

## *Chapter 4*

# EUROPEAN UNION

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## **TARIFFS**

### ***1) High Tariff Products***

**\* 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>**

The current bound tariff rate and simple average of bound tariff rates for non-agricultural products is 100% and 3.9%, respectively. However, the application of high tariff rates remains on several products, such as, 22% on motor trucks and 10% on passenger cars. Moreover, the applied tariff rates as of 2012 for electric appliances (maximum 14%, simple average 2.8%) and textiles (maximum 12%, simple average 6.6%) are higher than those of other developed countries, rendering imported products at a severe competitive disadvantage in comparison with domestically-made products.

#### **<Concerns>**

High tariff rates themselves do not conflict with the WTO Agreements unless they exceed the bound rates. However, in light of the spirit of the WTO Agreements of promoting free trade and enhancing economic welfare, it is desirable to reduce tariffs to the lowest possible rate and to eliminate tariff peaks (see “Tariff Rates” in 1. of Chapter 5, Part II).

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

Negotiations on enhancement of market access for non-agricultural products in the Doha Development Agenda (DDA) are ongoing and include negotiations on reducing and eliminating tariff rates. (See reference chapter for updated information). 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) “Information Technology Agreement (ITA) Expansion Negotiation” in 5. of Chapter 5, Part II for details). Furthermore, negotiations aimed at concluding the Japan-EU EPA for improving market access from Japan have been conducted since April 2013 (see Part III “Overview” for details).

### ***2) Tariff Classification Issue on the Treatment of Products Covered by the Information Technology Agreement***

The Information Technology Agreement (ITA), the Ministerial Declaration on Trade in Information Technology Products (see Part II of Chapter 5 (2) Information Technology Agreement (ITA) Expansion Negotiation for its outline), was agreed to by Japan, the U.S., the EU and other countries in 1996 for the purpose of eliminating tariffs on information technology equipment, parts and other products. It requires the ITA signatories to bind and eliminate customs duties within the meaning of GATT Article II, with respect to products covered by the ITA. Following the Declaration, signatories have individually incorporated items covered by the ITA into their respective Concession Schedules. In other words, if they actually levy customs duties on products, they would be in violation of concessions under GATT Article II. The number of its

member states is 78 countries and regions as of February 2014, including the 28 countries in the EU.

Although the EU eliminated customs duties on products covered by the ITA, including computers, computer-related equipment, and semiconductors, it still imposes high tariffs on electric equipment that is not covered by the ITA, such as television sets and video players. Due to progress in the technological convergence of these products, the problem has emerged whereby products that should be treated as products covered by the ITA are now subject to customs duties due to arbitrary changes of tariff classifications. Since the EU, which is one of the ITA signatories, has made the concession of treating products covered by the ITA as duty-free, imposing duties on these products would constitute a violation of GATT Article II. (Some of those problems, such as the one described below, are in the process of being resolved.)

The ITA ensures free trade for IT products and thus has contributed to further technological advancements in the IT field. Technological development is rapid and because of its characteristic, it is customary for IT products to be multifunctional or sophisticated. Consequently, if the ITA signatories impose customs duties on products covered by the ITA due to additional and/or sophisticated functions, the list of products covered by the ITA is likely to shrink. For this reason, the ITA includes stipulations with regard to the need to adapt to the advancement of technology. Thus, it made the following statement: “each party’s trade regime should evolve in a manner that enhances market access opportunities for information technology products” (refer to the first paragraph of the ITA Declaration), and, “participants shall meet periodically under the auspices of the Council on Trade in Goods to review the product coverage specified in the Attachments, with a view to agreeing, by consensus, whether in the light of technological developments, experience in applying the tariff concessions, or changes to the HS nomenclature, the Attachments should be modified to incorporate additional products, and to consult on non-tariff barriers to trade in information technology products” (Declaration Annex paragraph 3). In fact, the ITA expansion negotiation started in May 2012 and the tariff classification issue on some of the products has the potential to be resolved by the expansion of covered items. (*See Part II, Chapter 5, 5 (2) Information Technology Agreement (ITA) Expansion Negotiation for details*)

In December 2006, the Minister of Economy, Trade and Industry of Japan wrote to the EU Trade Commissioner requesting resolution of this issue. In January 2007, there were meetings between the Minister of Economy, Trade and Industry of Japan and the EU Trade Commissioner and between the Trade Vice-Minister and the External Trade Director General to discuss resolution of this problem. Japan and the EU subsequently continued high-level consultations but the EU did not endeavor to resolve the issues and, given the obvious likelihood that moves by the EU to place tariffs on the ITA products would have repercussions for other products covered under the ITA and for other member countries and given strong demands from the affected industries, the decision was made to resort to the WTO’s dispute settlement procedures. On May 28, 2008 a request for WTO consultations on 3 items, digital multi-function machines, flat panel displays, and set top boxes was submitted jointly with the US. Taiwan submitted a similar request for WTO consultations on June 12. When bilateral consultations with the EU in July 2008 failed to produce satisfactory results, a request was made jointly with the US and Taiwan on August 18 for the establishment of a Panel; the Panel was

established on September 23. Thereafter, two Panel meetings were held in 2009, and a Panel report accepting the claims of the countries that jointly filed the case was adopted on September 21, 2010. In December of the same year, Japan, the US and Taiwan agreed with the EU to implement the Panel's recommendations within the implementation period (by June 30, 2011) based on the determinations made in the Panel report. The EU announced a measure to implement the amendment of tariff regulations in the Official Journal of the EU issued on June 25, 2011, and implemented the amendment on July 1, 2011. In the journal issued on February 9, 2012, it also announced new regulations concerning classification standards for multifunction devices, for set-top boxes, in the journal issued on February 21, 2012. In the journal issued on October 5, 2013, it announced new regulations concerning classification standards for flat panel displays.

Below is an overview of the problems in individual cases.

## **(1) WTO Panel Discussions on Target Products**

### **(a) Digital Multifunction Machines**

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

Digital multifunction devices (MFM -- Multifunction Digital Machines) are information technology devices that combine the functions of a printer, copying machine, scanner, facsimile and other devices., which are peripheral devices used with computers and networks. The HS (Harmonized System) codes, which are utilized in the ITA for tariff classifications, are 8471.60 for input/output devices for computers, 8517.21 for facsimiles and 9009.12 for analog photocopiers, for which the ITA is not applicable. However, there was no international consensus as to which of those categories these digital devices were classified under. Therefore, this issue was discussed at the meeting of the HS Committee under the WCO (World Customs Organization). However, as the HS Committee is not formally related to the ITA, this issue was treated as a part of the problems of tariff classification. In 1998, Brazil, which is not a participant in the ITA, brought up this issue, suggesting that multifunction digital photocopiers should be classified under heading 9009.12. This initiated a vote, which was held in May 2001 at the meeting of the HS Committee of the WCO. As a result, it was concluded that heading 9009 should not include multifunction digital devices. However, the countries opposing this view exercised their rights to reserve decision, and the discussion continued. In November 2002, the second vote was held. This time, the majority voted for inclusion of digital devices under the heading, but again, the opposition exercised their right to reserve decision. At the third vote in November 2011, Japan persuaded the opposition and the result was a tied vote. Subsequently, in the HS nomenclature 2007 edition, which was published on January 1, 2007, a new separate heading (HS8443.31) was established for multifunction digital devices that are peripherals for computers or networks (MFM). Thus, the discussion under the WCO ended. However, another dispute as to whether these products should be treated as tariff-free products applying the new HTS code under the ITA has not been discussed in the ITA Committee. The issue remains unresolved.

Since the ITA was concluded, the EU had been applying a tariff on multifunction digital devices, which it classified under heading 9009.12. However, after the HS nomenclature 2007 edition was released, the EU set the tariff rate at 6% on those MFM

devices that do not have a function of a facsimile; except that MFM that are equipped with a function of photocopiers that can copy more than 12 pages per minute and can print digital photos were categorized in 8443.31.91 in the Combined nomenclature of the EU.

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

The EU committed in its concession schedule that products covered by the ITA, including printers (CN8471.60.40), scanners and other computer peripherals (CN8471.60.90), and facsimiles (CN8517.21.00), were not subject to any customs duties. However, applying tariffs on MFM that are computer peripherals, and MFM that function as a photocopier and a facsimile constitutes a violation of GATT Article II for the following reasons. MFM are computer peripherals, as they are connected to computers or networks and are used to receive and transmit data, which means inputting and outputting. Thus they are categorized as “input/output computer devices” (8471.60) under the ITA. MFM with facsimile function are categorized in facsimile (8571.60) under the ITA. Multifunction devices are simply sophisticated technical combinations of printer/facsimile/ scanner and other devices, that each has a dedicated function.

To exclude these products from the ITA impedes technological progress rather than promoting it. It is contrary to initial purpose of the ITA. It would cause a negative impact on the development of industries and society which is possible through technological progress. Therefore, Japan decided to utilize the WTO Dispute Settlement system concerning the tariffs that were imposed on MFM by the EU.

### **<Recent developments>**

The WTO panel report, which accepted the claims of the complainant countries, was adopted in September 2010. In response to this, the EU announced a measure in the Official Journal issued on June 25, 2011 to eliminate the 6% tariff which was applied on certain MFM (CH8443.31.91), to apply a 2.2% tariff on MFM that mainly functioned as digital copiers, and to eliminate tariffs on all other MFM. The measure was implemented in July 2011. Thus, the new regulations reduced the possibility of imposition of tariffs on MFM by specifying that a tariff would only be applied to MFM which function mainly as digital copier.

#### **(b) Flat Panel Display Tariff Classification**

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

In 2004, the EU changed its tariff classification of flat panel display (FPD) monitors equipped with digital visual interface (DVI), which is one of the standard computer interfaces developed for the purpose of transmitting digital signals from computers to displays. In the past, these devices were classified as input/output units for computers, which were covered by the ITA (CN8471.60.80; with a tariff of 0%). After the EC changed its classification, however, they were classified as video monitors not covered by the ITA (CN8528.21.90; with a tariff of 14%), because of their capability to receive video signals by means of a DVI. They are now subject to high tariffs.

In 2005, the EU took measure to suspend the tariff temporarily on FPD that met certain requirements, such as the size of the display was required to be 48.5 inches or

smaller (published in the Official Journal issued on March 31, 2005). The EU also implemented tariff regulations that classified various FPD under a code heading to which a 14% tariff was applied. These FPD were ones with the capability to display signals from sources other than computers, such as those with DVI or HDMI capability or compatibility with DVD recorders, video cameras and video games, etc. (published in the Official Journal issued on April 27, 2005, December 29, 2005 and May 30, 2008). However, if these types of FPD were determined to be subject to the temporary tariff suspension measure, the 14% tariff was not applied.

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

In its concession schedule, the EU committed to treat FPD input/output computer devices (8471.60) and FPD for computers as duty-free products covered by the ITA (the former based on ITA Annex A, the latter on Annex B, See Part II Chapter 4 Tariffs of this report for an outline of the ITA).

As mentioned above, the EU was imposing a 14% tariff on DVI-capable FPD. DVI-capable FPD monitors are devices used “solely or principally” for automatic data processing systems and should be classified as computer input/output units (CN8471.60.80) in accordance with note 5(B)(a) of HS Chapter 84, and be treated as duty-free items. Therefore, if the above-mentioned DVI-capable FPD monitors are included in FPDs, the EC’s imposition of duties on these monitors would constitute a violation of GATT Article II due to their technological and structural characteristics.

Due to the amendment of the HS nomenclature in 2007, the tariff on FPD (8471.60) was eliminated. Those FPD that are solely and principally used for computers are now classified in 8528.51. The EU also included, in its schedules of concession, that all FPD for computers are duty-free products based on ITA Annex B. To impose tariffs on those FPD that are compatible with equipment other than computers is a violation of GATT Article II.

The temporary suspension of tariff which was implemented in 2005 was extended in 2007 (published in the Official Journal issued on March 22, 2007). A number of FPD were still subject to the high tariff rate of 14%. The suspension of tariffs was indeed a temporary measure and it could be amended or withdrawn arbitrarily at any time. The measure was extended in 2009 and 2011, and it eventually expired at the end of June 2011. In 2009, the EU expanded the scope of items subject to the temporary suspension of tariff to include FPD with a screen size of 55.9 centimeters or smaller and other displays (published in the Official Journal issued on March 7, 2009). Japan decided to utilize the WTO Dispute Settle system.

### **<Recent developments>**

The Panel report, which accepted the claims of the complainant country, was adopted in September 2010. The EU responded by announcing a measure to remove tariffs on MFM and set top boxes in the Official Journal issued on June 25, 2011, but did not announce any new measure for FPD, as it already announced in November 2009 elimination of a measure that classified the FPD with the capability display signals from sources other than computers and those of DVI capability as video monitors (CN8528.59.10 or CN8528.59.90), which are not subject to the ITA.

The panel report, however, concluded that having DVI capability cannot be the sole factor for not being subject to the ITA, and that based on ITA Annex B, having been designed for use with computers qualifies them to be subject to the ITA and therefore to be duty-free products. Considering the above, in order to achieve tariff treatment that is consistent with the ITA, elimination by the EU in its schedules of concession of the aforementioned measure concerning tariff classification on certain monitors is not sufficient. The suspension of tariff must be fully ensured for all FPD that are designed to be used for computers.

Therefore the imposition of tariffs according to the size of computer monitors on certain models does not conform to its schedule of concession and, therefore, is likely to be construed as a violation of GATT Article II.

Subsequently, as a result of continued consultations between Japan and the EU on the implementation of the Panel recommendations, in the Official Journal issued on October 5, 2013, the EU released new regulations to eliminate tariffs on FPD capable of displaying signals from computers. Japan will pay attention to whether the WTO recommendations would be appropriately implemented in the administration of new regulations.

### **(c) Set Top Boxes**

#### **<Outline of measures>**

In 2008, the EU implemented the following tariff regulations on set-top boxes (published in the Official Journal of the EU issued on May 7, 2008):

- I) Set-top boxes with the capability of recording and playing media such as DVDs and hard disks are classified in CN8521.91.00 as video recorders and players, with a 13.9% tariff rate.
- II) Set-top boxes with the capability of ISDN, WLAN and ethernet connection are classified in CN8528.71.13 as set-top boxes with the capability of communication through networks such as internet connection, with no tariff,
- III) (All other set-boxes are classified in CN8528.71.19 as others, with a 14% tariff rate.)

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

Based on ITA Annex B, the EU treats set-top boxes (STB) with the capability of communication as duty-free products in its schedules of concession. Therefore when STB are subject to tariff, but have the capability of communication, there is a violation of GATT Article II.

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

The EU announced a measure to comply with the WTO panel report that was adopted in September 2010. It was published in the Official journal issued on June 25, 2011. The EU stated that those set-top boxes with the capability of communication would be treated as duty-free products, even if they function as players and recorders, as long as they do not lose the fundamental characteristic of set-top boxes. It also issues new regulations on classification standards in the Official Journal issued on February 21, 2012. Japan will monitor how the EU implements and enforces the new regulations

to comply with the WTO recommendations.

## **(2) Miscellaneous Products**

Although the following three products were not discussed in the WTO panel proceeding, they are highly likely to be treated in a manner inconsistent with GATT Article II. These products are excluded from the ITA because of their sophisticated functionality with advanced technology. They are treated contradictory to the ITA's initial intentions and negate its achievements.

### **1) Semiconductor Devices**

#### **<Outline of measures>**

In September 2008, some EU countries imposed a tariff on certain semiconductor devices such as packaged IGBT (Insulated Gate Bipolar Transistor) devices by unexpectedly changing its classification. This type of semiconductor device cleared customs as transistors (HS8541: tariff rate 0%). However, they were classified as switch devices (HS8535 or 8536: tariff rate 2.3~2.7%), which are not covered under the ITA.

Packaged IGBT devices function as sensing elements used in inverters installed in rail vehicles or wind power generators. Therefore to classify them under switching devices and to impose a tariff on these products would cause negative impact on the distribution of inverters that operate at high voltage and high current. The impediment of advancement of IT technology runs counter to the initial intent of the ITA. As mentioned above, it is of concern that to change classifications and impose tariffs accordingly will disrupt future business operations.

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

The EU is committed in its schedules of concession to classify transistor devices under heading HS8541 as duty-free products. Therefore, if packaged IGBT (Insulated Gate Bipolar Transistor) devices are classified as transistor devices, imposition of a tariff on these products would be a violation of GATT Article II. Packaged IGBT devices are devices with IGBT and multiple diodes packaged together. An IGBT is a transistor that is used as a high-speed switching device in a high voltage and amperage situation. They function like other single transistors by switching at high speeds, thousands or tens of thousands of times per second. They are not exactly switching devices per se as in machines turning off and on. Therefore they should be treated as semiconductors under the heading HS8541, which is covered under the ITA, and thus as duty-free products.

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

In July 2011, Japan submitted to the WCO a proposal to discuss this issue concerning classification of these products. In September of the same year, a vote was held at the meeting of the HS Committee of WCO. Although the majority voted for their classification to be under heading 8541 as semiconductors, the EU exercised their right to reserve decision; thus the issue stands unresolved. After that, another vote was taken at the WCO HS Committee in September 2012 and the majority voted for the HS



Code 8541 classification (semiconductors) again. It was officially adopted because no right to reserve was exercised. The EU responded by announcing in the Official Journal issued on December 5, 2013 that it would accept the WCO decision, and then these products were cleared through customs duty-free under the heading HS8541. However, Japan will continue to pay attention to the situation relating to customs clearance of these products.

## **2) Ink Cartridges**

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

In February 2002 and October 2006, the European Court of First Instance ruled that it was appropriate to classify ink cartridges without printer heads as ink (CN3215.90.80; with a tariff of 6.5%), not parts or accessories of computer output units (CN8473.30.90; with a tariff of 0%). As a result, customs authorities in EU member countries now classify ink cartridges without printer heads as ink and levy a 6.5% duty.

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

In its concession schedule, the EU has committed to duty-free treatment of CN8473.30.90, covered by the ITA. Therefore, if ink cartridges fall under the classification CN8473.30.90, then imposing a tariff on ink cartridges constitutes a violation of GATT Article II. Ink cartridges are not simply devices that store ink; rather, they perform several key functions of printers, such as supplying ink to printer heads and transmitting data to computers, and thus are undeniably a component of printers. Therefore, they should be classified as CN8473.30.90 covered by the ITA, and treated as duty-free.

### **<Recent developments>**

In October 2007, the WCO Secretariat submitted a paper concerning a possible new tariff line that would unify the classifications of ink cartridges, toner cartridges, cartridges for thermal transfer printing, and others to the HS Review Sub-Committee, which is responsible for a HS2012 revision. Under this paper, ink cartridges could end up categorized as a product not covered under the ITA. An unofficial seven-country working group was formed to examine the issue after it was raised by Japan and others. No consensus was reached by the working group, however, and the November 2008 meeting of the Tariff Classification Review Subcommittee decided to maintain the status quo.

## **ANTI-DUMPING MEASURES**

Anti-dumping is an area of hidden protectionism in the European Union. The current EC legislation contains significant amendments made in 1995 to bring European practice into conformity with the Anti-Dumping Agreement. Japan considers this Agreement to be one of the major successes of the Uruguay Round negotiations. However, in the EU, dumping margins may be artificially inflated because Commission authorities have greater discretionary powers than do the authorities in the United States.

Since the fall of 2011, the EU has initiated procedures for revising AD regulations and formulating guidelines for administration of these regulations aimed at improving predictability and transparency. After conducting public consultations in 2012, the proposal for the revision was adopted by the European Commission. At present it is under deliberation in the European Parliament and European Council. Major points of the revision include that (1) a notification shall be made to interested parties two weeks prior to the initiation of the provisional measures, (2) AD duties imposed for a period exceeding five years shall be refunded in cases where investigations continued for over five years from the imposition of AD duties and continuation of the duties were finally found to be unnecessary in sunset reviews, (3) investigations may be initiated on their own authority without application from industries in order to protect domestic industries in cases where there is a risk of retaliation, etc., and (4) a “lesser duty” rule (setting AD duty rates to the lowest possible level adequate to remove injury) shall not be applied to exports from countries where unfair subsidies are used to make a false representation of the structure of raw material prices. In addition, formulation of guidelines is planned for (1) methods of conducting sunset reviews, (2) methods of determining public interest (including interests of domestic industries, importers, industries using imported products and relevant consumers), (3) margin of damage (difference between the prices that domestic industries can compete at without suffering losses and import prices), and (4) methods of selecting alternative countries when using alternative country prices to investigate dumping of imported products from a non-market economy.

The EU has not imposed AD measures against Japan since the termination of the AD measure on TV camera systems (July 2007). However, AD investigations on grain oriented electromagnetic steel sheets were initiated in August 2014, and therefore it is important to continue to monitor the operation of the AD system.

## **STANDARDS AND CONFORMITY ASSESSMENT SYSTEMS**

### ***1) EU Directives on the Restriction of the Use of Certain Hazardous Substances in the Electrical and Electronic Equipment (RoHS Directive)***

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

In the EU, there have been efforts for legislation to restrain the use of hazardous substances in electrical and electronic equipment since the 1990s; the so-called RoHS directive was published in February 2003.

The Directive requires member countries to take measures, including establishment of domestic laws, to prohibit the inclusion of six chemical substances (including lead, mercury and cadmium) in electrical and electronic equipment placed on the EU market in volumes that exceed a certain percentage.

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

Due to differences in the establishment of domestic laws to implement the RoHS Directive and their effective dates among member countries, multiple regulations may co-exist for some time period, or some countries may not yet have established domestic laws as of the stipulated effective date under the Directive. In fact, as of August 13,

2004 (the time limit for establishing domestic laws under the EU Directive) the UK, Italy, and Germany, etc. had not promulgated their domestic laws. In addition, some member countries may establish their own regulations that exceed the content of the Directive. These cases may pose a problem from the point of view of Article 2.2 of the TBT Agreement (technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective). Since multiple regulations now exist in the single EU market, producers, importers and distributors of the subject products bear excessive burdens in terms of procedures and costs for dealing with the differences in member countries.

### **<Recent developments>**

In May 2011, the revised RoHS Directive (so-called RoHS2) was approved by the European Council and was published in the Official Journal in July of the same year. With the revised RoHS Directive coming into effect, the former Directive was annulled. In this Directive, electrical and electronic equipment with a maximum rated voltage of AC 1000V and DC 1500V are subject to regulation, and member countries are required to have their domestic laws effective by January 2, 2013 (Article 25).

## ***2) EU Directive Establishing a Framework for the Setting of Ecodesign Requirements for Energy-Related Products (EuP)***

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

To establish a framework for designing environment-friendly products, the EU published the “Directive Establishing a Framework for the Setting of Ecodesign Requirements for Energy-Using Products” (EuP Directive) in 2005 and the “Directive Establishing a Framework for the Setting of Ecodesign Requirements for Energy-Related Products” (ErP Directive or Eco-design Directive) in October 2009.

The Directive requires that the environmental impacts (e.g.: consumption of resources, emissions to air or water, noise, vibration, etc.) of products placed on the EU market throughout their life cycle (the period from procurement, manufacturing, and distribution to disposal) (the generic environmental consideration system requirement) must be taken into consideration. It also provides that energy consumption during use and/or in stand-by or off-mode shall not exceed specified values for some products (the specific environmental consideration system requirement). Requirements for each product subject to the regulation are published in the “Implementing Measures”.

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

As described above, requirements for each product are published in the “Implementing Measures”, but the draft of this “Implementing Measures”, about which the TBT Committee was notified, had some problems: (1) the scientific basis for setting requirements is unclear and (2) some wording is not clearly defined. If the Directive is not based on legitimate policy objectives, it may violate Article 2.2 of the TBT Agreement. In addition, the effective date was set at 20 days after the publication in the Official Journal, and this may pose a problem in relation to Article 2.2 of the TBT Agreement, which requires that publication take place six months prior to the effective

date.

#### <Recent developments>

In January 2013, the TBT Committee was notified of the Eco-design requirements pertaining to energy consumption in stand-by and off-mode of electrical and electronic equipment for home or office use. Japan submitted a comment concerning this notification, requesting a more clear definition of “Disconnect” and other terms. Japan needs to continue to pay attention to the developments regarding this matter.

### **3) Regulations on Chemicals (REACH)**

#### <Outline of the measure>

In the EU, regulations on chemicals, REACH (Regulation on Registration, Evaluation, Authorization and Restriction of Chemicals), was enforced on June 1, 2007.

Major features of REACH are as follows:

- (i) Existing and new substances will be regulated under the same framework. Existing substances that are already being supplied to the market must be registered in the same manner as new substances (applies to entities that manufacture or import an annual total of one ton or more chemical substances within Europe). As for chemicals manufactured or imported in quantities of more than ten tons per year, a Chemical Safety Report (CSR) must also be completed.
- (ii) The responsibility for risk assessment of existing substances, which have been implemented by governments, is imposed on industries.
- (iii) Based on this regulation, the European Chemicals Agency (ECHA) and member countries conduct safety assessments (examinations) on registered chemical substances. Based on the hazard information, exposure information, and amount used, substances subject to assessments are prioritized by the ECHA and member countries and published in the CoRAP (Community Rolling Action Plan) list.
- (iv) Under certain conditions, molded items (articles) that intentionally contain dischargeable substances with annual volume exceeding one ton must be registered and if more than 0.1% of a “substance of a very high concern” is contained, notification is required where such substances exceed 1 ton per year.
- (v) Regarding certain designated chemical substances that have extremely high degrees of danger of carcinogenicity *etc.*, a new system is introduced under which provision of these chemical substances to the market is authorized on the basis of individual uses, if they are listed in Annex XIV as substances subject to authorization. (Provision of such chemical substances to the market is prohibited without approval unless industries can prove that the risk is adequately managed.)

Based on this regulation, the European Chemicals Agency (ECHA) conducts safety assessments on registered chemical substances. However, there are over 100,000 registered chemical substances, and rules for prioritizing assessments of these

substances are unclear. As is done in the United States and Japan, the priorities of assessments should be decided with comprehensive consideration given to hazards and exposure volumes of the chemicals concerned. There is a concern, for example, that chemical substances not manufactured in member countries may be given higher priority for assessments.

In addition to the above, Denmark and France are discussing so-called additional regulations, specific to member countries, on four types of phthalates and bisphenol A, respectively. These proposed regulations are considered not to comply with the basic framework of essential principles of the REACH framework introduced as a unified chemical substance management system in the EU. The European Commission persuaded Denmark to harmonize its regulations with those of other member countries, and this resulted in the abolition of the additional regulations. Japan needs to continue to pay attention to the developments of additional regulations in individual EU member countries.

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

Since registration is uniformly required, but with some exceptions, for chemical substances with annual volumes of one ton or more, this regulation causes significant costs for (1) obtaining data for registration, (2) preparing documents for registration, and (3) designating/maintaining only one representative to deal with registration and subsequent assessments, etc. for companies outside the EU; thus it imposes excessive burdens on industries.

For articles containing more than 0.1% of a substance of a very high concentration, the above-mentioned registration and notification of information is required, but the methods used for calculating the concentration are not consistent among member countries (the so-called issue of the applicable limits), and excessive burdens are therefore imposed upon industries. Regulatory harmonization among member countries needs to be achieved.

In the event that these operational regulations treat companies outside the EU at a disadvantage compared with EU companies, they may be inconsistent with the TBT Agreement Article 2.1 (national treatment). Also, in the event that regulations impose an excessive burden on businesses, they may be inconsistent with TBT Agreement Article 2.2 (technical regulations must not restrict trade more than necessary to achieve legitimate objectives).

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

Japan has been expressing its concerns to the EU since June 2013.

With the aim of increasing predictability of business activities including that of Japanese companies, Japan needs to continue paying attention to developments of chemical substance regulations in the EU.

### ***4) Regulations on Biocidal Products***

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

In order to protect human or animal health and the environment from biocidal

products (disinfectant, pesticides, etc.), in September 2013 the European Commission began to apply the “Biocidal Products Regulation” in place of the “Biocidal Products Directive”, and it strengthened the content of regulations (published: June 2012, effective: July 2012).

In addition to active substances that are effective against harmful organisms (e.g.: ethyl alcohol) and biocidal products containing active substances (e.g.: disinfectant), this Regulation newly regulates “treated articles” that are treated by biocidal products. In addition, active substances contained in biocidal products used for treated articles need to be substances registered in the EU. Treated articles that fall under requirements for labeling are required to be labeled in accordance with this Regulation.

Exemption is not provided for treated articles with no remaining active substance due to drying or cleaning, etc. Therefore, for the products subject to regulation, cost burdens are imposed for registering the active substances, substituting the active substances registered in the EU list, and changing labels on packaging even where there are no health/environmental risks.

In addition, reviews (review program) are conducted of active substances that had been used in the EU market prior to May 2000. Biocidal products containing active substances that were not approved in the review can continue to be placed on the market for a grace period of up to two months after the disapproval determination, but the grace period for treated products is set at 180 days. In addition to the difference in the grace periods between biocidal products and treated products, the grace period for treated products is not sufficient for substituting them for active substances registered on the EU list, thus raising a concern about adverse effects on exports to the EU.

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

Under this Regulation, treated articles are uniformly subjected to regulation, and no exemption is provided. However, policy objectives likely could be achieved with less trade-restrictive measures such as accepting exemptions for cases where health/environmental risks are small, for example there is no remaining active substance due to drying or cleaning, etc.

Therefore, this Regulation appears to be more trade-restrictive than necessary in light of the policy objectives of this Regulation to protect human or animal health and the environment, and may violate Article 2.2 of the TBT Agreement.

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

Since October 2013, Japan has been expressing its concerns over handling of treated products with no remaining active substance to the EU at TBT Committee meetings, etc.

Japan intends to pay close attention to future developments regarding this issue and to request that the regulation be improved in cooperation with other countries that have similar concerns.

## TRADE IN SERVICES

### *Audio-visual Service*

**\* 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>

For the purposes of protecting cultural values, the EU issued Directive 89.552. EEC “Television without Frontiers” (revision: 97. 36. EC) and requested member states to reserve at least half of the television air time for European programs in a feasible and appropriate way (except for news, sports/event, game, commercial and teletext programs). All member states have completed domestic legislation implementing the directive. For example, France provides that at least 60 percent of movies on television must be made in Europe and that more than 40 percent of the programs must be broadcast in French (Government ordinance No. 86-1067 issued on January 18, 1992). Thereafter, this Directive was given new life as an “Audiovisual Media Services Directive” that went into force on December 19, 2007 (see “Column: Summary of the ‘Audiovisual Media Services Directive’” below). Disciplinary rules governing television advertising, video-on-demand, etc., have been newly added.

#### <Concerns>

The above measure does not violate the WTO Agreements because the EU has made no commitment in the AV sector and has registered an MFN exemption. However, the GATS should cover all services and efforts towards further liberalization are desirable.

MFN is one of the most important pillars for achieving liberalization in the multilateral trade regime and is a basic principle of the WTO Agreements. MFN exemptions are a deviation from this most important principle and it is desirable that this exemption should be removed. The GATS stipulates that MFN exemptions are temporary and ought not to exceed ten years. In this regard, the EU itself made a statement, in a document published in July 2009, titled “Staff Working Document on the External Dimension of Audiovisual Policy,” which encourages countries intending to accede to the WTO in the future to register an MFN exemption without making any commitment in terms of audio-visual services in order to establish a cultural cooperative relationship with the EU. This is hard to accept from the perspective of the spirit of the WTO.

#### <Recent developments>

As mentioned above, in November 2007, the European Commission adopted the European Parliament and European Council Directive Bill to correct the 89/552/EEC Council Directive (“Television without Frontiers Directive”) concerning coordination of part of the Members regulatory policy relating to television broadcast activities” (COM (2005) 646) (“Draft of Audiovisual Media Services Directive”); it was enacted in December. The time frame for implementation of this directive to be integrated into member states’ domestic law was within 24 months (by December 19, 2009). All

member countries have made notification to the European Commission of measures adopted to implement the directive in their own countries.

On March 29, 2011, the European Commission requested 16 member countries to provide information on the status of their adoption of the “Audiovisual Media Services Directive”. The Commission analyzed and thoroughly examined the domestic laws that each member country adopted and determined whether elements in the directive were properly reflected in the domestic laws.

Cultural preservation policies continue to be stringently carried out in the EU. Japan is requesting that the EU improve its liberalization commitments in the ongoing WTO services negotiations, etc.

## **GOVERNMENT PROCUREMENT**

### **Proposed New Regulation on Public Procurement (External Public Procurement Initiative)**

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

In March 2012, the European Commission proposed a “new regulation on public procurement” (document no. COM(2012)124) providing procedures to promote negotiations related to: (1) the access of goods and services of third countries to the market within the EU in the public procurement and (2) the access of goods and services of the EU to the public procurement market of the third party countries. The objective was to provide incentives for open market for trading partners with insufficient access to the public procurement market. A system to eliminate certain tenders on goods and services from outside the region from the individual procurement procedures and a more general system to provisionally restrict access of tenders on goods and services from outside the region to the EU public procurement market were proposed in the new regulation.

The first system is a framework for procurement entities to eliminate tenders on goods and services from outside the region with the approval of the European Commission. Tenders on goods and services from outside the region targeted for elimination are (1) tenders with procurement contracts that exceed an assessed value of 5 million euro, and (2) of which the price of goods and services not covered by EU market access promised by the international agreements on government procurement (the Agreement on Government Procurement (GPA) and Free Trade Agreement (FTAs)) exceed 50% of the total tender value (paragraph 1, Article 6 of the proposed regulation). The European Commission must approve the elimination if (1) the EU is explicitly reserving market access of such goods or services based on an international agreement related to market access of public procurements, or (2) in case no international agreement exists, then, if the third-party country producing such goods or service maintains a procurement restriction measure that will result in substantial lack of mutuality in an open market (paragraph 4, Article 6 of the proposed regulation).

On the other hand, in the latter system, the European Commission conducts a survey of the government procurement market of a third-party country and a



consultation is requested if procurement restriction measures are taken. However, if satisfactory results are not achieved within 15 months, access to the market will be provisionally restricted (paragraph 1, Article 10 of the proposed regulation). As market access restriction measures, (1) goods or services of the third-party country which contain more than 50% of EU non-covered goods or services in the total value are eliminated from procurement and (2) penalty costs are assessed for part of the non-covered goods or services (paragraph 2, Article 10 of the proposed regulation).

In the Directive that stipulates rules for the procurement by entities operating in the utilities sectors (2004/17/EC; revised by 2014/25/EU in 2014), discriminatory provisions based on the principle of reciprocity (Articles 58 and 59) exist at present, before the introduction of the proposed regulation (see Chapter 14 of Part II for details of said Articles). In addition to these provisions, the proposed new regulation on public procurement provide detailed procedures for restricting access of /services of third countries to public procurement markets in the EU. However, measures that restrict access to goods or services of third countries based on the proposed new regulation apply not only to procurements by institutions in the utility sectors, but also to procurements by government agencies subject to the Public Procurement Directive (2004/18/EC; revised by 2014/24/EU in 2014), which generally regulates public procurements in the EU, and the Concessions Directive (2014/23/EU) newly established in 2014.

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

##### **(1) Potential violation of non-discriminatory treatment obligations of the Government Procurement Agreement (GPA)**

The above-mentioned proposed new regulation on public procurement may violate the GPA non-discriminatory treatment obligations (paragraph 1, Article 4 of the revised GPA). Tenders targeted for elimination are stipulated as those containing more than 50% of EU non-covered goods or services, based on the total value. If this provision is interpreted literally, tenders containing a large volume of covered goods and services may be considered as targets for elimination, if such goods or services do not account for 50% of the total value. As a result, goods and services covered by the market access commitment and goods and services within the EU region will be treated differently in the procurement procedures, and, therefore, this may violate the GPA non-discriminatory treatment obligations that stipulate the non-discriminatory treatments of goods and services within the region.

In the proposed new regulation on public procurement, some consideration is given to not eliminating goods and services covered by market access commitment during the process before awarding by virtue of provisions stating that only non-covered goods or services are subject to the above restriction measures and that the procurement entity shall treat covered goods and services equivalent to goods and services within the EU region at the time of awarding. However, if they are treated differently from EU goods and services during the process before awarding, it is likely to be a violation of the non-discriminatory treatment obligations.

## **(2) Potential violation of GATT national treatment obligations**

For government procurement, GATT Article III:8(a) stipulates that a law to regulate “procurement by government agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale” as an exception to the national treatment obligation.

However, the proposed new regulation on public procurement covers procurements that are subject to the EU directives on procurement. Of the EU directives on procurement, the Utilities Directive covers a wide range of procurement including (1) procurements in the utilities sector such as electricity, gas, water supply and railway and (2) procurements by not only government agencies and public undertakings but also by entities with special or exclusive rights. This gives rise to the question of whether or not procurements subject to the proposed new regulation on public procurement are limited to procurements by governmental agencies for governmental purposes as provided for in GATT Article III:8(a); the proposed new regulation will be applicable to procurements not included in the above GATT exceptions. Therefore, the discrimination in favor of EU products indicated above may be a violation of the national treatment obligations stipulated in GATT Article III:1.

## **(3) Ambiguous requirements**

Another requirement is the “lack of substantial reciprocity in the open market”. It is ambiguous and so risks arbitrary application.

### **<Recent developments>**

In January 15, 2014, the European Parliament adopted draft amendments to the proposed new regulation on public procurement. The proposed new regulation are being deliberated by the European Council. Adoption was decided at the First Reading by the European Parliament, and unless the European Council approves the draft amendments by the European Parliament, legislative procedures will continue and the Second Reading will take place in the European Parliament and in the European Council. It was reported in the media in December 2014 that, in response to opposition by member countries, etc., the European Council was discussing amendments to the proposed regulation. Clarification of the applicable range of conditions for elimination from the procurement process is expected, and the concerns above are expected to be resolved through these deliberations/amendments, etc. in the future.

## **REGIONAL INTEGRATION**

### ***Increasing Binding Tariff Rates***

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

Croatia joined the EU on July 1, 2013 and, as has occurred during previous rounds of enlargement of the EU since 1973, tariffs of newly acceded Member States

conformed to the common external tariff of the EU, raising bound tariff rates of some items as a result. According to Article XXVIII:1 of GATT, bound tariff rates may be raised only after negotiating and reaching an agreement with countries concerned. However, tariff rates in the newly acceded Member States were raised prior to the completion of the EU's negotiations with concerned countries including Japan. The unilateral increase of bound tariff rates of new Member States of the EU not only occurred in January 2007 when Bulgaria and Romania joined the EU, but has repeatedly occurred at the time of enlargement. For instance, during the EU enlargement of ten countries in May 2004, although Japan had several occasions to press the EU to work toward completion of the negotiation by the time of enlargement, tariffs in the newly acceded Member States were raised without any negotiations at all. As a result, it took 20 months following the enlargement before the compensation was agreed and implemented, and companies exporting to the EU suffered damages arising from the imposition of tariffs that had been raised unilaterally.

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

The unilateral increase of tariffs by EU enlargement is inconsistent with Paragraph 6 of GATT Article XXIV, which provides for compensatory adjustment for increases in bound tariff rates through the procedure stipulated in Article XXVIII of GATT.

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

In July 2013, Japan notified its intent to enter into negotiations with the EU under Article XXIV:6 of GATT regarding the accession of Croatia to the EU. Japan and the EU have continued to have consultations on this case. Consultations with the EU under Article XXIV:6 of GATT regarding the accessions of Bulgaria and Romania to the EU in 2007 ended with the gap between Japan's view and that of the EU not having been bridged. Japan claimed that the accumulated amount of damage due to the increase of tariff rates should be considered the "amount of damage", and the EU argued that where the tariff rate is increased in one new member country while it is reduced in another new member country, the amount of damage should be lessened considering the benefit from the decrease. Therefore, according to the EU, compensation was not necessary.

Negotiations regarding the accessions to the EU of Iceland, Turkey and Montenegro are on-going; the former Yugoslav Republic of Macedonia and Serbia have also been granted the status of a candidate country. Japan will continue to negotiate with the EU to secure consistency with Articles XXIV:6 and XXVIII of GATT.