Japanese-made chloroprene rubber since May 10, 2005. However, it started an interim (changed circumstances) review on August 28, 2009, upon request by the domestic industry for a review of the margin of dumping.

In the final determination made by MOFCOM on August 25, 2010, there were the following problems concerning calculation of the margin of dumping and procedures for AD investigations:

- (1) The margin of dumping was calculated based on the facts available (FA) without accepting actual export prices submitted by companies subject to investigation (MOFCOM accepted the export prices by other companies subject to investigation instead of companies in question).
- (2) Reasons for not accepting evidence or information submitted by companies subject to the investigations were not immediately given in notifications to the companies, to give them the opportunity to give further explanations within a reasonable period.

#### **<Problems under international rules>**

Although China usually gives a notice of disclosure of essential facts in writing, it has not provided written notification of the result of calculating the final margin of dumping, in this case. Therefore, there is a question about whether a notice of disclosure of essential facts as required by Article 6.9 of the AD Agreement has been given in an appropriate manner.

In addition, despite submission of actual export prices by companies subject to the investigations within a reasonable period, the margin of dumping was calculated using FA while taking no account of that information. This calculation method may be inconsistent with Article 6.8 of the AD Agreement.

Furthermore, MOFCOM neither immediately notified companies subject to the investigations of reasons for not adopting evidence or information submitted by the companies subject to the investigations, nor gave them the opportunity to provide further explanations within a reasonable period. These procedures are considered to be inconsistent with paragraphs 1, 5, and 6 in Annex II of the AD Agreement.

### **<Recent developments>**

Japan asked Chinese representatives questions concerning the above at the meeting of the WTO Anti-Dumping Committee in the fall of 2010, and requested answers in writing. In October 2011, Japan received a reply from China as follows:

- △ The reason why MOFCOM did not accept the data submitted by the company subject to investigation was because there was a significant difference between the result of on-the-spot investigation and the data in the response to the questionnaire. Although the company subject to investigation provided an explanation for the reasons during the process, it was not adequate nor was evidence submitted. The reason for the rejection of the data was addressed in the notice of disclosure of essential facts and the final determination. A period of 10 days for correspondence was also given to the company before the final determination.

While China answered the request by Japan, the answer is still an insufficient explanation in accordance with the AD agreements. Therefore, Japan must monitor the situation closely so that similar procedures will not be repeated in other investigations.

## ***2) AD measures on Japanese high-performance stainless steel seamless tubes***

### **<Outline of the measure>**

In September 2011, upon request of the domestic industry, the Chinese government initiated an AD investigation into the importation of high-performance stainless steel seamless tubes from Japan and the EU. In November 2012, the Chinese government made a final determination imposing AD duties on these products on the basis of dumping as well as injury to the domestic industry caused by the dumped imports.

### **<Problems under international rules>**

China's AD measures may be inconsistent with the AD agreement because, in this case, there are possible flaws in the investigation procedure such as insufficient facts in the public notice of the final determination and in the determination of injury to the domestic industry caused by dumped imports.

### **<Recent Developments>**

At the WTO AD committee meetings held in autumn 2011, spring and autumn 2012, Japan indicated that the majority of products exported from Japan do not compete with Chinese products because they are high-grade products used in supercritical boilers in coal-fired power plants and, therefore did not cause injury to the domestic industry. Japan strongly demanded appropriate determinations be made taking the opinions of Chinese users of those Japanese products into account. Since then, Japan has made efforts to resolve this case in consultations with the Chinese government, requesting exclusion of Japanese products from the scope of the investigation scope. However, China made the AD measures as mentioned above and a resolution was not reached. In December 2012, Japan requested consultations with China under the WTO

Agreement regarding the AD measures. In addition, Japan also raises issues concerning individual AD investigation procedures by China at the AD Committee meetings in April and October of 2012 and April and October of 2013. Japan requested the establishment of a panel (DS454) in April 2013, and the panel was established in May. The EU also requested consultations under the WTO Agreements in June 2013 and requested the establishment of a panel in August of the same year; it was established in the same month. A Panel report was released in February 2015. Regarding the determinations of injury and causal link, the measures were determined to be inconsistent with the AD Agreement because (1) in the examination of whether or not dumped imports “undercut” the prices of domestically manufactured products (Articles 3.1 and 3.2 of the AD Agreement), China failed to ensure that the prices of domestically manufactured products were comparable to the prices of imported products where the production volumes, etc. significantly differ between imported products and domestically manufactured products; (2) China failed to consider the indices of the magnitude of the margin of dumping, etc. listed in Article 3.4 of the AD Agreement in the determination of injury to the domestic industry; and (3) China failed to provide a sufficient explanation about the mechanisms by which subject imports caused injury to the domestic industry in the examination of whether there was a causal link (Article 3.5 of the AD Agreement), where most domestic products are of lower grade than imported products. In addition, procedures regarding treatment of confidential information and disclosure of the essential facts, etc. were also determined to be inadequate.

### ***3) AD measures on Japanese-made resorcinol***

#### **<Outline of the measure>**

In March 2012, the Chinese government initiated an AD investigation on the import of resorcinol (an organic compound mainly used as materials for rubber adhesives and ultraviolet absorbing agents) from Japan and the United States upon an application by domestic enterprises. In March 2013, the Chinese government made a final determination imposing AD duties on these products on the basis of dumping and the causal relationship with injury to the domestic industry.

#### **<Problems under international rules>**

During the investigation period, there were basically no changes in resorcinol import volume, domestic market share or domestic sales prices, which implies that the cause for injury to the domestic industry was the entry into the market of new domestic enterprises. Therefore, the Chinese determination was inconsistent with Articles 6 and 12 of the AD agreement

It also may be inconsistent with Articles 6 and 12 of the AD agreement because information disclosure and explanations regarding calculation bases / methodology for dumping margins as well as bases for injury determination were insufficient.

#### **<Recent Developments>**

At the WTO AD committee meeting in October 2012, Japan indicated that the import of resorcinol did not cause injury to the domestic industry and requested that the

investigation be terminated, as provided in Article 5.8 of the AD agreement. China responded by stating that the application was examined carefully and the investigation was initiated based on the WTO agreement and Chinese laws and legislation.

In February 2013, the Japanese government participated in the public hearing for this investigation held by the Bureau of Industry Injury Investigation of Ministry of Commerce of China. It indicated the AD agreement issues involved in this investigation and requested an appropriate and deliberate investigation based on the AD agreement. However, in March 2013, a final determination was made that there was dumping and causal relationship with injury to the domestic industry.

Japan will examine whether or not the determination of the measures was made fairly and equitably in accordance with the AD agreement in future sunset reviews, etc. and as for the problems with AD investigations, Japan continues to seek improvement by China.

#### ***4) AD Measures on Japanese Optical Fiber Preform***

##### **<Outline of the measure>**

In March 2014, upon application by domestic Chinese companies, the Chinese government initiated an AD investigation into the importation of optical fiber Preform from Japan and the United States.

##### **<Problems under international rules>**

In this case, an investigation using sampling (Article 6.10 of the AD Agreement) was conducted. There is a concern, however, that conducting a sampling investigation despite the fact that only four Japanese companies were subject to investigation may be inconsistent with the AD Agreement, which allows sampling investigation only when the number of relevant exporters, etc. is so large as to make a determination impracticable. There are also possible flaws in the determination of injury to the domestic industry caused by dumping, etc.

##### **<Recent developments>**

The Japanese government submitted a statement on the sampling investigation in the AD investigation to the Ministry of Commerce of the Chinese government in September 2014. In addition, at the meeting of the WTO Anti-Dumping Committee held in the fall of 2014, Japan requested China to make a careful judgment considering that (1) the sampling investigation on optical fiber preform conducted in this case appears to be inconsistent with Article 6.10 of the AD Agreement and (2) there did not appear to be a threat of material injury to the domestic industry in China based on the data in the “applications” and other information/documents publicly available.

## **SUBSIDIES**

### **Commitments upon Accession**

Upon accession, China committed to eliminate export subsidies and subsidies favoring the use of domestic over imported products stipulated under Articles 3.1(a) and

3.1(b) of the Agreement on Subsidies and Countervailing Measures (ASCM). China reserved rights to apply each of the provisions of Article 27.10, 27.11, 27.12, and 27.15 of the ASCM, which provides for special treatment given to developing countries, and committed not to seek application of the provisions of Article 27.8, 27.9, and 27.13 of the ASCM, which also provide for special treatment.

China committed not to maintain or to introduce any export subsidies on agricultural products. Further, some subsidies, which under the Agreement on Agriculture developing country members may exempt from domestic support reduction commitments (Article 6.2), would be subject to China's reduction commitments. China also committed to implement a *de minimis* exemption figure, the ceiling for subsidies which would normally be subject to reduction but can be exempted due to the small amount of the subsidy, of up to 8.5 percent of the value of China's total agricultural production (in the Agreement the *de minimis* exemption percentage is up to 5 percent for developed countries and up to 10 percent for developing countries).

## **Report of Subsidies and Points to Be Rectified**

There is an obligation in the ASCM to submit a detailed report on subsidies every second year, and reported subsidies are reviewed at Subsidies Committee meetings. However, the first report China submitted after its accession in 2001 was in April 2006, and no report was submitted thereafter for some time. This caused the member countries to express their serious concerns. In particular, in October 2011, the United States, claiming that China had not properly notified nearly 200 measures having the effect of subsidies to the Subsidies Committee, countered this by bringing the alleged subsidies to the notice of the Committee, as provided by Article 25.10 of the ASCM. Immediately after this, China submitted its second report since accession to the WTO. The United States, however, responded that the contents of China's report were not sufficient to comply with the requirements of the ASCM, as it only covered the period between 2005 and 2008, and subsidies by local governments were not included, etc., and has held informal bilateral consultations with China. In addition, the United States made a second counter-notification regarding nearly 100 Chinese subsidies in accordance with Article 25.10 of the ASCM in October 2014, and then continues to repeatedly express its concern that China's report on subsidies is insufficient at Subsidies Committee meetings. Japan has been cooperating with the United States in requesting China to report not only subsidies by the central government, but also subsidies by local governments.

The member countries expressed their concerns regarding the consistency of the subsidies reported by China with the WTO Agreements. Japan, the US, the EU and others questioned whether the notified subsidies were compatible with the ASCM at the October 2006 meeting of the Committee on Subsidies. In particular, subsidies reported by China included those that appeared to be subsidies prohibited by the ASCM, i.e., export subsidies and subsidies contingent on the use of domestic over imported goods, which China had pledged to remove upon its accession to the WTO. Japan therefore requested clarification of the content of subsidies by asking questions, etc. However, China repeatedly insisted that its subsidy system was in accordance with the WTO.

China only provided a general overview and rough explanation of its subsidy system, and concrete data has not been provided.

China's subsidies also have been challenged in WTO dispute settlement Proceedings. In February 2007 the US and Mexico requested consultations, claiming that the Chinese subsidies system reported to the WTO (the majority of which were tax breaks as part of preferential measures for foreign capital) included export subsidies and subsidies contingent upon the use of domestic over imported goods, prohibited by the ASCM. Japan, the EU and Australia requested participation in this consultation as third parties (DS358, 359).

Following the request for consultations, the Chinese Government revised its corporate income tax law (enacted on January 1, 2008) and has undertaken a full-scale review of its preferential tax treatment for foreign capital. Furthermore, it has also abolished its low-interest loan program which was conditional upon export. However, the content that was changed in the administrative instructions consequent upon the revision to the corporate income tax law are unclear, and there are concerns that grandfathering provisions still remain. Because of this, a panel was established in August 2007 based upon the requests from the United States and Mexico.

In November, China committed, in a memorandum with the US and Mexico, to repeal the subsidies brought up in the WTO dispute settlement proceedings by January 1, 2008. As a result, the review by the panel on this issue terminated.

In December 2010, the United States submitted a request for consultations pursuant to WTO agreements on the grounds that subsidies for wind power generation equipment provided by the Chinese Government are subsidies contingent upon the use of domestic over imported goods, which are prohibited under the ASCM (DS419). As a result of the bilateral discussions between the United States and China, the United State announced that China had abolished the subsidies at issue in June 2011, and the dispute has been settled.

In addition, on February 13, 2015, the United States claimed that the "Demonstration Base / Common Service Platform program" implemented by the Chinese Government provides free services and subsidies, etc. to exporting companies that reside in the site and requested consultations (DS489). Japan also requested participation as a third party in the consultations.

For its part, Japan will work together with other member countries in continuing to make requests of the Chinese side through the WTO Subsidies Committee and bilateral consultations in order to ensure that China adheres to the commitments it made at the time of its accession, and that China's system is applied in a manner that is consistent with the WTO Agreement on Subsidies and Countervailing Measures.

## **SAFEGUARDS**

### **Regulations on Safeguards**

#### **<Outline of the measure>**

In October 2001, China adopted regulations on safeguards that incorporate basic rules of its safeguard measure under the Foreign Trade Law; it took effect in January



2002. After that, four detailed regulations (considered “by-laws”) relating to the investigation procedure were also enacted for the implementation of the regulations. In addition, related amendments to the Foreign Trade Law were also enacted in July 2004.

#### **<Problems under international rules>**

Japan believed that some parts of this legal framework were inconsistent with the Agreement on Safeguards. In addition, the preliminary and final safeguard measures on steel products applied in April 2002 were also questionable in terms of consistency with the WTO agreements. Specifically, provisions in these regulations concerning the existence of unforeseen circumstances, provision of compensatory measures, and public hearing procedures, etc. do not appear to be consistent with GATT and the Agreement on Safeguards.

#### **<Recent Developments>**

In 2006, in the Committee on Safeguards, Japan questioned the consistency of a Chinese provision for countermeasures under Article 31 of the Chinese regulations on safeguards with the WTO agreements, as well as certain matters concerning China’s legal framework (unforeseen developments, securing of public interests when applying safeguard measures, clarifying the provisions of compensation and lack of a moratorium provision). The Chinese Government responded that China’s legal framework is fully consistent with the WTO agreements and that (even though there is no explicit provision) the Chinese authority implements its investigations in an appropriate manner in accordance with the WTO agreements and its domestic laws.

Japan believes that it is necessary to continue to seek adequate explanations from China and keep a close watch on its future implementation on safeguards with regard to their consistency with the WTO agreements.

## **TRADE-RELATED INVESTMENT MEASURES (TRIMs)**

### **Commitments upon Accession**

China committed to comply fully with the TRIMs Agreement upon accession. China also made commitments above and beyond the TRIMs Agreement regarding the trade-related conditions imposed on foreign investment. To that end, China agreed to eliminate all measures prohibited in the TRIMs Agreement. For example, China agreed to eliminate local content requirements (mandating the use of designated percentages of locally-produced items), which are in violation of GATT Article III, and foreign-exchange balancing requirements (permission to import raw materials and capital goods only in proportion to export earnings and volumes), which are in violation of GATT Articles III and XI. In addition, China also agreed to eliminate export performance requirements, transfer of technology, or any other performance requirements on the permission or rights for import and investment.

In other areas China will maintain a category-by-category approval system for authorizations for motor vehicle producers. However, within two years after accession, China committed to eliminate restrictions on the categories, types and models of vehicles permitted for production, and to raise the limit within which investments in motor vehicle manufacturing could be approved at the provincial government level. At accession, the level of investment was set at \$30 million, but China agreed to raise the level to \$60 million one year after accession, to \$90 million two years after accession, and to \$150 million four years after accession. Finally, China committed to removing the 50 percent foreign equity limit for joint-ventures regarding the manufacture of motor vehicle engines.

### **Implementation Status and Problems under International Rules**

From October 2000 to July 2001, in line with the above commitments, China amended the Law on Foreign Capital Enterprises applicable to 100-percent foreign-owned companies. China also amended the Law on Chinese-Foreign Contractual Joint Ventures, applying to joint ventures where equity participation by all parties is not required but is determined pursuant to the joint venture contract, as well as the Law on Chinese-foreign Equity Joint Ventures, applicable to joint ventures where equity participation by all parties is required. The administrative instructions of all three laws were modified and wording pertaining to export requirements, local content requirements, and foreign-exchange requirements was amended or deleted.

In addition to the above three foreign investment laws, the new “Company Law,” which was amended and implemented in January 2006, applies to foreign-owned companies.

Although the above-listed amendments have been made to bring domestic laws in China into conformity with the WTO Agreement, non-conformance with the Agreement and restrictive measures on investment still exist and should be rectified speedily. On July 1, 2009, in order to encourage development of the domestic automobile industry and energy saving measures, the Ministry of Industry and Information Technology implemented a “Rule controlling entry of new energy automobile manufacturers and products” and “Entry conditions and evaluation requirements for entry of new energy automobile manufacturers”, as alternatives to the above rule. The rules require entering manufacturers to establish research and development institutes and to disclose technological information on the new energy automobile to be produced, and Japan intends to continue to scrutinize it closely. In addition, the National Development and Reform Commission announced the “Temporary Provisions Controlling Entry of Newly-Established Pure Electric Automobile Manufacturers and Products” on November 26, 2014; it requires newly-established manufacturers to comply with the “Rule controlling entry of new energy automobile manufacturers and products” as before.

Furthermore, laws on local content requirements have also been put in place for the petrochemical industry. The “Proposal on Accelerated Promotion of Autonomous

Large-scale Petrochemical Facilities” promulgated by the National Development and Reform Committee at the end of December 2007 stipulated a local procurement rate of 75% for large petrochemical plants by the end of 2010. As a result, the rate of domestically-produced 10,000,000-ton class oil refining equipment exceeded 90% during the eleventh five-year plan.

China has opened its railway market to foreign investment since its accession to the WTO, but there remain in place some restrictions on large-scale railway investments. The Ministry of Railways announced in September 2007 that it would be establishing a 70%+ local procurement rate for high-speed railways; in 2009 the Ministry also declared its intent to encourage foreign investment in railways. In May 2012, an “Opinion on the implementation regarding the encouragement and introduction of private capital in railway investment” was announced. It promised equal treatment for both private and public capital for a wide range of investments including railway construction, transport and technological development. However, such requirements still constitute barriers to foreign investment.

With regard to the satellite application industry, the Ministry of Land and Resources made public the Land and Resources Satellite Application and Development Plan in August 2009. The plan aims at raising the rate of domestically acquired satellite data to 80% in the 12 years from 2009 to 2020, and at diffusing domestically produced satellites in the overall land and resources system. However, the plan does not reveal the method of achieving the goal for the rate of domestically acquired satellite data.

In September 2009, the National Development and Reform Commission, the Ministry of Science and Technology, the Ministry of Industry and Information Technology, the Ministry of Finance, the Ministry of Construction, and the General Administration of Quality Supervision, Inspection and Quarantine jointly promulgated the “Views of the Semiconductor Lighting Energy Industry.” It aims to achieve domestic production of large MOCVD equipment, core raw materials, and more than 70% of chips by 2015. The document requests all divisions to take measures to encourage procurement of domestically produced MOCVD equipment and to develop a mechanism of compensating the risk of using domestically produced equipment and provide support in the form of financial subsidy if conditions are fulfilled. However, since 2009, sales of MOCVD equipment increased significantly, and by 2012, the subsidies system was eliminated in a majority of areas due to concerns of excessive production.

In 1998, China's Ministry of Information Industry and the former National Development Planning Committee jointly announced the "Opinion Concerning Promoting the Development of the Mobile Communications Industry" (Statement No. 5). This statement provided not only that the import of foreign mobile communications products would be severely restricted beginning in January 1999, but also that if less than a certain percentage of the cellular phones produced by foreign-owned companies were exported, import quotas on related products and parts could not be obtained. Although the effective period of Statement No. 5 was to end in 2005, to date there have been no specific laws or ordinances to revoke the statement and some of the provisions continue to be enforced. At the present time, no major issues have developed, but Japan

intends to closely monitor developments of this issue.

In China, sectors for foreign investment are categorized into favoured, restricted, or prohibited business categories (those not belonging to any of these categories are categorized as being accepted). The National Development Reform Committee and the Ministry of Commerce amended the “Catalogue of the Guidance of the Foreign Investment Industry” (promulgated in 2007) on December 24, 2011, and the revision went into effect starting January 30, 2012. The National Development and Reform Commission initiated new public comments on the “Catalogue” (comment period: from November 4 to December 3, 2014).

The present categories of restricted or prohibited business specified in the new Catalogue enforced on January 30, 2012 are classified as shown in Figure I-1-6.

**Figure I-1-6 Businesses Restricted/Prohibited from Foreign Investment As Listed in the ‘Catalogue for the Guidance of Foreign Investment Industries’**

	Restricted Business Categories	Prohibited Business Categories
Agriculture, forestry and fisheries business	Development and production of new agricultural product varieties and seeds (with majority ownership on Chinese side); processing of logs of rare wood (limited to joint venture or collaboration); processing of raw cotton	Cultivation of improved varieties, genetic recombination and breeding; development and production of fishery seeds; fishing in jurisdictional waters and inland waters
Drilling business	Special or rare coal surveying and development (with majority ownership on Chinese side); surveying and drilling for barite (limited to collaboration and joint ventures); surveying and drilling for precious metals (gold, silver, platinum); surveying and drilling for precious non-metallic minerals such as garnet; drilling for and sorting of phosphoric ore; drilling for boron-magnesium and boron-magnesium ore; drilling for celestite; drilling for marine manganese nodules and sea sand (with majority ownership on the Chinese side)	Tungsten; molybdenum; tin; antimony; surveying and drilling of fluoride; surveying, drilling, and processing of rare earth; surveying drilling, and processing of radioactive materials
Processing of food made from agricultural by-products	Processing of soy and canola oil for human consumption (with majority ownership on Chinese side); high-level processing of corn; production of liquid biofuel (fuel alcohol, biodiesel, oil; with majority ownership on Chinese side)	—
Beverage production business	Production of fermented alcoholic beverages or high-quality distilled spirits (with majority ownership on the Chinese side); production of carbonated beverages	Processing of traditional Chinese tea and special types of tea (refined tea, black tea, etc.)
Tobacco product manufacturing business	Production and processing of husked and twice-dried tobacco leaves	—
Printing business and reproduction of recorded media	Printing of published materials (with majority ownership by the Chinese side; excludes printed packaging materials)	—

	Restricted Business Categories	Prohibited Business Categories
Petroleum processing and cokes business	Construction and management of oil refineries with annual production of less than 8 million tons (including 8 million tons)	——
Raw chemicals and chemical product production businesses	Production of caustic soda (sodium hydroxide) calcium base (potassium hydroxide); production of photosensitive materials, benzodyne, chemicals that can easily become toxic (seven types), HCFCs and Hydrogen HCFCs, ethylene tetrafluoroethane, aluminum fluoride, and hydrogen fluoride; production of BR and emulsion polymerized styrene-butadiene rubber and thermoplastic SBRs; production of methane chloride (excluding chloromethane) and chlorinated calcium carbonate plastic; production of titanium oxide sulfate, open-hearth permanganese potassium; processing of boron-magnesium iron ore; production of barium salt and strontium salt	——
Pharmaceutical manufacturing businesses	Production of chemical materials such as chloramphenicol or analgine or vitamin pills and oral calcium; production of anesthetic medicines and type-one psychiatric medicines (with majority ownership on the Chinese side); production of blood products, disposable syringes and other items	Processing of traditional Chinese medicines listed in "Regulations on the protection of wild medicinal substances" and "China's rare and protected species list"; production of secret prescriptions for traditional Chinese medicine by applying heating techniques, such as steaming or cooking, to herbal concoctions
Chemical textile manufacturing business	Production of chemical textiles for normal biopsy spinning; production of viscose fiber	——
Rubber products business	——	——
Smelting, rolling, and processing of non-ferrous metals business	Smelting of rare metals such as tungsten, molybdenum, tin (other than tin alloys), and antimony (including antimony oxide and antimony sulfide); smelting of non-ferrous metals such as electrolytic aluminum, copper, lead, and zinc; refinement and separation of rare earth (limited to joint ventures and collaborative firms)	Refinement and processing of radioactive minerals
Metal products business	——	——
Distribution equipment business	Regular-level pairing (PO) and related parts; manufacturing of unprocessed goods; manufacture of heavy machinery under 300 tons with wheels or caterpillar wheels (limited to joint ventures, collaboration)	——
Specialized equipment manufacturing business	Manufacture of low- to mid-level type B ultrasonic wave monitors; manufacture of general synthetic equipment and bulldozers under 320 horsepower; hydraulic excavators, wheeled cargo machines at the 6-ton level or under; graders of 22 horsepower or lower;	Manufacture of weapons and ammunition

	Restricted Business Categories	Prohibited Business Categories
	forklifts; skip dump trucks at the 135 ton level or under; road surface paving and repair equipment; gardening machines and tools; manufacture of concrete machines	
Electrical machine and appliance manufacturing business	—	Manufacture of open-format lead acid batteries, silver-oxide batteries containing mercury, zinc manganese batteries, and cadmium and nickel batteries
Industrial and other product manufacturing business	—	Ivory sculpture; processed tiger bone; lacquer production; production of enamel products; production of traditional paper and ink; production of carcinogenic, birth-defect inducing, or mutagenic materials and permanent organic contaminants
Transportation equipment production business	Repair, design, and manufacture of regular ships (with majority ownership on the Chinese side)	—
Telecommunications equipment, computers and other electronics	Production of terrestrial equipment to receive satellite broadcast equipment or parts thereof; manufacture of tax-exempt storage devices	—
Electric power, gas, and water production and supply business	Construction and management within the range of small-scale electricity distribution networks such as Tibet, Xinjiang, Hainan, of coal-fired gas steam power plants with capacity of 300,000 tons or less, or of coal-fired gas steam extraction power plants with capacity of 10,000 tons or less; construction and management of a power grid (with majority ownership on the Chinese side)	Construction and management outside the range of small-scale electricity distribution networks such as Tibet, Xinjiang, Hainan, of coal-fired gas steam power plants with capacity of 300,000 tons or less, or of coal-fired gas steam extraction power plants
Transport, warehousing and telecommunications business	Railway cargo transportation companies; railway travel transportation companies (with majority ownership on the Chinese side); road travel transportation companies; international automobile transportation company; waterways transportation companies (With majority ownership on the Chinese side); general purpose airline companies for photography, mine searching, and industry (with majority ownership on the Chinese side); communications companies; extra transmission business activities (with less than 50% foreign investment); basic telecommunications mobile voice or data service (with less than 49% foreign investment); basic telecommunications domestic and international business (With less than 35% foreign investment, raised to 49% foreign investment by December 11, 2007)	Airline regulation companies, postal service companies

	Restricted Business Categories	Prohibited Business Categories
Wholesale and retail trading business	Trading of goods; food items; cotton; vegetable oil; sugar; pharmaceuticals; tobacco; automobiles; petroleum; agricultural chemicals; plastic film for agricultural use; wholesale and retail distribution of chemical fertilizer (chain stores with over 30 branches and who market the products of multiple suppliers, with majority ownership on the Chinese side); distribution (limited to joint venture companies, with majority ownership on the Chinese side) of AV products (except for films); wholesale of petroleum products; construction and management of gasoline stands (chain stores invested in by investors from the same country, with other 30 branches that market the products of multiple suppliers, with majority ownership on the Chinese side)	—
Finance business	Banks; financial lease companies, financial companies; investment trust companies; currency brokers; insurance companies (life insurance companies with foreign investment under 50%); securities companies (limited to underwriting of A shares, and underwriting and trading of B and H shares and government or social bond certificates, with under 33% foreign investment); companies managing securities investment funds (under 49% foreign investment); insurance brokerages; futures trading companies (with majority ownership on the Chinese side)	—
Real estate business	Large-scale land development (limited to joint investment, collaboration); construction and management of luxury hotels, vacation homes, luxury office buildings, or international conference/exhibition centers; real estate agents or broker companies involved in buying and selling on the real estate market	—
Leasing and business service business	Legal consulting; market research (limited to joint ventures and collaborations); credit research and rating companies	Social research
Scientific research, technological services, and surveying businesses	Location survey companies (with majority ownership on the Chinese side); inspection, appraisal, and certification of import-export products; photography services (including special photography services other than aerial photography for survey or cartographic purposes; limited to collaboration)	Development and application of medical technology for human cell and genetic analysis; land survey; marine survey; cartography; aerial survey or cartographic photography; survey or cartography of boundaries of administrative regions; drawing up of maps; creation of electronic maps for navigational purposes
Water facility, environment, and public facility management	—	Development of plant and animal resources for national protection; construction and management of a nature reserve in an internationally important wetland

	Restricted Business Categories	Prohibited Business Categories
businesses		
Education	Ordinary junior and senior high school level educational institutions (limited to joint investment and collaboration)	Obligatory educational institutions; special educational institutions for military, public security, government, or Party studies
Hygiene, social security and social welfare businesses	—	—
Culture, sports, and entertainment businesses	Creation of broadcast programs and films (limited to collaborations); construction and management of movie theaters (with majority ownership on the Chinese side); construction and management of a large-scale theme park; public performance broker institutions (with majority ownership on the Chinese side); operation of an entertainment facility (limited to joint investment and collaboration)	Business activities related to the publishing, issuing, and import and export of books, newspapers, and magazines; AV products and publishing, creation, and import and export of electronic content; mass media institutions, broadcasting stations at all levels, television stations, broadcasting networks, broadcast television program creation management companies; film creation and distribution companies; movie theaters; news-oriented websites; institution operating online program services or Internet services; management of Internet culture; video broadcasting companies, construction and management of a golf course; gambling businesses (gambling of all kinds, including horse racing); adult entertainment service businesses
Other	Business categories restricted under national regulations or under the regulations of international treaties which China has signed or is party to	Actions which inflict harm on the safety or functioning of military facilities; business categories prohibited under national regulations or under the regulations of international treaties which China has signed or is party to

Note: according to “Listing of Industrial Indicators for Foreign Trade Investment” (Revised December 1, 2007)

## STANDARDS AND CONFORMITY ASSESSMENT SYSTEMS

### Individual Measures

#### *1) Administration of the CCC Mark regarding Electric Appliances*

##### <Outline of the measure>

Two safety certification regimes co-existed in China: one was the CCIB Mark designated by the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and the State Administration for Entry-Exit Inspection and Quarantine (SAIQ), and the



other was the Conformity Certification of Electrical Equipment ‘Great Wall’ Mark designated by the State Economic and Trade Commission and the China State Bureau of Quality and Technical Supervision. The former applied to the export of products listed in the Compulsory Certification List, while the latter applied to products distributed in China. Although the conditions for obtaining the ‘Great Wall’ mark were the same for both foreign-made and domestic-made products, certification of the CCIB Mark was compulsory only for foreign companies. China pledged to unify its double certification system before acceding to the WTO. China introduced the Compulsory Certification and CCC Mark in May 2002; the CCIB and Great Wall marks were abolished at the end of April 2003.

In January 2008, the Chinese Government announced that 13 IT security products (e.g., firewalls and smart card OS’s) had been added to the products subject to the compulsory certification system. Japan responded to this by holding bilateral consultations with the Chinese Government and cooperating with the United States, the EU and the Republic of Korea in expressing concerns at TBT Committee meetings in 2008 and 2009. As a result of these efforts, the Chinese Government revised the measure and finally announced at the TBT Committee meeting in March 2010, etc. that the measure was applicable to government agencies but not to procurement by state-owned enterprises. The Chinese Government started operation of the measure as part of the national information security product certification system covering IT security products in May 2010.

#### **<Problems under international rules>**

Although the double certification system was improved, it still takes long time for some factories located outside of China to acquire the CCC Mark. One of the reasons for this is that China does not permit the implementation of the initial factory inspection by a foreign Conformity Assessment Body (CAB). It is possible that these issues conflict with Article 6.4 of the TBT Agreement (a provision that supports participation of foreign Conformity Assessment Bodies in domestic Chinese conformity assessment activities) and Paragraph 195 of the Working Group Report on China’s accession (securing national treatment for foreign Conformity Assessment Bodies), Paragraph 342 of the same, and Article 1.2 of the Accession Protocol.

In addition, Japan needs to continue paying close attention to trends regarding compulsory certification of IT security products so as to prevent regulations that are more trade-restrictive than necessary from being introduced (Article 2.2 of the TBT Agreement).

#### **<Recent developments>**

A memorandum of understanding between Japan and China on cooperation in product safety, assessment, and standardization activities was signed in April 2007. This initiated a series of discussions between Japan and China for facilitation of the compulsory certification system. At present working-level consultations are being held to broadly exchange information on the systems of both countries and to discuss the administration of the compulsory certification system. Japan intends to continue holding consultations aimed at resolving issues relating to administration of the

certification system.

As it was confirmed in March 2010 that compulsory certification of IT security products was being applied to government agencies, but not to procurement by state-owned enterprises, detrimental impact on Japanese industries has basically been eradicated. Japan addressed this as an agenda item at the Japan-China High-Level Economic Dialogue held in August 2010. In addition, Japan has been expressing its concerns about the compulsory certification system of IT security products with the EU, etc. at meetings of the WTO TBT Committee since July 2008. Furthermore, since November 2009, Japan, as well as the EU, also has been expressing its concerns at meetings of the WTO TBT Committee regarding (1) the Regulations for the Administration of Commercial Encryption, which require the permission of the Office of the State Commercial Cryptography Administration (OSCCA) when importing/manufacturing/selling technologies and products for encrypting information that is not a national secret; and (2) the information security Multi-Level Protection Scheme, in which the Ministry of Public Security of the Chinese Government categorizes IT security products used in systems related to four categories of communications, finance/railways/energy, government agencies, and national secrets into different grades (Grades 1 to 5) and requires the use of Chinese products as core components for Grade 3 and above, in addition to the compulsory certification system of IT security products.

The Chinese Government has been revising the compulsory certification system since 2013. For instance, revisions were made with regard to the certification process to rank manufacturing facilities; they allow the first facility inspection to be conducted after the certification if products are manufactured in superior facilities. Revisions were also made to allow registration of foreign capital certification/testing institutions on the condition that they are located in China.

## ***2) Security Regulation of IT Equipment by Chinese Banking Industry***

### **<Outline of the measure>**

On September 3, 2014, the Chinese government (China Banking Regulatory Commission, National Development and Reform Commission, Ministry of Science and Technology, and Ministry of Industry and Information Technology) issued the “Advisory Opinion on Network Security and Informatization of Banking Industry through Application of Information Security Control Technologies”, providing that (1) the adoption rate of secure and controllable information technologies in the Chinese banking industry shall be raised to 75% by 2019 and (2) the network security auditing standards for the Chinese banking industry shall be established to strengthen security inspection of banking-specific information technologies and products.

Furthermore, in response to the Advisory Opinion, guidelines on information and communications technology related products and services used by banks, etc. requiring the use of Chinese domestic intellectual property rights-based products, evaluation/authentication based on the China-specific standards, and introduction of specifications that obstruct data distribution across borders, etc. were issued only to a

small number of interested parties on December 26, 2014. A supplementary description of the guidelines, stating among other things that a “country-by-country discrimination” does not exist, etc. in relevant requirements, was subsequently published on February 12, 2015.

Based on the guidelines, each financial institution is required to submit a plan for this fiscal year and a five-year master plan by March 15, 2015.

Although the Advisory Opinion and guidelines are likely to be a technical regulation on information technology products in the banking industry, not only was the TBT Committee not notified of either of them, but also public comment procedures have not been initiated. The Advisory Opinion and supplementary description of the guidelines have been published, but the guidelines, which are considered most important, have not.

### **<Problems under international rules>**

While the supplementary description of the guidelines published on February 12, 2015 states that related requirement do not make distinction between nationality, the unpublished guidelines are said to include provisions that require the use of Chinese domestic intellectual property rights-based products. It is therefore necessary to carefully examine the Chinese regulation in the future and pay close attention to its operations.

If the use of products that use core technologies based on Chinese domestic intellectual property rights (owned by Chinese private citizens) is required, the security level required for the banking industry in China is not clear, and therefore the validity of the obligations (why the Chinese domestic intellectual property rights owned by Chinese private citizens/corporations, etc. are required) is unknown. In addition, depending on the content of China-specific evaluation/authentication, similar concerns arise over its validity. From the point of view of necessity and procedures for obtaining licenses for the Chinese domestic intellectual property rights owned by Chinese private citizens/corporations, etc., these obligations cannot be regarded as being based on legitimate regulations, and may violate Article 2.1 of the TBT Agreement, which obligates securing no less favorable treatment to products manufactured overseas when the terms are relatively disadvantageous to overseas vendors, etc. (principle of non-discrimination between domestically produced and imported products). In addition, these obligations may also violate Article 2.2 of the TBT Agreement if they are more trade-restrictive than necessary to fulfill a legitimate objective (security level necessary for banking industry in China).

This regulation has not been notified to the TBT Committee of this regulation, nor has been published. Therefore, it may violate Article 2.9.2 of the TBT Agreement, which obligates advance notification of proposed technical regulations, etc. to the WTO for comments, and Article 5.8 of that Agreement, which obligates WTO Members to immediately publicize, etc., all established technical regulations, etc.

### **<Recent developments>**

On March 3, 2015, five organizations in the information and communication

equipment industry jointly submitted a statement to the Chinese government to express their concerns over this system. In addition, on March 13 of the same year, the Japanese government raised its concerns to the Chinese government. Moreover, at the TBT Committee in March of the same year, Japan, the United States, the EU and Canada jointly expressed their concerns regarding this matter. Consequently, some reported that the enforcement of this system has been postponed. In either case, however, Japan will continue to urge the Chinese government to correct the system, in cooperation with concerned countries/business operators, by utilizing the opportunities at bilateral consultations and various Committees, including the TBT Committee, etc.

### ***3) Measures for Controlling Pollution by Electronic Information Products***

#### **<Outline of the measure>**

China's Management Measures for Controlling Pollution by Electronic Information Products (hereafter referred to as the "Controlling Measures"), notified to the TBT Committee as of September 2005 was promulgated jointly by the Ministry of Information Industry, National Development and Reform Commission, Ministry of Commerce, General Administration of Customs, State Administration for Industry and Commerce, General Administration of Quality Supervision, Inspection and Quarantine, and State Environmental Protection Administration in February 2006; they became effective in March 2007. In order to: (i) control and reduce environmental pollution by waste electronic information products, (ii) save resources, and (iii) promote the sustainable development of the electronic information industry (Articles 1 and 2), the Controlling Measures are designed to regulate the use (manufacture, sale and import) of toxic/hazardous chemicals or elements (lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyl (PBB) and polybrominated diphenyl ether (PBDE), *etc.*) contained in electronic information products (radios, TVs, computers, and electronic products for households, *etc.*) in amounts that exceed a certain percentage (Article 3). They also contain provisions for the agencies set forth in the Controlling Measures (divisions of customs, commerce and industry, quality inspection, and environmental protection) to penalize violators (designers, producers, distributors, or importers) within the scope of the agencies' duties and responsibilities (Article 22). The Controlling Measures require producers and importers to (1) determine the Environment Friendly Use Period (Article 11), (2) indicate the name and levels of toxic/hazardous substances, and (3) indicate recyclability of the products that were in effect immediately after the enforcement of the Controlling Measures (both Article 13). However, (4) "concrete methods for compulsory product certification (Article 19)" by the SAIQ and the list of products subject to compulsory certification ("Catalogue for priority control of pollution by electronic information products (Article 18)") have not been established.

#### **<Problems under international rules>**

The necessity of the Controlling Measures (required to be demonstrated by Article 2.2 of the TBT Agreement) at present cannot be verified because many factors subject to regulation and methods used under the Controlling Measures, including the Catalogue for priority control, have not been established as described above, and they were not

made public at the time of notification to the TBT Committee. Two standards, namely “State standards” and “industry standards” (Article 9) exist for the control of toxic and hazardous substances or elements in electronic information products, but the definitions, scope and distinctions between them are unclear.

In addition, once such details are established, notifications to the TBT Committee need to be made again (see Article 2.9 of the TBT Agreement).

#### **<Recent developments>**

At the TBT Committee meeting in March 2011, the EU and Japan expressed their concerns about China’s notification to the TBT Committee on October 21, 2010 regarding the certificate system and the products covered; and they requested exemption of some items, such as automobiles, batteries, and parts from the Catalogue. A clear response from China has not yet been received. In July 2012, Japan exchanged opinions on the certification system with an executive official of the Ministry of Industry and Information Technology who attended a seminar hosted by local private organizations, and requested that China accept a self-certification system similar to those adopted by Japan, the United States, and the EU.

The Japanese electronics industry produces/distributes a large number of products in China, and therefore the establishment of the Catalogue for priority control and revision/removal of the Controlling Measures is of concern, as it can have a significant impact. Japan needs to continue to learn about the intentions of China in a rapid and detailed manner through the TBT Committee and bilateral consultations, and to make efforts in encouraging the establishment of internationally accepted fair and open rules, etc.

### ***4) Regulations of new cosmetic ingredients***

#### **<Outline of the measure>**

China’s State Food and Drug Administration (SFDA, reorganized into the China Food and Drug Administration, CFDA, in March 2013) announced a “Declaration of acceptance of administrative licensing requirements on cosmetics” (hereafter referred to as the “Declaration”) in December 2009 (enforced in April 2010, TBT notification in March 2010). Due to this Declaration, cosmetic manufacturers and importers had to apply to the CFDA for a license and be evaluated prior to using new cosmetic ingredients or importing cosmetics for the first time.

The CFDA announced a “Guideline for application and evaluation of new cosmetic ingredients” (hereafter referred to as the “Guideline”) in May 2011, as a guideline for application and evaluation of new cosmetic ingredients (enforced in July, TBT notification in June 2011). Definitions of new cosmetic ingredients, matters to be observed, application procedures, and the principle of valuation were clarified to a certain degree by the guideline.

Although five years have passed since introduction of this measure, there have been only four applications of the registry to new cosmetic ingredients from around the world so far, and this has had an adverse effect on the production and export of

cosmetics containing new ingredients. Japan also has the following concerns regarding this measure.

According to (2), 2, II, Article 3 of the Guideline, new cosmetic ingredients must not be complex materials, which means that application and safety evaluation must be carried out on single materials. There are some plant extracts and fermentation liquids that are substantially difficult to be isolated into solvents and new substances and, even if isolated, possibilities of chemical changes during processing or forming of different materials when mixed with cosmetics cannot be denied. This proves that the safety cannot be evaluated adequately in this manner. It is desirable from the perspective of ensuring safety of the new ingredients that application be carried out on same substance contained in the final product, as is done in the majority of countries including Japan, the United States and Europe.

The disclosure and release of information also needs improvement. The Chinese government requires the disclosure of company secrets such as details on procedures, reaction process and reaction conditions of the manufacturing process when evaluating new ingredients and, there are cases where such information was published on the SFDA website after evaluation. In January 2014, CFDA invited public comments (scheduled for April 2014) on the revision of administrative rules for accepting new ingredients, and indicated its intention to accept new ingredients on a company-by-company basis and to not disclose company secrets such as manufacturing methods, etc. for four years. CFDA also made notifications to the WTO-TBT Committee in February. Although this revision may improve the disclosure and release of information and accelerate acceptance of new ingredients, details remain unclear.

#### **<Problems under international rules>**

TBT Articles 2.2 and 5.1.2, stipulate that technical regulations and conformity assessment procedures shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. As mentioned above, the Chinese government claims that the objective of the regulation is to secure safe quality of cosmetics, but rational reasons for the registry of new cosmetic ingredients not progressing have not been given. In addition, the measures, including single substance application and safety requirements, appear to be more trade-restrictive than necessary in light of the policy objectives of the regulation, and so may violate TBT Articles 2.2 and 5.1.2.

#### **<Recent Development>**

Japan sent a comment raising its concerns in response to China's TBT notification of June 2011, and also to the TBT enquiry point of the Chinese government in June 2012. In the TBT Committee meetings held since November 2011, Japan has raised questions about conformity with the TBT Agreement and has requested China to clarify the examination criteria / procedures and to relax scientifically groundless regulations. The United States and Europe also expressed their concerns at the Committee meetings.

Japan will continue to monitor whether there has been progress and, in cooperation with other concerned countries, to request improvement in the regulations.

## ***(5) Regulations of cosmetic labels***

### **<Outline of the measure>**

China's cosmetic labeling regulations were promulgated on November 15, 2014, and the China Food and Drug Administration (CFDA) of the State Council of China made the TBT notifications on December 12. The enforcement date is scheduled to be July 1, 2015. The purposes of the regulations are to strengthen supervision and management of the cosmetic industry and protect the rights and interests of customers. The main contents of the draft regulations are as follows:

- (1) Cosmetic labels may not be amended or supplemented by means of adhesion, trimming, or modifying.
- (2) The descriptions, such as manufacturer names, all ingredients, and quality guarantee periods, etc. must be listed on the labels. The descriptions to be listed also include the actual manufacturers/processors.
- (3) When indicating the effect/efficacy testing results on the product labels, a report showing the details of the testing concerned must be made public on the website specified by CFDA and are subject to supervision.

### **<Problems under international rules>**

With regard to (2), the purpose of requiring the listing of manufacturer names, etc. on the labels is explained as making the investigation of legal liabilities for illegal products easier. For customers, the identity of the responsible party when quality issues arise, is considered important information. For this purpose, however, listing only the companies having legal quality responsibilities is sufficient, and the necessity of requiring the listing of actual manufacturers is not explained. Therefore, the regulations are suspected of being more trade-restrictive than necessary in light of the objective and may violate Article 2.2 of the TBT Agreement.

In addition, with regard to (3), the purpose is said to be to facilitate companies in providing information to customers and to improve the technical details of products by disclosing the reports describing the details of effect/efficacy testing on the website. However, the regulations are suspected of being more trade-restrictive than necessary in light of the objective and may violate Article 2.2 of the TBT Agreement, because the necessity of providing this information is not explained, and, for instance, consumers are prevented from making appropriate decisions by not being aware of the details of the reports on effect/efficacy testing.

### **<Recent developments>**

In response to the TBT notifications on the draft regulations, Japan sent comments expressing its concerns to the TBT enquiry point of the Chinese Government in January 2015. Japan intends to pay close attention to future developments with this issue and to request improvement of the draft regulations through active efforts at the TBT Committee and bilateral consultations in the future.

With regard to the regulations concerning (1), whether or not adhesive labels that are currently allowed will continue to be allowed is not immediately clear from the

provisions of the regulations. If adhesive labels are prohibited, and printed labels are required, China-specific packages need to be produced for products exported to China after adhesive labels have been prohibited. Therefore, in the comments sent in response to China's TBT notifications, Japan requested China to clearly stipulate that adhesive labels would continue to be allowed.

The purpose of prohibiting adhesive labels is states to be to prevent companies from re-adhering labels multiple times. However, hard to peel off adhesive labels are also considered to be able to fulfill the objective. Therefore, if labels other than printed labels are not allowed, the regulations are suspected of being more trade-restrictive than necessary and may violate Article 2.2 of the TBT Agreement.

## ***(6) Regulations of Chemical Substances***

### **<Outline of the measure>**

On October 15, 2010, the "Measures for Environmental Management of New Chemical Substances" were enforced. The measures require pre-production/pre-importation registration for managing new chemical substances produced in/imported by China and are also known as Chinese REACH because many provisions of the EU's REACH regulations were adopted.

The measures require three ecotoxicity tests: biodegradability tests (tests for measuring the degradation ratio of chemical substances by microbial sources such as activated sludge, etc. within a certain period of time), fish acute toxicity tests (tests for measuring the fatality rate of fish exposed to chemical substances for a certain period of time), and earthworm acute toxicity tests (tests for measuring the fatality rate of earthworms exposed to chemical substances for a certain period of time) to be conducted in China using organisms bred and raised in China. The guidelines established by the OECD (OECD Test Guidelines) are used for safety tests of chemical substances on an international basis. The OECD Test Guidelines, however, do not specify the place of origin of organism species and the location of laboratories used in these ecotoxicity tests.

In order to comply with the measures, tests must be conducted again in China using organism species bred and raised in China, even if there is test data obtained in accordance with the international guidelines (OECD Test Guidelines). This obstructs smooth business operations.

### **<Problems under international rules>**

The above-mentioned three ecotoxicity tests are required to be conducted in China using organism species bred and raised in China. It is unlikely, however, that the biological characteristics of the same organism species differ depending on the place of origin. If the biological characteristics of the same organism species differ depending on the breeding/raising conditions, specifying the breeding/raising conditions would be considered sufficient, but China does not explain the reasons for requiring the tests to be conducted using organism species bred and raised in China. In particular, the same conditions are not specified for ecotoxicity tests other than the above-mentioned three (alga growth inhibition tests, etc.), and the reasons for applying



different conditions based on the types of ecotoxicity tests are not explained. If the reasons are not reasonably explained, the measures may violate Article 2.2 of the TBT Agreement, which stipulates that conformity assessment procedures shall not be more trade-restrictive than necessary.

### **<Recent developments>**

In February 2014, missions were sent from the Japanese chemical industry to request the Chinese Government to improve the system. In addition, Japan took the opportunity to participate in bilateral consultations during the TBT Committee in November of the same year, and expressed to Chinese authorities its concerns about the system. In the future Japan will urge improvements in the system through the TBT Committee and other channels.

## **TRADE IN SERVICES**

### **Commitments upon Accession**

Prior to accession, there were strict restrictions on foreign investment in the major Chinese services sectors.

For example, for the distribution services industry the process of experimental advances by retailers into limited major cities and special economic zones had been approved, but the entry of foreign investment companies was prohibited in the telecommunications industry.

As a result of the WTO accession negotiations, China committed to the liberalization of various service sectors, which was intended to mitigate or do away with regulations like the geographical restrictions and the foreign equity restrictions pertaining to investment companies in a phased manner within roughly five years after acceding.

### **Status of Implementation and Points to Be Rectified**

As the following will indicate, situations in which these accession commitments have not been completely fulfilled up to the present have been observed, and further responses will be sought from the Chinese Government in the future.

### **Individual Measures**

#### ***1) Distribution Services (wholesaling, retailing, and franchising)***

##### **<Outline of the measure>**

China enforced the “Measures for Administration on Foreign Investment in Commercial Fields” on June 1, 2004, and has gradually eliminated geographical and foreign equity restrictions on distribution sectors following its WTO accession commitments. However, foreign companies receive unfavorable treatment in terms of not being allowed to engage in the distribution of books, newspapers, magazines, and audio-visual products. They also receive disadvantageous treatment relative to

domestically-financed companies when it comes to matters like their registration capital, operating term, and the publications they are permitted to manage and distribute.

### **<Problems under international rules>**

China committed to allowing free distribution for books, newspapers and magazines within three years after accession (within one year for retailing services), and therefore measures highlighted in the previous paragraph may be inconsistent with China's WTO accession commitments.

### **<Recent developments>**

In April 2007 the United States lodged a request for consultations with China pursuant to the WTO Agreements. As a resolution was not reached through the consultations, in November 2007 a panel was established by the Dispute Settlement Body (DSB) of the WTO. (Japan and the EU participated as third-party countries; refer to the section on "Recent developments" related to the "Right to Trade" in this chapter for more details). In the end, the case was referred to the Appellate Body, and China's violation of the obligation under the Agreement became final and conclusive in December 2009. The time limit for complying with the WTO Recommendations was set at March 2011.

With regard to electronic publications, the General Administration of Press and Publication in February 2008 promulgated new "Electronic Content Publication Rules" and eliminated a clause stating "Independent foreign companies (100% foreign investment companies), Chinese-foreign joint ventures (companies established with investments by foreign companies and Chinese companies), and Chinese-foreign joint production companies (companies established with prior agreement on investment methods, profit distribution, and asset distribution, etc. between foreign companies and Chinese companies) may not engage in general wholesaling or wholesaling operations for electronic publications."

In regards to books, newspapers and magazines, the General Administration of Press and Publications promulgated and implemented revised publication regulations (2001) in March 2011. Publication businesses by Chinese-foreign joint ventures, Chinese-foreign joint productions and foreign invested enterprises were also added to these revised publication regulations. Additionally, in December 2011, the National Development and Reform Commissions and the Ministry of Commerce issued the "Catalogue for the Guidance of Foreign Investment Industries (Amended in 2011) and implemented them as of January 2012. In the Catalogue, general publication and importation of books, newspapers and magazines, the importation of audio-visual products and electronic publications and electronic music distribution services were removed from the list of banned items (not investable) and not included in the list of restricted items (investable with special permits), and thus were considered to be included in the list of permitted items (investable with general permits). However, the status of the implementation needs to be monitored continuously.

Furthermore, at the WTO DSB meeting held in February 2012, China announced

that it had fulfilled the majority of the DSB recommendations, and also that the United States and China had, in a memorandum, reached an agreement in February 2012, to settle the disputes. According to the joint communication issued in May of the same year to the chairperson of the DSB, in this memorandum China agreed, among other things, to accept the import of at least 14 titles of IMAX and 3D, high-definition films in addition to the 20 titles within the framework of the annual distribution restrictions of foreign films that China had set, and to raise the profit distribution rate for film producers to 25%. At the meeting of the WTO Dispute Settlement Body held in May 2012, China declared that all DSB recommendations were fulfilled. The United States, on the other hand, said that the memorandum agreed between the US and China showed that there had been significant progress, but it did not indicate final resolution of the disputed matter.

Japan will keep a close watch on the bilateral developments as well as the developments in the reform of relevant legislative systems and the status of China's implementation, and make efforts to further ease restrictions on foreign investment via bilateral policy discussions and WTO service negotiations.

## ***2) Construction, Architecture and Engineering***

### **<Outline of the measure>**

In September 2002, China promulgated “Regulations on Administration of Foreign-Invested (which means foreign-capitalised) Construction Enterprises (Decree No.113 of the Ministry of Construction and the Ministry of Foreign Trade and Economic Cooperation)” in compliance with its WTO construction services commitments to allow the establishment of wholly foreign-owned enterprises. In September 2003, the first wholly Japanese-owned construction company in China was approved.

However, foreign-owned enterprises are assigned qualification grades based on a series of requirements on capital and the number of engineers. Particularly for the application standards for the “Super Grade” qualifications which were revised in 2007, corporations are obligated to possess net assets, business tax payments, and bank credit which are each at or above a certain level, and have also been obligated to establish a technical center and retain patents. In addition, the amount of construction work which can be executed is restricted based on this grading system. Furthermore, although there have been revisions approving the placement of certain subcontracting orders for the specialty construction industry, the stringency of the requirements has not been mitigated. As such, the majority of foreign corporations wholly owned by Japanese construction companies have been unable to proceed further than acquiring Grade 2 qualifications as a consequence of the excessive requirements.

Various institutional reforms have been implemented with the objective of properly managing the construction market and excluding unqualified contractors. Imposing limitations on construction work via the qualification grades not only obstructs foreign service providers from carrying out construction which is

commensurate with their capacity, but also limits the range of contract work of wholly foreign-owned enterprises to foreign-capitalised projects and the like. As this demonstrates, substantial entry barriers have not been removed; conversely, there are sectors for which restrictions have been strengthened. Moreover, the direct acceptance of construction orders by foreign construction companies without the involvement of local subsidiaries had been possible up to that time, but since July 2005, foreign-based service providers have not been allowed to accept orders without establishing local subsidiaries, and it has become more difficult for them to offer services than before China's accession to the WTO.

Regarding architectural and engineering services, the "Rules for Implementation of Regulations on Administration of Foreign-Invested Construction and Design Enterprises" ("Detailed Rules"), which relaxed the requirements of the "Regulations on Administration of Foreign-Invested Construction Enterprises" ("Design Regulations"), which had been in effect since December 2002, were promulgated in 2007. The Design Regulations included the requirement that, in cases where foreign-capitalised construction and design companies applied for construction work and design company qualifications, the number of people at foreign service providers who had acquired qualifications as Chinese-registered builders and registered manufacturers had to be less than one-fourth the number of registered company employees through the standard provisions for each qualification grade. But the Detailed Rules contained sections which relaxed the related requirements, by making it possible to hire Chinese people who are certified builders and or registered manufacturers to secure the required number of employees, etc. Conversely, the Design Regulations permitted the overseas performance of a foreign company to be taken into consideration for the acquisition of qualifications; yet it does not clearly specify specific standards related to overseas performance. In addition, there are restrictions. For example, only qualified architects can apply for permission with a Chinese design institute (design company).

#### **<Problems under international rules>**

China committed to allow the establishment of joint ventures with majority foreign investment for construction services upon WTO accession and, within three years of accession, wholly foreign-owned enterprises. Regarding architecture and engineering services, China committed to permit joint ventures with majority foreign investment as for construction services, but allow wholly foreign-owned enterprises only after five years after accession. Owing to the imposition of excessive requirements for acquiring qualification grades and restrictions such as limiting the orders for construction work that can be accepted, etc., foreign service providers are unable to enter the Chinese market, and there is the possibility that China is violating its accession commitments.

#### **<Recent developments>**

For construction services, the lack of approval for the reception of direct orders continues, and the orders for construction work that can be accepted are limited. Not only are Japanese construction companies unable to receive orders for construction projects which are commensurate with their capacity to execute, but institutional revisions have also been carried out which obligate them to obtain China's

qualifications. Furthermore, specific standards concerning considerations for the overseas performance of foreign companies when it comes to construction and engineering services remain unclear. In addition, some local governments require the obligation, which may not be necessary, to establish a local subsidiary with respect to each project. At China's TRM at the WTO's Council for Trade in Services in 2009, Japan sought indications regarding the details of China's systems and consistency with its accession commitments, but has not received satisfactory responses.

For the future, it will be necessary to pay close attention to trends in China's development and application of laws, as well as to take various opportunities to seek improvements.

### ***3) Telecommunication Services***

#### **<Outline of the measure>**

China has been easing restrictions related to specific matters, including business scope, investment ratio, region of operations, and minimum capital requirement. Foreign companies whose foreign capital ownership is less than 49% are allowed to supply basic telecommunications services based on the "Catalogue for the Guidance of Foreign Investment Industries (enacted in December 2007, revised in 2011)" and the revised "Catalogue on Telecommunications Services Classification," which was promulgated by the State Council in September 2008. (In March 2008, the State Council transferred oversight for the telecommunications industry from the Ministry of Information Industry to the Ministry of Industry and Information Technology as part of its central government reforms.) However, in reality the entry of foreign companies into China's telecommunications industry has not proceeded smoothly due to factors including the problems listed below.

#### **1. Telecommunication Services**

Under Article 4 of the Provisions on the Administration of Foreign Investment in Telecommunications Operations, which came into force in November 2002, foreign telecommunications companies including Japanese telecommunications companies may handle basic telecommunications operations and value-added telecommunications services. Specific classifications for these basic telecommunications operations and value-added telecommunications services have been listed in the "Catalog of Telecommunications Services Classifications" effective April 2003. However, foreign companies are only allowed to provide a limited scope of services, and this has erected a major barrier to foreign communications companies operating in China that wish to provide data center services, Internet connection services, and other services for which there is a strong demand from Japanese companies operating in China.

In May 2010, the State Council promulgated the "Several Opinions of the State Council on the Encouragement and Guidance of Sound Development of Private Investment," in which it allowed private capital to enter the basic telecommunication operation market in the form of capital participation. At the National Conference on Industry and Information Technology 2013 held in December 2012, private participation in trials for the resale business and access network business of mobile communications

were advocated. Resale of mobile communications has been conducted on a trial basis via the “Notice of Pilot Program for Mobile Communications Resale Business” released by the Ministry of Industry and Information Technology in May 2013. (The Notice states that the period for acceptance of applications for the Pilot Program was to be until July 1, 2014 and that the Pilot Program will end on December 13, 2015). However, requirements for application for the Pilot Program include that “for a domestic, privately-owned enterprise listed outside China, the percentage of equity held by the enterprise’s foreign investors shall be less than 10% and its single largest shareholder shall be a Chinese investor”; as a result, the entry of foreign capital is extremely limited at present. With regard to access network business, on the other hand, the Ministry of Industry and Information Technology issued the “Notice on the Opening of Broadband Access Market to the Private Sector” in December 2014, and provided the “Pilot Program Plan for the Opening of Broadband Access Network” in the appendix to the Notice in order to encourage private companies to establish infrastructure required for access network services and provide broadband access services to users. In this Plan, 16 cities, including Shanghai and Guangzhou, are set to be the pilot cities, and the pilot period is set to three years from March 1, 2015.

## 2. Transparency of Licensing Requirements, etc.

When obtaining licenses for communications services, such as nationwide licenses for “information provision services” deemed Category 2 value-added telecommunications services in the April 2003 “Catalog of Telecommunications Services Classifications,” companies have faced unclear and arbitrary administrative obstacles, including conditions conveyed orally which have not been clearly stated in regulations.

## 3. Formulation Status of the Telecommunications Law

As of February 2015 the Telecommunications Law, which will form the fundamental law for telecommunications business consistent with China’s commitments upon acceding to the WTO, had yet to be promulgated and enacted

## 4. Easing/lifting of restrictions on broadcasts and volume of foreign-made dramas and animation, and disclosure/easing, etc. of screening standards for imported content carried out by the State Administration of Radio, Film and Television (broadcasting)

Prime-time broadcasts (during the hours 17:00-20:00) of animation produced outside of China have been prohibited as of September 2006, and the hours of prohibition were extended to 21:00 as of May 2008. Additional controls governing the total volume of broadcasts of foreign-made dramas and animations exist, including broadcast quotas for Chinese-made and foreign-made dramas and animation for periods other than prime time. The State Administration of Press, Publication, Radio, Film and Television (an agency under the immediate control of the State Council) reportedly conducts import screening of foreign-made content twice each year (January and July), but the unspecified screening standards constitute a major barrier to export of content to China. In February 2012, the State Administration of Radio, Film and Television implemented the “Notice on Further Strengthening and Improving the Administration of Importation and Broadcasting of Foreign Films and Television

Dramas”, which approves import permits for 50 or fewer episodes of foreign dramas, and bans broadcasting of foreign dramas between 19:00 to 22:00. It is tightening the policy of assessment on imports and the controls on broadcasting foreign content. In addition to these, management of videos on the Internet is in the process of being strengthened because the “Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas” (No. 204), issued by the State Administration of Radio, Film and Television in September 2014, stipulates that the number of foreign films/dramas on the respective video sites annually imported/broadcast shall not exceed 30% of the total number of domestic films and TV dramas purchased and broadcast in the previous accounting year; also, an application for examination of all the foreign films/dramas scheduled to be broadcast in the coming year shall be submitted to the State Administration of Radio, Film and Television in order to obtain prior permission.

### **<Problems under international rules>**

Prior to its accession to the WTO, sales of telecommunications services were strictly controlled and the entry of foreign capital was prohibited in China. However, upon its accession it made the following commitments, and there is the possibility that the measures listed above are in violation of China’s accession commitments. China committed to allowing foreign-based enterprises to participate in;

1. Services like domestic and international phone calls involving basic telecommunication services (public communications infrastructure facilities, data and speech communication services, etc.): 49% limit on foreign investment
2. Mobile telecommunications services: 49% limit on foreign investment
3. Value-added services like information and database searches: 49% limit on foreign investment

At the same time China also undertook obligations outlined in the reference material regarding basic telecommunications services, and thus Japan needs to pay attention to violations of the commitments, such as “public availability of licensing criteria”, etc.

### **<Recent developments>**

Japan has been encouraging China to fulfill its accession commitments through the WTO Doha Round negotiations, Japan-China Economic Partnership Agreements, the WTO’s TRM for China, and other forums, and will need to pay attention to the country’s regulatory status for telecommunication services within the trade frameworks of China-Japan-Korea FTA and RCEP, etc. Furthermore, caution is also needed to ensure that China does not impose excessive telecommunications regulations in a manner that violates its WTO commitments for computer-related services and other related services. As there have been some efforts to open the market in the China (Shanghai) Pilot Free Trade Zone established in September 2013, close attention also needs be paid to the developments in the Pilot Zone.

## **4) Finance**

### **4-1) Insurance**

#### **<Outline of the measure>**

In June 2006 the State Council promulgated “Several Opinions of the State Council on the Reform and Development of the Insurance Industry,” which contains provisions intended to fulfill China’s WTO accession commitments and to promote the opening up to outside companies. The document contained provisions on transparency for administrative procedures related to approval such as licenses, branch offices (including local subsidiaries), and products, including extending the period related to approval for foreign-invested insurance companies.

With regard to foreign-invested companies’ capital participation in local insurance companies in China, the China Insurance Regulatory Commission (CIRC) promulgated the “Measures for Administering Insurance Companies’ Shares” on May 4, 2010. According to this, in the case of an insurance company for which the investment/capital participation ratio of foreign-invested shareholders is less than 25% of the company’s registered capital, investment exceeding 20% by a single shareholder (including those on the related side) is permitted if the following conditions are satisfied: Although a foreign financial institution holds 15% or more of shares of an insurance company as a single shareholder, (1) it is a major shareholder that can directly or indirectly control the insurance company and has continuous investment ability and its financial reports demonstrated that it was profitable for the most recent three accounting years, (2) its net assets are not less than 200 million yuan, and (3) it is in high repute and also holds a leading position the industry.

In addition, Article 5 of the “Measures for Administering Insurance Companies’ Shares” (insurance companies for which the foreign investment ratio or the shareholding ratio is 25% or less, where two or more insurance companies are under the control of the same institution, shall not operate insurance businesses of similar kind that involve conflict of interest or competitive relationship) prohibits so-called double licenses, but there is a problem because no clear standard has been indicated with regard to the aforementioned control standard.

In terms of reinsurance business, the provisional regulations of “preferential treatment for domestic reinsurers” were removed from the new “Insurance Law”, which came into effect in October 2009. Following this, the contents of the “Measures for the Administration of Reinsurance Business” (CIRC 2005), which was revised on May 21, 2010, were also adjusted. This adjustment enables foreign insurance companies to compete with domestic companies fairly as they are no longer regulated under the “preferential treatment for domestic reinsurers”. However, there are some problematic regulations still in effect at the present time. One of them is that transactions of reinsurance with relevant companies without a permit issued by the CIRC are not permitted by foreign insurance companies (Article 23).

#### **<Problems under international rules>**

With regard to automobile insurance, the Regulations on Automobile Traffic



Accident Liability Statutory Insurance formally entered into force on July 1, 2006, and statutory insurance and voluntary insurance came to be operated separately. Multiple foreign-invested nonlife insurance companies obtained approval for voluntary automobile insurance business. However, foreign-invested nonlife insurance companies were disadvantaged in terms of competition compared to domestically-invested insurance companies, as they had to separately secure statutory insurance at domestic insurance companies when dealing with voluntary insurance.

Moreover, in December 2006 the CIRC released the “Directive on Strengthening Information Disclosures for Reinsurance Transactions by Foreign-Invested Insurance Companies and their Affiliated Companies.” Enacted on January 1, 2007, the directive calls for greater information disclosures by foreign insurance companies. As there is the potential that foreign insurance companies will not receive treatment that is equal to local insurance companies in China, the above regulations may possibly represent a violation of the country’s accession commitments. In order to operate in China, foreign-invested life insurance companies are required to establish joint ventures with maximum foreign investment of 50%.

Furthermore, with regard to approval for establishing branch offices and local subsidiaries, China committed to issuing licenses with attention paid to economic demand and without quantitative restrictions for the issuance of such licenses. Yet despite this, examples in which the standard processing period for approval for foreign insurance companies has been greatly exceeded have been observed, and cases in which the entry of foreign insurance companies is effectively restricted may potentially violate China’s accession commitments.

### **<Recent developments>**

Concerning these measures, at China’s TRM at the WTO’s Council for Trade in Services in October 2009, Japan sought indications regarding the details of China’s system and its consistency with China’s accession commitments, but has not received satisfactory responses.

As mentioned above, due to the revision of “Insurance Law”, restrictions were eliminated in cases where foreign insurance companies develop their business in the Chinese reinsurance market. However, it is expected that the monopolization of the market by domestic companies will not change in the short term as domestic reinsurance companies prefer conducting their business through “personal connections”.

In terms of auto insurance, in August 2011, the CIRC distributed a press release titled “promoting development of China’s mandatory insurance system”, which stated that it would “actively conduct a study on opening the market to foreign investors”. Following this, in February 2012, the policy to open the market to foreign investors was made public in the US-China joint fact sheet at the bilateral meeting between the Chinese Vice-President and the US President. In May 2012, the mandatory insurance system was opened to foreign investors. However, some foreign-invested nonlife insurance companies have been approved for mandatory insurance business, but 2-stage approvals for changing the scope of business and for handing business, which are required for approval procedures for mandatory insurance, have not been granted to

Japanese nonlife insurance companies. Of the 2-stage approvals required for conducting nonlife insurance business, Japanese nonlife insurance companies obtained the first stage approvals for changing the scope of business in April and May 2014. Some Japanese nonlife insurance companies obtained the second stage approvals for conducting business from the CIRC in November of the same year and started conducting nonlife insurance business.

## **4-2) Banking**

### **<Outline of the measure>**

With regard to the Renminbi business, on December 11, 2006 the “Regulations on the Administration of Foreign-Owned Banks” and the “Detailed Rules for Implementation of the Foreign-owned Bank Control Regulations” were enacted. This was accompanied by the repeal of the “Regulations on Administration of Financial Institutions with Foreign Capital” (promulgated in 2001), and the Renminbi business was opened to foreign-owned banks.

However, the creation of local subsidiaries serves as a virtual condition in order for foreign-owned banks to fully engage in the Renminbi business aimed at individuals in China. In addition to which, the Renminbi business aimed at individuals within China by branches of foreign-owned banks is limited to fixed-term deposits of 1 million yuan or more per person. Moreover, if branch offices of foreign banks are converted to local subsidiaries they will come to occupy the same position as Chinese banks. However, as a result of this new restrictions will be imposed, including “a deposit to loan ratio of 75% or below” and “loans to a single company of no more than 10% of the bank’s balance of capital.” With regard to the former deposit to loan ratio regulation (not more than 75%), there are limitations on the procurement of deposits within China for foreign-owned banks, since expansion of their commercial presence in China is limited. Therefore, the measure may not substantially conform to the principle of non-discrimination. In addition, the Chinese authorities also set external debt limit regulations that restrict influx of foreign capital in order to prevent influx of speculative money (hot money) into real estate and shares. The regulations have the effect of regulating total volume. However, there is a concern that the regulations may affect the sound development of the Chinese economy by hindering the raising of capital by companies.

### **<Problems under international rules>**

China claimed that it would repeal existing measures which restrict matters like the foreign investment ratio, services, and corporate configuration, excluding those for the preservation of orderly credit conditions, within five years of its accession. The conditions for deploying services and similar requirements imposed on foreign-owned banks may potentially constitute a violation of China’s accession commitments.

### **<Recent developments>**

In September 2010, the United States submitted a request for consultations with China pursuant to WTO Agreements, on the grounds that permitting business operators

in China monopolize credit-card transactions on a Chinese yuan basis and not allowing foreign credit card companies to enter such transactions is inconsistent with China's WTO accession commitments. The consultations did not reach a resolution, and a dispute settlement panel was established in February 2011. In July 2012 it determined that, while there was no proof of the monopolization of Chinese yuan-based credit card transactions by business operators in China, requiring the display of logos and terminal installation, etc. in favor of business operators in China was unfairly discriminating against foreign credit card companies, and so violated the WTO Agreements. In October 2014, the State Council announced regulation relaxation measures, which would allow foreign credit card companies to handle Chinese yuan-based transactions and to establish transaction companies in China.

In the "China (Shanghai) Pilot Free Trade Zone" established by the Chinese Government in September 2013, regulation relaxation measures have been implemented on a trial basis in various sectors, and a series of financial liberalization policies were introduced, including lifting the prohibition, with usage restrictions, etc., on cross-border yuan transactions by companies within the Zone.

In addition, there are efforts to extend these regulation relaxation measures implemented in the "China (Shanghai) Pilot Free Trade Zone" to other regions. The relaxation measures regarding conversion of foreign currency capital into Chinese yuan permitted by the above-mentioned "Notification No. 20" were extended to 16 regions in China by the State Administration of Foreign Exchange "Notification No. 36" on July 4 and nationwide by the State Council "Notification No. 65" on December 21. Notification No. 65 also included Chinese yuan/foreign currency conversion business concerning over-the-counter commodity derivative transactions by banks, which is expected to be implemented by June 30, 2015.

Furthermore, on December 28, 2014, the Standing Committee of the National People's Congress decided to establish new Free Trade Zones in Guangdong, Tianjin, and Fujian and to expand the area of the Free Trade Zone in Shanghai. Similar to the existing Free Trade Zone in Shanghai, foreign capital management using the negative list and regulation relaxation measures will be expanded from the Shanghai Zone according to the characteristics of the respective regions.

### **4-3) Securities**

#### **<Outline of the measure>**

The content of the commitment to open up securities business to foreign companies, which China made at the time of its accession to the WTO, is as follows. (1) In terms of establishment by merger of companies managing securities investment funds, the foreign investment ratio was up to 33% at the time of the accession, increased to up to 49% within three years of accession. (2) The establishment of securities companies in the form of merger was to be allowed within three years after the accession, but the foreign investment ratio was not to exceed one-third. Merged securities companies may conduct underwriting and selling business for A shares, but entry into the distribution market of A shares is not permitted. In addition, merged

Chinese companies are required to be securities companies, and merged securities companies cannot engage in the same business as the parent companies (so-called “competition prohibition rules”). The “Decision on Amendments to the ‘Regulations on the Establishment of Foreign-Invested Securities Companies,’” which entered into force in January 2008, stipulates that, with regard to the shareholding ratios for listed domestic securities companies, the shareholding ratio of a single foreign investor shall not exceed 20%, and the total of the shareholding ratios of all foreign investors shall not exceed 25%.

#### **<Recent developments>**

In April 2012, the China Securities Regulatory Commission announced expansion of the total of the amount of investment by Qualified Foreign Institutional Investors (QFII) to 80 billion dollars. In August of the same year, the Commission also announced a proposal for revising the upper limit of foreign capital ratio in merging securities companies with foreign investors from 33% to 49%. The Commission then announced on July 12, 2013 that the total investment limit would be lowered to 150 billion dollars.

In addition, the Renminbi Qualified Foreign Institutional Investor (RQFII) was introduced as a relaxation of regulations on cross-border yuan transactions in December 2011, and the investment limitation was raised to 270 billion yuan in November 2012. It initially applied to Hong Kong financial institutions; then the investment limitation was raised to 80 billion yuan for the UK (London) and 50 billion yuan for Singapore in 2013, to 80 billion yuan for France, 800 billion yuan for the Republic of Korea, 800 billion yuan for Germany, 30 billion yuan for Qatar, 50 billion yuan for Australia, and 50 billion yuan for Canada in 2014, and 50 billion yuan for Switzerland in 2015.

Furthermore, two-way exchanges between the Shanghai Stock Exchange and the Hong Kong Stock Exchange were allowed to a certain extent (the daily maximum amount of 13 billion yuan and total amount of 300 billion yuan for investment in Shanghai, and the daily maximum amount of 10.5 billion yuan and total amount of 250 billion yuan for investment in Hong Kong) in November 2014, thereby enabling foreign investors to acquire Chinese yuan-based stocks via the Hong Kong Stock Exchange.

### **4-4) Financial Information**

#### **<Outline of the measure>**

In September 2006 the Chinese state-run Xinhua News Agency promulgated the “Law Controlling the Promulgation of News and Information within China by Foreign News Agencies,” announcing that it would take effect the same day. The law mandated that foreign news agencies transmitting news in China had to obtain prior approval from Xinhua News Agency and must transmit said news through an agency designated by Xinhua. As a result, direct news transmissions from foreign news agencies to consumers within China which had previously been authorized were no longer allowed.

### <Problems under international rules>

China is currently carrying out its liberalization commitments related to the “provision and transfer of financial information.” At this stage, its imposition of restrictions on the transmission of information, including financial information, on only foreign news agencies may potentially violate its obligations for the treatment of its domestic residents. In addition, within this same pledge China also made commitments to the effect that it would not become more restrictive than it was at the time of its accession with regard to matters like the approved business scope for foreign service providers that had already advanced into the country. These restrictions may potentially violate this pledge.

### <Recent developments>

At China’s TRM at the WTO’s Committee on Trade in Financial Services in November 2007, Japan raised these issues but did not receive satisfactory responses. In March 2008 the United States and the EU lodged a request for consultations with China pursuant to WTO agreements regarding this matter. (In June Canada also requested consultations.) On November 13, the US, the EU and Canada agreed to review with China the regulations governing financial information distribution services provided by foreign communications companies within China. Statements by the US and other countries indicate that China has agreed, among other things, to (1) designate an independent regulatory institution to grant distribution licenses, and (2) to repeal the requirement that foreign communications companies provide their distribution services through an agent, etc.

In response to this, in April 2009, the State Council Information Office, the Ministry of Commerce and the State Administration for Industry and Commerce jointly promulgated the “Provisions on Administration of Provision of Financial Information Services in China by Foreign Institutions.” The provisions entered into force on June 1, 2009. These provisions made clear that financial information services differed from news agency services, and foreign institutions will not be subject to the regulations under the “Measures for Administering the Release of News and Information in China by Foreign News Agencies” (Xinhua News Agency, 2006) when they provide financial information services. In addition, the provisions designated the State Council Information Office as the agency for supervision and administration of foreign institutions providing financial information services in China instead of Xinhua News Agency. The provisions do not contain the statement that “an agent is required when a foreign institution distributes financial information.” As a result, foreign institutions are now allowed to provide direct financial information services targeted to China’s domestic consumers if they obtain permits from the State Council Information Office. As of January 12, 2010, the State Council Information Office had given permission to provide financial information services within China to 28 foreign financial information service providers.

## **PROTECTION OF INTELLECTUAL PROPERTY**

### **Commitments upon Accession**

One of the areas in which Members (especially developed country Members) strongly sought improvements from China in the Working Party on accession was its systems for protecting intellectual property. These concerns reflect the increasingly serious problem of counterfeit and pirated products and other infringing goods in China. Following Working Party negotiations, China committed to adhering to the TRIPS Agreement immediately upon accession.

China did not seek transitional measures as a developing country, but committed to adhere to its obligations under the TRIPS Agreement upon the date of accession and to amend and improve its legal system to bring it into conformance with the TRIPS Agreement. In particular, China committed to reforming: the Patent Law (including patents for invention, patents for utility models, and patents for industrial designs), the Trademark Law, and the Copyright Law. In the area of enforcement, China further committed to performing its obligations under the TRIPS Agreement by rationalizing compensation payments for losses, bolstering its system for suspending products, strengthening administrative measures and border measures, easing requirements for applying criminal penalties, as well as educating and enlightening the public.

### **Implementation Status**

In China, protection of intellectual property is regulated substantively through several laws including: the Patent Law; the Trademark Law; the Copyright Law; the Law against Unfair Competition (Anti-unfair Competition Law); regulations prohibiting acts infringing upon undisclosed information (trade secrets); the Implementation of the Protection Regulation of Layout Designs of Integrated Circuits; and the Technology Exports and Imports Administrative Ordinance. Procedurally, intellectual property rights are protected through the general provisions of the Civil Law; the Criminal Law; the Customs Law; and the Regulations on Customs Protection of Intellectual Property.

Numerous new laws have been established or amended and old laws and ordinances abolished to bring the legal system into conformance with the TRIPS Agreement. In addition, 2008 saw the enactment of the Outline of the National Intellectual Property Rights Strategy (June 2008), aimed at developing an innovation-driven nation and to improving its capabilities for creating, utilizing, protecting and managing intellectual property rights, as well as the 2008 Action Plan on Intellectual Property Rights Protection (April 2008), which offers systematic guidelines and concrete steps to protect intellectual property nationwide, signifying a pro-active attitude by China toward protecting intellectual property rights. In December 2008, the Standing Committee of the 11<sup>th</sup> National People's Congress passed the amended Patent Law, and the law entered into force on October 1, 2009. Furthermore, in October 2010, the "Bill of activities for the special project to expose the violation of intellectual property rights, manufacturing and sales of imitation and poor quality goods" has been passed by the State Council of China. Intensive special project activities

were conducted nationwide in order to discover violations of intellectual property rights, manufacturing and sales of imitation and poor quality goods. In addition, China has been making efforts to strengthen the administrative measures by establishing a national group that instructs how to discover and counteract violations of intellectual property rights and manufacturing and sales of imitation and poor quality goods in November 2011. In the “2012 National Intellectual Property Rights Strategy Enforcement Promotion Plan” (April 2012) China also raised in detail a number of administrative measures to strengthen the structure of the intellectual property rights violation eradication system. At the local level, for example, three hit double option activities have been conducted with the aim of eradicating counterfeit products in Guangdong Province (three hit double option activities have ended for the present and were replaced by double option activities -- establishing market surveillance and reliability systems). In August 2012 and in March 2013, the State Intellectual Property Office (SIPO) announced a proposal for amendment of the Patent law to expand administrative power (opinion collection draft). Amendment of the Trademark Law also progressed rapidly; the revised Trademark Law was established in August 2013 and became effective on May 1, 2014. Furthermore, the “2014 National Intellectual Property Rights Strategy Enforcement Promotion Plan” (April 2014) also listed a number of efforts, including the implementation of specific actions concerning the sales of infringing/counterfeit products using the Internet, etc. The “establishment of intellectual property courts” was also raised as a discussion item in this Plan, and a “Decision on the Establishment of Intellectual Property Courts in Beijing, Shanghai and Guangzhou” was approved at the Standing Committee of the National People's Congress on August 31, 2014. Subsequently, Intellectual Property Courts were actually established in Beijing, Shanghai and Guangzhou (\*)<sup>2</sup> in 2014. This is expected to lead to strengthening of intellectual property rights protection by unified judgments.

## Points to Be Rectified

As to the legal system for protecting intellectual property rights, in general, China has brought it into approximate conformance with the TRIPS Agreement, though further improvements are still considered necessary or desirable on a number of issues.

It has been noted, however, from the point of view of the actual situation of distribution of infringing products such as counterfeit/pirated products, etc., that little improvement has been seen in spite of the efforts of the Chinese authorities. As proof of this, a survey of Japanese companies showed that, among the companies that suffered damage caused by counterfeiting in fiscal year 2013, 67.0% cited China and Hong Kong as the country where counterfeit and pirated products were produced, transferred, sold

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<sup>2</sup> The Intellectual Property Courts in these three cities have different functions. The Beijing Intellectual Property Court mainly handles the granting of administrative rights, including patents and trademarks, and the examination/disposition of right-determination cases, and also handles the examination/disposition of civil cases. The Shanghai and Guangzhou Intellectual Property Courts mainly handle the examination/disposition of civil cases for infringement of patent and other rights, and do not handle the granting of administrative rights, including patents and trademarks, and the examination of right-determination cases.

or provided (“FY 2014 Survey Report on Losses caused by Counterfeiting,” Japan Patent Office (March 2015)). According to a Survey Report published by the Ministry of Finance of Japan in March 2015 (“2014 status of seized goods due to violations of intellectual property rights at customs”, March 2015), the number of cases where imports from China were seized due to violations of intellectual property rights (FY2014) was 29,553, which was 14.4% higher than the previous year. Among these cases, more than 9 out of 10 (92.2%) originated from China. What is needed to rectify this situation is not only improvement of the actual legal system, but also drastic improvements in the enforcement of the existing legal protections. Tighter control needs to be exerted in the administration of various judicial and administrative branches. In addition, despite such circumstances, the “Action Plan for Further Implementation of the National IP Strategy” announced by the State Council of China in December 2014 stated that the goals of the “Outline of National Intellectual Property Rights Strategy (June 2008)”, which aimed at clear reduction of counterfeit/pirated products within the five-year period, were basically achieved. Therefore, the difference in perception also needs to be resolved.

The following sections specifically identify points where further remedies or improvements are sought.

### ***1) Issues Related to Counterfeit, Pirated and Other Infringing Products***

#### **<Outline of the measure>**

Protection of intellectual property first requires improvement of specific regulations. China’s efforts to make improvements as it acceded to the WTO through a series of amendments to its laws and recent revision of the Trademark Law, etc. should be recognized. Nevertheless, in ensuring the effective protection of intellectual property, in accordance with the provisions of the TRIPS Agreement, it is vital that enforcement systems using civil, administrative, criminal and other procedures be strengthened and, where necessary, implemented in more efficient and speedy manner. Moreover, enforcement systems must be administered in a fair and equitable manner.

The following section notes several issues on enforcement, which play a large role in protecting intellectual property in China.

#### **<Problems under international rules>**

##### **(a) Inadequate administrative, civil and criminal remedies**

For intellectual property rights infringements, Chinese laws and regulations recognize administrative penalties (suspension of infringements, levying of administrative fines, confiscation and disposal of goods infringing rights, *etc.* by the administrative authorities), and allow for civil recourse (embargo based on court judgment, compensation for losses, rehabilitation of reputation through advertisements expressing apologies, *etc.*), as well as criminal sanctions (imprisonment, fines, *etc.*).



### (Administrative Procedure)

While the Chinese Government has enforced administrative penalties, the penalties are insufficient. In the case of trademark infringements, administrative penalties under the Article 60 of the new Trademark Law provide for a maximum fine for an act of infringement of the exclusive right to use a registered trademark of five times the amount of the illegal business turnover (the price of manufactured and sold infringing goods) (if it is 50,000 or more yuan), or not more than 250,000 yuan (where there is no illegal business turnover or if it is less than 50,000), and that more severe punishment should be given to those who have infringed trademark rights twice in five years or in other serious circumstances. Its effective enforcement is expected.

However, in cases where infringers intentionally do not keep accounts, etc., correctly calculating the amount of the illegal business turnover has been difficult. A sufficient deterrent compared to the illegal profits that can be earned by infringements cannot be imposed because the amount of the illegal business turnover determined tends to be lower than the actual amount. In the case of the infringement of copyrights, although administrative penalties are imposed by the administrative agency in charge of copyrights (the Copyright Agency) when “public interests are damaged,” the requirement is not yet clearly defined. Because of the lack of clarity of this requirement, copyright owners who wish to see the violators penalized are sometimes required to submit excessive proof of infringement to identify the violators and/or pirate product manufacturers, and imposing penalties is exceedingly difficult. It is desirable, therefore, to have relaxation of requirements, clarification of the enforcement requirements, and the mitigation of overly-stringent requirements. In the proposal for revising the Trademark Law (opinion collection draft) announced by the Legislative Affairs Office of the State Council in January 2013, the requirement regarding “damage to public interests” was deleted. Future revisions will be monitored. Moreover, as repeat offences are very frequent (Ministry of Economy, Trade and Industry, “Field Survey of Intellectual Property Infringement in China,” March 2010), more severe penalties are required from the standpoint of a deterrent to further infringements called for in Article 41 of the TRIPS Agreement.

Although simplified processing for Customs enforcement has been achieved through the implementation of the General Collateral Regulations, more improvements are required. Japan looks forward to improvements in the procedures required under the current export regulation system (*e.g.*, improvement in the responding period for the rights holder, further simplifying appraisal procedures, *etc.*), as well as abolition of the practice of having the rights holder pay warehousing fees, etc.

There are also reports that counterfeit goods manufactured in China are exported to various parts of the world, including other Asian countries and Middle East, with potentially unfair and distortive effects on international trade. Furthermore, there are many reports of goods discovered with improper indications of origin. Article 51 of the TRIPS Agreement does not require the introduction of export restrictions. However, this could still be considered an area requiring stronger measures for seizure in order to provide for effective exercise of rights under Article 41.1.

### **(Civil Recourse)**

With regard to civil remedies against infringements of intellectual property rights, compensation claims are allowed and there also are efforts to raise the amount of compensation. However, that adequate compensation is not necessarily being recognized, and compensation is rarely paid by infringers even if the rights holder wins a case. In this regard, there have been some Interpretations of the Supreme People's Court adopted on methods of calculating damages -- for example, "The Judicial Interpretation of the Supreme People's Court on Questions Regarding Applicable Laws for Adjudication of Patent Dispute", which went into effect in July 2001, new Trademark Law, and "The Interpretation of the Supreme People's Court of Several Issues Concerning the Application of the Law to the Trial of Civil Dispute Cases Involving Trademarks" and "The Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright Cases", which went into effect in October 2002. However, there are said to be many cases which approve compensation within the limits stipulated in those interpretations, yet do not adequately compensate the rights holder. The "Interpretation of the Supreme People's Court of Several Issues Concerning the Application of the Law in Trials of Patent Infringement Dispute Cases," which entered into force in January 2010, also contains provisions on the amount of compensation for damages. The "Supreme People's Court's Opinions on Several Issues Concerning Overall Support for Intellectual Property Lawsuits under the Current Economic Situation," notified in April 2009, also includes a provision to the effect that the compensatory, punitive, and deterrent effects of compensation for damages shall be strengthened. Japan needs to continue monitoring how these provisions, etc. are administered when courts find the amount of damages in lawsuits, in light of the provisions of Article 45 of the TRIPS Agreement, which require adequate compensation for damages, and the commitment made by China at the time of its accession to the WTO to provide adequate compensation for damages. The draft for a revised Patent Law (opinion collection draft) announced in March 2013 and the new Trademark Law to be enforced in May 2014 provide a three-fold increase in maximum compensation and the amount of statutory damages (no more than one million yuan in the March 2013 draft for a revised Patent Law and no more than three million yuan in the new Trademark Law) in case of intentional patent or trademark infringement. Future developments will be monitored.

### **(Criminal Sanctions)**

As for criminal sanctions, Paragraph 7, Chapter 3 of the Criminal Code provides for imprisonment and fines for criminal cases of infringements of intellectual property rights (trademark infringement is covered in Articles 213 - 215, copyright in Articles 217 - 218). However, there were some problems concerning the requirements to impose criminal penalties. Since the monetary thresholds for criminal prosecution were up to 50,000 yuan, coupled with a lowered value for the amount of illegal business

turnover due to calculations based on the price of infringing goods as claimed by the accused party (which is very likely to be underreported) instead of the price of the genuine goods, it was impossible to meet the standards for criminal prosecution and to impose criminal penalties even if there is infringement on a commercial scale in many cases. Furthermore, the threshold for companies is three times higher than the threshold for individuals, making it difficult to impose criminal penalties against infringements by companies.

Under the current conditions it is still difficult to levy criminal penalties, thus weakening the ability to deter infringement and not tying into the especially effective prevention of repeat offenses. As such, there are concerns regarding the effective enforcement of intellectual property rights. In addition, there are many sophisticated cases of infringement where the distribution of small lots and inventory control is used, etc. Criminal detection of the reality of the increasingly organized and sophisticated counterfeit goods business is quite difficult (at the small-scale retail level, in particular). Japan has been highly interested in the enforcement of effective intellectual property rights. Japan continues to request improvements during bilateral talks between Japan and China such as the Japan-China Economic Partnership Conference, as well as at multilateral forums such as the Transitional Review Mechanism (TRM) of the WTO TRIPS Council. The “Interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues of Concrete Application of the Laws in Handling Criminal Cases of Infringing Intellectual Property (2)” (April 2007) materially lowered thresholds related to companies to one-third their previous levels by abolishing the disparity between companies and individuals concerning thresholds related to intellectual property rights, including the unauthorized use of trademarks and unlawful reproduction of copyrighted works. Furthermore, of the thresholds related to “copyright infringements” stipulated in Article 217 of the Criminal Code, the reproduction mark standard was lowered from 1,000 to 500. As these demonstrate, a certain degree of improvement has been observed with regard to intellectual property rights. In the case of trademark infringement, however, the 50,000 yuan threshold is maintained. This is likely to be a factor that makes the criminal investigation of companies responsible for selling counterfeited trademark goods difficult.

These matters pose problems in terms of consistency with Article 41 of the TRIPS Agreement, which requires remedies that provide effective deterrent power, Article 61 of the TRIPS Agreement, which stipulates the application of penal measures related to the unauthorized use of trademarks at a commercial scale and the unlawful reproduction of copyrighted works, and similar articles. In April 2007 the United States filed a request for consultations over these points based on the WTO Agreement, and a panel was established in September of that year. Japan took part in this case as a third-party country. The Panel’s report was adopted by the DSB meeting in March 2009. Regarding the US’ claim on threshold values that “the commercial scale stipulated by China is in violation of Article 61 of the TRIPS Agreement and other provisions of the TRIPS Agreement”, the Panel dismissed the complaint on the illegality of stipulating a threshold value itself due to insufficient evidence presented by the US, but accepted the assertion that “commercial scale” was subject to change by market, product or other factor. The actual situation in China needs to continue to be monitored from the point

of view of consistency with the TRIPS Agreement.

In terms of criminal transfer, “China’s Action Plan on IPR Protection 2010” states that transfer of suspected cases of trademark crime will be further regulated and strengthened. In addition, the “2012 National Intellectual Property Rights Strategy Enforcement Promotion Plan advocated the cooperative work of the administrative and the criminal justice systems on the infringement of intelligent property rights and the maintenance of the information sharing system between the administrative and criminal justice systems. Specifically, “Opinions on Several Issues Concerning Reinforcement of the Cooperative Work of the Administrative and Criminal Justice Systems” was presented by the State Administration for Industry and Commerce in December 2012. Japan will continue to pay attention to the existence of cases where criminal procedures are not fairly initiated, and ask the Chinese Government to strengthen educational activities for and monitoring of regional regulatory authorities.

#### **(b) Abuse of Misappropriated Applications / Non-examination System on Inventions of Foreign Countries**

Some Japanese companies reported that, in China, there have been many cases where patent applications and utility models for an invention or a design created in a foreign country is submitted by a person other than the authentic inventor and a patent is granted by the patent office. In China, misappropriation is not recognized as either a reason for refusal or a reason for invalidation. Remedy is available only by requesting confirmation concerning the attribution of the relevant right (Articles 85 and 86 of the Implementation Regulations for the Patent Law). Japan has been encouraging China to effectively prevent such cases through the Government-Private Joint Mission to China for IP Protection of the International Intellectual Property Protection Forum and by exchanging opinions with the State Intellectual Property Office, etc., in light of Article 41.1 of the TRIPS Agreement on expeditious remedies to prevent infringement.

Additionally, in China, a non-examination system is adopted not only for utility models but also for designs (which are examined in Japan) and there is no obligation to submit a patent examination report created by the examiner to validate the rights when exercising them. The lack of preventive regulations regarding the abuse of rights is of strong concern. Japan continues to make efforts in improving the situation by facilitating the understanding of differences in the systems through the framework of China-Japan-Korea Patent Office meetings and seminars in China, etc. and requesting to make obligatory the submission of patent examination reports at the time of exercising the rights in public comments to seek amendment of the Patent law, etc.

#### **(c) Bad faith trademark filings**

It has been reported that there were many cases where Japanese companies' trademarks or characters were applied for and registered by third parties (bad faith filings). When such applications are publicly notified and registered, it can cause obstructions to the business operations of the rightful owners. Those obstructions may be demands to purchase the rights to trademarks and characters, commencement of

unfair business operations using the registered and trademarked names, and indictments being filed against the original owners who had market share in China at the State Administration for Industry and Commerce for violations of the rights, etc. In cases where original owners submit requests for administration enforcement to the local administrative offices, their claims are based on the counterargument that the applications for trademarks were submitted by producers of imitation goods knowing that they were bad faith filings. Thus enforcement actions would be suspended until the trademark offices reach their determination on the legitimacy of the bad faith filings applications. This can cause situations where the original owners cannot promptly prevent injury caused by infringing goods.

Japan has been requesting improvement on this issue at bilateral meetings between the two countries and also at other opportunities that involve other countries. The Supreme People's Court promulgated "Opinions on several issues concerning maximizing functions of the intellectual property rights court, promoting significant development and prosperity of socialism culture and economic development through voluntary cooperation" (implemented December 2011). This clarified that China will regulate unethical applications considering the intentions of trademarks, and that, in case that indictment for violation of trademark rights was filed against the initial owners, their counterargument of being the original users of the trademark rights will be acknowledged. Continuous close monitoring will be necessary to effectively prevent the expansion of injury by bad faith filings and respond by utilizing the opportunities at bilateral consultations and multilateral frameworks in light of the purpose of the TRIPS Agreement Article 41 Clause 1 (prompt action of rescue measures to prevent violations).

#### **(d) Local Protectionism**

One of the major problems cited concerning control of intellectual property rights infringements in China is "local protectionism." In particular, the officers in charge of regional administrative agencies lack a basic understanding of intellectual property (incomplete understanding of systems and treaties or simply ignorance of their existence). There are some cases where local authorities use their discretion in controlling these goods, or, in extreme cases, unofficially provide manufacturers of counterfeit and pirated products with information of a crackdown, because of an understanding that the manufacturer of counterfeit and pirated products brings profits to the local area. These actions impede speedy and accurate enforcement of intellectual property rights in China, and this is a problem in light of Article 41.1 of the TRIPS Agreement (on ensuring the availability of enforcement procedures under a Member's law for effective action against any act of infringement). Cases where there are discriminatory effects in the recourse of foreigners and foreign companies could also cause problems regarding TRIPS Article 3.1 with respect to national treatment.

The Chinese Government has taken some positive actions to improve local government awareness regarding intellectual property obligations such as implementing a special program to detect acts of infringement all over the country from October 2010

to June 2011. After the special program finished, in November 2011, the results were verified and a policy to continue thorough detection was announced. Furthermore, “opinions of the state council regarding further enforcement of detecting the act of infringement and the manufacturing and sales of counterfeit or poor-quality products (November 2011)” was expressed. However, many are of the opinion that local protectionism still exists in China. On the other hand, there are some local governments with a high level of awareness on IPR protection. In Guangdong, where counterfeit damage to Japanese companies is great, it has been reported that the Guangdong Provincial Administration has promulgated regulations for detecting counterfeits and implemented a unique initiative, the “three hit double option”. Japan needs to continue to ask the Chinese Government to strengthen educational activities for and monitoring of regional regulatory authorities to respond to cases suspected of being local protectionism.

## ***2) Problem of Infringement Applications***

**\* This particular case was included in light of the following concerns despite it being a trade or investment policy or measure that does not expressly violate the WTO Agreements or other international rules.**

### **<Outline of the measure & Concerns>**

Many Japanese companies are still being harmed by misappropriated applications of trademarks, and responding to it remains an important issue in China.

Japan, the US and the EU commented during the WTO’s legislative review on the inadequacies of China’s protection for well-known trademarks in particular (an issue of great concern also to many other developed countries). In the past, the list of well-known trademarks in China only covered Chinese companies, which was counter to Article 3 of the TRIPS Agreement (national treatment). However, it is appreciated that at present foreign well-known trademarks are recognized as well-known marks in China. However, based on Article 13 of the new Trademark Law of China enforced on May 1, 2014, obtaining approval of well-known trademarks requires the trademark being well-known to the public “within China”. In addition, Article 32 of the new Trademark Law of China, which can be used to prohibit infringement applications, also states that “trademarks that are already used by others and have a certain degree of influence shall not be registered in a dishonest manner” and, despite no clear statement of “in China”, this Law is considered to require that the concerned trademark shall already be used within China and have a certain degree of influence; therefore, the protection of trademarks that are well-known only in foreign countries has not been achieved. In order to suppress infringement applications, encouraging the introduction/utilization of information disclosure prior to public notification and introduction of provisions to refuse applications of well-known foreign trademarks (corresponding to paragraph 1, Article 4 of the Trademark Act of Japan) is considered desirable. Meanwhile, new paragraph 2 added to Article 15 of the new Trademark Law provides that an application shall be refused by filing an objection, in cases where an agreement or trading

relationship is concluded with another party and a third party who clearly knows of the existence of the trademark used by such party applies for a trademark registration for goods of the same kind or for similar goods. Attention will be paid to future enforcement.

### ***3) Licensing Regulations on Patents and Know-How***

#### **<Outline of the measure>**

China regulates contracts approving patent exploitation (so-called licensing agreements) between foreign and Chinese companies through the Technology Introduction Contract Administrative Ordinance, the Technology Introduction Contract Administrative Ordinance Application Rules, and the Technology Export and Import Contract Registration Administrative Statute.

#### **<Problems under international rules>**

Through the accession negotiations, the problematic provisions of China's licensing system were amended and now are closer to conforming to the TRIPS Agreement with the enforcement of the Technology Exports and Imports Administrative Ordinance (hereinafter referred to as the "Administrative Ordinance"), etc. While China's efforts to make improvements should be acknowledged, a number of restrictive clauses and mandatory warranties contained in the Administrative Ordinance are subject to concern from the point of view of Article 3 of the TRIPS Agreement (national treatment) in relation to Article 28(2) of the same Agreement with respect to the right of patent owners to conclude licensing contracts.

The section below notes several issues in possible contravention of the TRIPS Agreement.

#### **- Actuality of Royalty Regulations**

Before 1993, under the "principles of instruction for conclusion of technology-introduction contracts and permit assessment", the maximum royalty rate was 5% of net sales. Although this rule has already been abolished, there are some causes where controls are still imposed on the maximum royalty rate or contract terms due to administrative instructions by local government during the process of assessment for establishing joint venture enterprises. It is assumed that, in establishing joint venture enterprises, foreign enterprises are licensors in most cases. Regulating licenses in terms of royalty rate can be inconsistent with Article 3(1) of the TRIPS Agreement, obligation of national treatment, although it can affect the right of patent owners to conclude licensing contracts.

#### **- Ownership of Improvements (Article 27 & 29(3) of the Administrative Ordinance)**

Article 27 of the Administrative Ordinance states that improvements in the

licensed technology belong to the improving party. In addition, Article 29(3) of the said Ordinance prohibits the party providing technology from restricting the party receiving the technology to make improvements in the technology provided through licensing or other means, or to use the improved technology.

In contrast, for domestic technology transfer or licensing contracts, Article 354 of the Contract Law of China stipulates that parties may contractually provide for the method of sharing technological achievements resulting from improvements. No mandatory provisions, such as those provided for in the Administrative Ordinance, exist. In addition, Article 355 of the Contract Law provides that, if laws or administrative regulations set separate provisions for technology import and export contracts, patent contracts or patent application contracts, such provisions shall govern. This handling indicates that the Administrative Ordinance, which is a special law, is applied with priority to license contracts that fall under technology import and export while Article 354 of the Contract Law of China is applied to other ordinary domestic technology transfer or licensing contracts.

In many cases of technology import and export subject to the Administrative Ordinance, foreign companies are assumed to be the parties providing the technology. The Ordinance providing that improved technology belongs to the party who has made the improvement irrespective of agreements among the parties may be inconsistent with Article 3(1) of the TRIPS Agreement, obligation of national treatment, because mandatory provisions are applied only to foreign companies providing the technology and therefore can be a measure that discriminates between Chinese and foreign technology transfer.

#### **- Licensor Liability (Article 24 of the Administrative Ordinance)**

Where a licensee, or party receiving technology, with regard to technology import and export is sued by a third party for infringement of a right as a result of using technology provided through licensing or other means, the licensor was obliged to respond under the old ordinance (the Technology Introduction Contract Administrative Ordinance and the Technology Introduction Contract Administrative Ordinance Application Rules). However, the obligation to respond ceased with the abolition of the old ordinance. However, Article 24(2) of the Administrative Ordinance still provides for the obligation to cooperate in responding to a third party's claim for infringement of a right. Furthermore, Article 24(3) of the Administrative Ordinance provides, in the same manner as the old ordinance, that "If the recipient party in a technology import contract uses the technology provided by the supplier according to the agreement in the contract, and such use results in the infringement of a third party's legal rights and interests, then the supplier assumes responsibility." For example, where the licensee infringes a third party's legal rights and interests as a result of using the licensed technology by usage that does not follow the contract, the licensor could be exempted from liability. However, the licensor will have to respond in some way to its liability for infringement against the third party, even for matters in which it is not involved, until exemption from liability becomes clear.



On the other hand, the Contract Law of China (Article 353), which governs contracts between Chinese companies, provides that liability for compensation in the case of infringement of a third party's rights and interests may be separately provided for by a contract between the parties.

Therefore, as mentioned above, the provision in the Administrative Ordinance that the supplier bears certain obligation and liability for infringement of a third party's rights and interests irrespective of agreements between the parties can be inconsistent with the national treatment obligation set forth in Article 3.1 of the TRIPS Agreement, as a measure that discriminates between Chinese and foreign technology transfer.

**- Guarantee of Completeness, etc. of Provided Technology (Article 25 of the Administrative Ordinance)**

In the same way as the old ordinance, Article 25 of the new Administrative Ordinance still contains a provision to the effect that the party providing technology shall guarantee that the technology provided is complete, free from defects, and effective, and can achieve the contractual technological goal. Therefore, for the parties providing the technology, it can obstruct the conclusion of licensing contracts because compulsory performance might be forced on the party providing technology to achieve the technological goal.

In this manner, foreign persons providing technology are still in the situation where they inevitably become wary of providing technology. Japan will request that China further clarify the Administrative Ordinance and promote deregulation. Also, Japan needs to continue to monitor the operation of the authorities that register and administer or permit international licensing contracts, etc., including differences in the regulations governing licensing contracts and other technology provision contracts concluded between Chinese companies.

**<Recent developments>**

China was subject to TRIPS Council transitional reviews (China TRM) for eight years after the accession in December 2001 in accordance with a provision in the Accession Protocol for the purpose of verifying its compliance with the TRIPS Agreement, both with respect to improving and operating its domestic legal system and enforcement system. The last review was conducted in October 2011. At the TRIPS Council China TRMs conducted in October 2009 and October 2011, Japan set forth the aforementioned areas where further improvements were needed and especially pointed out the importance of enforcement with respect to counterfeits, piracy and other infringements of intellectual property rights. The United States and the EU made similar comments on the need to improve this enforcement. At the 2007 and 2008 meetings regarding China TRM in the TRIPS Council, Japan requested clarification about the application of the regulations in question pertaining to the aforementioned responsibilities of licensor, and the Chinese representatives responded at the 2008 Council meeting that “the transferring party is not liable as long as the user used the item in an appropriate environment and manner”.

At the last review, conducted in October 2011, Japan pointed out the discriminatory regulations in the Ordinance. China, however, replied that discriminatory regulations do not exist in the Ordinance

Japan has requested improvement on intellectual property issues at various meetings, such as the meetings held with the chief of State Administration for Industry and Commerce (May and December 2011, May 2012), bilateral meetings with the State Intellectual Property (SIPO), the Trilateral Policy Dialogue meeting among Japan, China, and the United States, and also at the high-level mission (September 2012) with the International Intellectual Property Protection Forum (IIPPF), which takes measures against cross-border imitation and pirated goods by private enterprises. Additionally, the “memorandum of cooperation and exchange for intellectual property rights protection” was exchanged between the Ministry of Economy, Trade and Industry of Japan and the Ministry of Commerce of China at the Japan-China High-Level Economic Dialogue in June 2009. Based on the memorandum, in November 2009, October 2010 and October 2011, a meeting of the Japan-China Intellectual Property Rights Working Group was held. Japan exchanged opinions with the Chinese government on a wide range of issues regarding intellectual property rights protection. In August 2009, the “memorandum of cooperation on intellectual property rights protection” was concluded between the Ministry of Economy, Trade and Industry of Japan and the State Administration of Industry and Commerce of China. Based on the memorandum, in July 2010 and January 2012, meetings of the Japan-China counterfeit office working group were held. At meetings, Japan exchanged opinions with the State Administration of Industry and Commerce regarding violations of trademark rights and of the Law against Unfair Competition of China. Based on the same memorandum, in January 2012, the Japan-China Trademark Administrators Conference was held. Japan exchanged opinions with the State Administration for Industry and Commerce of China regarding the status of the discussion on the amendment of Trademark Law of China, the standards for trademark attorneys and problems relating to trademark applications and registrations by third parties (the problem of infringement applications). Japan will continue to monitor the status of developments in the intellectual property legislative system in China as well as operation of the system at various opportunities of bilateral discussions, and to take actions to rectify problems as situations arise.

In order for the Chinese Government to strengthen its enforcement, it is necessary to simultaneously improve the capacities of individual Chinese Government agencies. It is with this in mind that Japan provides support by accepting trainees and dispatching experts, as well as hosting various seminars. Assistance provided by Japan to China for the improvement of its legal system has included exchanges of opinions pertaining to revisions to the patent law and trademark law. What is important from a medium- to long-term perspective is creating a wide-ranging program to work on the development of specialized human resources in the judicial branch and the administrative branch responsible for examination and enforcement, and to conduct educational activities to communicate the need for respect and protection of intellectual property to the general public.

The private sector conducted various activities, with the view of encouraging, and cooperating with, the Chinese authorities to further address the issues, including: requesting for crackdown and providing information company by company; strengthening enforcement capacity by the IIPPF, a cross-industry organization; and working through the Quality Brand Protection Committee (QBPC) with participants including European and American companies. In order to support such activities, JETRO provides varied information to Japanese companies, and has established consultation offices in Beijing, Shanghai, and Guangzhou as a mediator with the Chinese Government. It is important for the Government of Japan itself to encourage the vigorous activities of private companies, and to provide necessary support for the further promotion of efforts.

With regard to regulations on licensing, etc. of patents, know-how, etc., at the industry-academia-government study meeting on the Free Trade Agreement (FTA) among Japan, China and Republic of Korea (the 3rd meeting held at the beginning of December 2010 and the 7th meeting in December 2011), Japan pointed out that the Administrative Ordinance and other regulations on technology transfer, including discriminatory treatment in relation to the liability for guaranteeing infringement against a third party, are disincentives to investment in China. It is important for Japan to continue to encourage further clarification of the Administrative Ordinance and deregulation through such bilateral/multilateral consultations, etc. In addition, in relation to the provisions which exclude the exercise of the intellectual property rights in Article 55 of the Anti-Monopoly Act of China, an opinion-collection draft regarding the proposed “Provisions on Prohibiting the Abuse of Intellectual Property Rights to Preclude or Restrict Competition” was announced by the State Administration for Industry and Commerce in June 2014. The enacted version of the above Provisions has not been disclosed as of March 2015. It is necessary to pay close attention to future developments with regard to the range of application of the Anti-Monopoly Act, which is expected to be clarified by these Provisions.

#### **Column: Main Regulations**

The following are the main regulations enforced to date:

##### ***Patent Law (amended October 2009)***

The “Patent Law”, which was adopted at the 6th Standing Committee of the National People's Congress in March 1984, regulates protection of patents, inventions and designs. The third amendment of this law is currently in effect. The State Intellectual Property Office (SIPO) announced an opinion collection draft regarding the proposal for the fourth revision in March 2013, and Japan submitted its views through the China Japanese Chamber of Commerce and Industry on April 1 of the same year. The proposal for the revision is currently under discussion at the Legislative Affairs Office of the State Council. Notably, the proposal includes administrative seizure of patent infringement, introduces punitive damages for stronger enforcement, and extends the protection period for design rights (to 15 years), etc. The remaining issues include that [1] utility models and designs are registered without examination and there is no

obligation to submit a patent examination report even when disputes occur, and that [2] no provisions provide that when an invalidation decision of utility model registration becomes final, those exercising the rights without being based on a report of utility model technical opinion or otherwise taking reasonable care bear responsibility for damages caused by exercising the rights, etc.

The Patent Law was among the priorities of the 12th National People's Congress, and is expected to be given priority for its establishment.

### ***Trademark Law (effective May 2014)***

The Standing Committee of the National People's Congress decided on an amendment of the Trademark Law (established in August 1982) in October 2001; it became effective in December of the same year. Furthermore, the new Trademark Law was adopted and put into effect in May 2014. The new Trademark Law aims to improve convenience for the applicant, maintain market order for fair competition, and reinforce trademark protection, etc. Specifically, it provides: a time limit on trademark examination (completing trademark examination within nine months, etc.), changes to the opposition system (trademark registration immediately takes place when oppositions are rejected), prohibition of advertising or promotional use of well-known trademarks, prohibition of bad faith filings by those having contract/business relationships, etc., reinforced protection of exclusive rights to use trademarks (raising the amount of statutory damages from 0.5 million yuan to 3 million yuan, and introduction of punitive damages), and standards for trademark agency business (establishment of penal provisions), etc.

The new Trademark Law contains many positive provisions. Considering the actual situations in China, where a very large number of misappropriated applications still exist, however, there still remain a number of issues, including those regarding the requirement that infringement application measures that trademark registration take place immediately after oppositions are rejected reduces opportunities for challenging infringement applications (or acts of Japanese rights holders may (formally) become infringement at an early stage), and that foreign well-known trademarks are not considered a reason for refusal of application.

Therefore, Japan needs to pay attention to the operations based on the new Trademark Law in the future.

### ***Copyright Law (effective April 2010)***

The "Copyright Law", effective in April 2010, is scheduled to be revised shortly. The Legislative Affairs Office of the State Council announced an opinion collection draft in January 2013, and the China Japanese Chamber of Commerce and Industry submitted comments on March 1 of the same year. The opinion collection draft includes provisions that can contribute significantly to the reinforcement of intellectual property rights protection, including raising the amount of administrative penalties, enabling the selection of calculating methods for the amount of damages in judicial remedies, raising the upper limits of the amount of statutory damages, stipulating penal provisions, reinforcement of the means for evidence collection through the courts, deleting the requirement of "infringement of public interest" from the requirements for executing

administrative actions, and providing regulations regarding circumvention of technological protection measures and provisions concerning manipulation of rights management information, etc. applicable to radio/TV programs, etc. However, further improvement is desirable regarding the provisions concerning group-based management of copyrights, obligation to reward employees for work/performance for hire to be in place, and cases where the copyrighted work can be used without the permission of the copyrights holder are broadly included, etc.

The Copyright Law was among the priorities of the 12th National People's Congress as with the Patent Law and is expected to be given priority for enactment.

***Administrative Measures on Internet Transactions (effective March 2014)***

The obligations of managers, etc. of businesses that provide internet commodity transactions and related services (including third-party transaction platform businesses) were set with the aim of sound development of internet commodity transactions; it has been in effect since July 2010 as the Provisional Administrative Measures on Internet Commodity Transactions and Related Services. An opinion-collection draft regarding the proposal for its revision was initiated in September 2013, and the revised Measures were put into effect in March 2014 as Administrative Measures on Internet Transactions. The obligations of managers of third-party transaction platform services that are of particular interest to the rights holders include protection of trademark rights, etc., cooperation in regulating illegal acts on the Internet (including trademark infringements and acts of unfair competition), and establishment of a credit assessment system. However, there is no obligation that users of the platform services who are infringing intellectual property rights provide information. Other notable provisions include that a natural person who is engaged in internet commodity transaction business without meeting the conditions of business registration must carry out business activities through a third-party transaction platform, and that the Administration for Industry and Commerce can conduct on-site inspection and examine relevant data/documents, including written contracts and accounts, etc. when internet commodity transactions suspected of being illegal, etc. are subject to seizure.

The Japanese government needs to determine the legal and other means available to the rights holders under this Administrative Measures and conduct activities to make the content known to Japanese companies, etc.

***Revision of the Interpretation of the Supreme People's Court of Several Issues Concerning the Application of the Law in Trials of Civil Disputes over Protection of Well-Known Trademarks (effective April 2013)***

This revision provides that the Supreme People's Court may designate the Basic People's Court to have first-instance jurisdiction over patent disputes.

***Several Provisions of the Supreme People's Court Concerning Publishing of the List of Persons Who Failed to Execute Duties (effective October 2013)***

These provisions provide measures to make a list of "those having abilities but who do not execute determined duties of effective legal documents" and broadly disclose it to

the public as a punishment, thereby imposing practical restrictions on borrowing, etc. by those included in the list; it is expected to improve the situation many rights holders are faced with today where they have won intellectual property rights lawsuits, but action has not been taken against the other parties.

***Provisions Concerning Disclosure of Legal Document Websites of the Supreme People's Court (effective January 2014)***

Formerly, important trial cases were not necessarily disclosed, and this has been an issue from the point of view of transparency (required by Article 63 of the TRIPS Agreement), as well as in practice causing difficulties in analyzing/discussing legal systems in China. Significant improvement will be made with implementation of these provisions.

## **GOVERNMENT PROCUREMENT**

### **Commitments upon Accession**

WTO Members are not required to become signatories to the Agreement on Government Procurement (GPA). This is a plurilateral agreement and only those countries that accede are bound by its rules. Therefore, only a subset of countries, mainly developed countries, has have acceded to the GPA. At the time of its accession to the WTO, China committed to accede to the GPA in the future and to working to ensure transparency in government procurement procedures as well as to provide MFN treatment when procuring from foreign countries. China has already been an observer of the Agreement.

China submitted its application for the accession to the GPA and its initial offer in December 2007. Accession negotiations have taken place since 2008. However, various problems with the initial offer were pointed out, and other countries requested early submission of a revised offer. In response to this, China submitted four revised offers in July 2010, November 2011, November 2012, and December 2013 but it was pointed out that the contents of the revised offers still were inadequate. China is expected to submit a new offer for further improvement.

### **Status of Implementation and Problems Under International Rules**

To prepare for future accession to the GPA, China adopted the People's Republic of China Government Procurement Law in the 28th Session of the 9th Standing Committee of the NPC in June 2002; it took effect on January 1, 2003.

The law governs government procurement and has provisions that are similar to those of the GPA in terms of coverage (procurement organization, products, *etc.*), procurement methods (open and competitive bidding, *etc.*), procurement procedures and complaint filing procedures. However, there still remain some differences between the Law and the GPA, including the followings.

**\* The following measures do not expressly violate the WTO Agreements or other international rules as China has yet participated in the GPA at present, but may be**

**discussed in accession negotiations and therefore matters that can be issues from the point of view of consistency with the GPA are described below.**

**• Subject of Procurement**

The GPA basically bans discrimination in the procurement of goods and services above the relevant threshold by organizations covered by the Agreement. In contrast, China's Government Procurement Law stipulates that domestic goods and services can be given preference except in the following three cases: (i) goods and services cannot be domestically procured in China or cannot be produced under reasonable commercial conditions; (ii) procurement is for use in foreign countries; and (iii) other laws or administrative regulations stipulate otherwise. These are not consistent with the principle of national treatment in the GPA, and are likely to pose problems in China's accession to the Agreement. In May 2009, nine government-affiliated agencies, including the National Development and Reform Commission and the Ministry of Commerce, announced the "Notice of Opinions on Accomplishing Strategies to Promote Economic Growth through Increased Domestic Consumption and More Strictly Managing/Supervising Public Bidding and Bidders of Infrastructure Constructions", which provides that (i) government investment projects are included within the scope of government procurement, (ii) Chinese products shall be purchased for cases where the processes, freights, or services are not procurable within China under reasonable commercial conditions (as set forth in laws and ordinances), and (iii) when imported products need to be purchased, an application must be made to the related departments, which must be examined and approved in accordance with national regulations prior to the procurement. Although this is regarded as reconfirming China's conventional policy based on the Government Procurement Law, it expanded the impression that China took a new protectionism policy, in the situation where protectionist pressures are rising in the world due to economic/financial crisis.

The "Indigenous Innovation Product Accreditation System", announced by the Ministry of Science and Technology, the National Development and Reform Commission, and the Ministry of Finance in November 2009, designates the following types of products as national indigenous innovation products and gives them favorable treatment in government procurement on the conditions that the company manufacturing the products possesses intellectual property rights in China and that the place of the initial registration of the relevant trademark is China: (1) computers and associated equipment, (2) communications equipment, (3) newest types of office equipment, (4) software, (5) new energy sources and facilities, and (6) high-efficiency energy-saving products. This system may be a measure that is discriminatory to foreign companies' products, and is highly likely to contradict the commitment to oppose protectionism made among the leaders at G20 and other meetings. Therefore, both the Japanese Government and industries have strong concerns about the system. In December of the same year, the Japanese Government expressed concerns by issuing a letter from the Japanese Embassy in China.

After that, in April 2010, the Ministry of Science and Technology, the National Development and Reform Commission, and the Ministry of Finance published the

“Notice on Development of the 2010 National Indigenous Innovation Product Accreditation Operation,” and announced it would accept public comments until May 10<sup>th</sup>. It was scheduled to enter into force on the same date. The notice remained essentially unchanged from the Indigenous Innovation Product Accreditation System announced in 2009, and can be a measure that discriminates against the products of foreign companies. Therefore, Japan expressed concerns by issuing a letter from the Government to China, and by submitting public comments from the industry. In response to concerns expressed by other countries, China announced *de facto* cancellation of the enforcement scheduled on May 10<sup>th</sup>. In May 2011, as an achievement of the Third U.S. - China Strategic Economic Dialogue, the United States announced that China had stated that it would review the proposed ordinance so that the preferential treatment of government procurements would not be linked to indigenous innovation products. In June, the Ministry of Finance of the People’s Republic of China announced the “Notice on the suspension of execution of three documents including the directive on the government purchase budget of indigenous innovation product,” and suspended the execution of some of the rules related to the indigenous innovation product system on the website. Also, in November, as an achievement of the 22<sup>nd</sup> U.S.-China joint Commission on Commerce and Trade, the United States announced that China stated that its State Council submitted to local governments a notification requesting that by December 1 they delete any catalog linking the preferential treatment of government procurements with the indigenous innovation system. Japan will continue to closely observe the status of implementation after the abolition of the Indigenous Innovation Product Accreditation System to see whether there continues to be preferential treatment of government procurements.

In addition, a revision of the “Catalogue Guiding Indigenous Innovation in Major Technology Equipment,” made public in December 2009 by the Ministry of Industry and Information Technology, the Ministry of Science and Technology, the Ministry of Finance, and the State-owned Assets Supervision and Administration Commission, was announced in July 2012; 19 major technology equipment areas and 260 equipment items were included. This Notice provides that each local department of industry, finance, science technology, and supervision and management of national assets shall refer to the content of the Catalogue, make linkage to the actual situations of the region and business types, and accelerate promotion of indigenous innovation products of major technology equipment. Equipment/products included in the Catalogue are considered necessary for national major construction processes and company technology improvements, as are major technology equipment in relation to security information of the National Development Strategy. Furthermore, products included in the Catalogue will be given priority in being selected for relevant science technology and product development plans of the Government and be able to acquire financing for commercialization, and, after being successfully developed and certified as national indigenous innovation products, they will also be given priority in being selected for the “Catalogue of Indigenous Innovation Products for Government Procurement” and politically privileged treatment. Announcement of this Catalogue raises concerns about effect on foreign companies’ products in government procurement, etc.



A draft implementing ordinance for the Government Procurement Law was made public in January 2010. However, the following concerns remained; (i) the Law is inconsistent with the principle/provision of non-discrimination cited in the GPA, (ii) the standards and guidelines are unclear and lack transparency, and (iii) foreign products and foreign companies could be given discriminatory treatment. Therefore, in February of the same year, Japan requested that the implementing ordinance be made consistent with the GPA and submitted an opinion strongly advocating China's early accession to the GPA. In addition, Japanese industry also submitted comments, including a request for making the draft implementing ordinance consistent with the GPA. China has yet to make public the final draft of the implementing ordinance in response to these public comments.

Moreover, the draft administrative measures on domestic products procured by the government, published in May 2010, define domestic products as "end products produced within China for which the domestic production cost ratio exceeds 50%," and provide for their accreditation method, etc. In June, the Japanese Government and industry also submitted comments on the draft administrative measures, such as that the measures are inconsistent with the principle under the GPA. China has yet to make public the final draft of the administrative measures in response to the public comments.

Furthermore, in May 2012 the Ministry of Finance announced the "Notice of Matters Related to the Reinforcement of Management of Central Budget Unit Government Procurement", which provides that central government shall implement on their own initiative government procurement measures such as supporting energy saving/environment protection in government procurement, purchasing official version of software, and purchasing Chinese products strictly following administrative provisions on imported products and not purchasing imported products where domestic industries are well-developed for such products. In addition, a department which purchases a relatively large number of imported products shall establish a review system by experts to strictly review application of procurement of imported product items by the department.

#### • Procurement threshold

In the GPA of the WTO, a procurement threshold used in determining whether or not procurement of goods/services is subject to the Agreement for the central government agencies, local government agencies, and other public agencies of each member country is stipulated respectively in the Appendixes, and is applied to all agencies of the same level of government. However, in China, there are no unified regulations for procurement limits. The "Catalogue of Concentrated Procurement" and the "Government Procurement Limitation Criteria" are set by the State Council for procurements by the central government. For provincial-level governments or authorized procurement organizations, they are set by local budgets. Therefore, procurement thresholds differ by region. Using the example of the Beijing government, where economic development has been significant, the procurement limitation criteria for 2014 are 500,000 RMB (equivalent to 84,000 dollars) for goods and services, and 1,000,000 RMB (equivalent to 168,000 dollars) for construction. On

the other hand, in economically undeveloped regional areas the procurement limitation criteria normally remain at a low level. (Using the example of Xinjiang Uygur Autonomous Region, procurement limitation criteria for 2014 are 100,000 RMB (equivalent to 16,000 dollars) for goods, 50,000 RMB (equivalent to 8,000 dollars) for services, 300,000 RMB (equivalent to 50,000 dollars) for construction.). These standard procurement amounts, which are variable as indicated above, complicate bidding procedures.

#### • Bidding methods

The GPA sets forth open bidding and selective bidding (open to suppliers invited by the procurement organization) as general bidding methods. Limited bidding (individually negotiating with a supplier selected by the procurement entity in cases where no competition exists due to technical reasons) or negotiation (negotiation conducted by the procurement organization for identifying advantages and disadvantages of bidding) is allowed when certain requirements are met. In recent years, the Chinese Government primarily has adopted a public bidding system for government procurement, significantly raising the percentage of public bidding in government procurement to 83.8% in 2012. It was 83.3% in 2013, down 0.5 points from 2012, but the percentage of public bidding still remained high. Under China's Government Procurement Law, however, in addition to these four bidding methods, there is a possibility to adopt methods other than bidding, such as multiple estimates.

#### • Transparency

The GPA emphasizes transparency in the government procurement process and has strict provisions detailing information disclosure related to procurement plans, closing bids and procurement procedures.

China's Law prescribes only general principles. The Ministry of Finance gave guidance for implementing rules thorough promulgating regulations on the "Goods and Services Government Procurement Bid Participation Method", "Government Procurement Information Announcement Method" and "Government Procurement Supplier Complaint Handling Method," which took effect on September 11, 2004.

China's Law only stipulates in an abstract manner that government procurement information and background should be disclosed through designated media. The Chinese Government and each local government have respectively promoted efforts to secure transparency, issuing regulations for disclosing procurement catalogues, procurement bidding information and procurement conditions. Specifically, the "Measures for the Administration of Government Procurement Information Disclosure" published by the Ministry of Finance (enforced in September 2004) stipulates that various information related to government procurement in China should be disclosed through designated media except for state secrecy, commercial secrecy of suppliers, and confidential government procurement information defined by law and regulations. In addition, the "China Economic Bulletin" (a newspaper supervised by China's Ministry of Finance), "Chinese Government Procurement" (a magazine) and "The Chinese Government Procurement Network" are media for disclosure of government procurement information designated by China's Ministry of Finance and release

information concerning government procurement free of charge. Seen from the perspective of information disclosure, the transparency of government procurement is high, and the amount of information released by the Chinese Government Procurement Network has increased substantially.

**Figure I-1-7**  
**Status of Information Disclosure through Chinese Government Procurement Network**

	2009	2010	2011	2012	2013	2014
Number of bid announcements	67,186	73,681	124,183	145,547	175,604	222,423
Number of successful bid announcements	77,778	67,331	148,282	193,163	233,647	304,663
The ratio of number of successful bid announcements to bid announcements	116%	91%	119%	133%	133%	137%

Source: Search results of the public procurement information,  
Chinese Government Procurement Network (as of January 27, 2015)

**Column: WTO dispute settlement procedures and China's administrative response**

China acceded to the WTO on December 11, 2001, and since then, China has achieved remarkable economic development and is now a key player in global economic growth. China is the number one trading partner of Japan leading the push for free trade in Asia.

However, as mentioned repeatedly in this report, China's trade policy and measures appear to need improvement given inconsistency in complying with WTO rules even now after 10 years or more have passed since accession. In this column, we summarize developments in China's compliance and administration of international trade rules after its accession to the WTO.

**(a) China's dispute cases**

China is a key player, not only in world trade, but also in the WTO Dispute Settlement system. Before 2005 China used the WTO Dispute Settlement system only once (DS252: United States – Steel Safeguards). However, since 2006, cases in which it has been both complainant requesting consultations and respondent to requests for consultations have been rapidly increasing (12 cases as complainant and 32 cases as respondent, a total of 44 cases as of the end of 2014<sup>2014</sup>). China is starting to use the system more often in order to protect its own interests, and it is already one of the main players; its use of the system exceeds that of Japan and Republic of Korea (cases both as complainant and respondent totaling 29). While China's presence in world trade is on

the rise, settling disputes according to international rules, using dispute settlement, without making them into political issues, which is the purpose of the WTO Dispute Settlement system, increasing.

### Transitions of China's dispute cases

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	total
requesting consultations	0	1	0	0	0	0	1	1	3	1	1	3	1	0	12
consultation being requested	0	1	0	1	0	3	4	5	4	4	1	7	1	1	32

### (b) China's administrative response to WTO dispute cases

It is acknowledged that China has been taking actions to improve and rectify its relevant measures in instances where it has lost cases or its violations of the WTO Agreements are undisputed in the WTO Dispute Settlement system. There has not been a case countermeasures pursuant to Article 22.6 have been sought against China for non-compliance with WTO recommendations. However, there is a case before a compliance panel (Article 21.5 of the Dispute Settlement Procedures) alleging insufficient correction, such as the China-GOES case (Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States, DS414). Therefore, China's future compliance needs to be continually monitored.

In 2001, before China's accession to the WTO, Japan made a preliminary decision to apply Safeguard measures on imports of green onions and Shiitake mushrooms. Responding to this event, China announced that it would apply countermeasures, which involved raising the tariff rate to 100% on automobiles and mobile phones. Since its accession, China has not made confrontational announcements except with regard to WTO trade remedy measures. Recently, the US and the EU commenced investigations to determine whether to impose anti-dumping and countervailing measures against Chinese products. Around the time of this event, China also initiated and conducted anti-dumping investigations and applied anti-dumping measures against products from the US and the EU. This developed into a WTO dispute case (DS427: China anti-dumping and countervailing duty measures on broiler products from the United States).

As for the preceding case regarding nine raw materials, based on the requests for WTO consultations and establishment of a panel submitted by the US, the EU and Mexico, the Chinese government responded to the Panel and the Appellate Body reports, which determined China's violations, and implemented the recommendation by the deadline of the end of 2012 with respect to 7 of the 9 raw materials (eliminated export duties and export quotas for seven items -- bauxite, cokes, fluorite, magnesium, manganese, zinc and silicone metal; also, bound levels in compliance with the Protocol are maintained for zinc and yellow phosphor.). This is one of the good examples where trading partners utilized WTO dispute settlement procedures to achieve correction of China's measures, and it is also notable that China did not make it a political issue but earnestly responded consistent with the WTO rules. In addition, with regard to the requests for WTO consultations and establishment of a panel regarding export restrictions against raw materials such as rare earth minerals submitted by Japan, the US

and the EU in 2012 (DS431, 432, 433), China also responded to the Panel and the Appellate Body reports, which fully accepted the claims of Japan, the US and the EU, and lifted the quantitative export restrictions in January 2015. China continues to impose export tariffs, however, and Japan will continue to request the elimination of export tariffs by May 2, 2015, the time limit for complying.

As China is conforming to decisions by the WTO Dispute system as described above and is showing willingness to respect the rules, it is expected to be a primary player in the enforcement of the rules in the world. However, there remain several questionable measures relating to international rules, and it is hoped that China will act responsibly as one of the primary countries that support global international trade systems.