

## ***ADDENDUM-1***

# **INTERNATIONAL ECONOMIC ACTIVITIES AND COMPETITION LAWS**

After its introduction in the United States in 1890, competition law has been introduced in many developing countries as well, especially after 1990 amid the global expansion of free market economies. It is said that more than 130 countries and regions have competition laws as of 2016.<sup>1</sup>

The issue of competition laws discussed here is itself not a question of consistency with WTO rules, since such issue should be addressed based on the principles under individual competition laws or generally accepted competition law and policy theories. However, even if a specific competition law is officially oriented toward fair reviews and investigations under the name of competition policy, there may be a case where there is a doubt that the law is enforced in a manner that protects domestic industries, for example. From the rule-oriented perspective, it is required to pay close attention to whether a country takes a measure to protect its domestic industry in the name of competition policy, infringing on the WTO Agreement and other international rules.

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## **DISCUSSION AND INTERNATIONAL COORDINATION REGARDING EXTRATERRITORIAL APPLICATION**

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### ***1. EXTRATERRITORIAL APPLICATION OF DOMESTIC LAWS (LEGISLATIVE JURISDICTION AND ITS EXECUTION) AND THE EFFECTS DOCTRINE***

Domestic laws generally apply only to conduct occurring in the country where they are enacted and lose their force at international borders (“territorial principle”). The concept of territorial principle applies, in principle, to competition laws as well as to other legislation.

In today’s global economy, as corporate activities become more international, conduct taking place in one country may have grave effects on markets elsewhere. Therefore, effective regulation cannot always be achieved through strict application of the territorial principle.

Under such circumstances, countries have traditionally applied to some extent their competition laws extraterritorially in an attempt to mitigate effects on their own market. For example, competition laws may be applied to an exporting cartel which may do damage to competition in an importing country. For example, many countries sought to prohibit cartels. Thus, it has become widespread practice in the US, the EU and many other countries including emerging countries, whose domestic market have been impacted by international cartels, to apply domestic competition laws extraterritorially.

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<sup>1</sup> Regular press conference of Secretary General of the Fair Trade Commission held on March 9, 2016 ([http://www.jftc.go.jp/houdou/teirei/h28/1\\_3/kaikenkiroku160309.html](http://www.jftc.go.jp/houdou/teirei/h28/1_3/kaikenkiroku160309.html)).

Such practice has been conducted based on the “effects doctrine,” which is said to have been supported in the United States, the EU, and a number of other countries (especially within the OECD) as well as in Japan. For example, the US case law has an established principle to approve the application of the US Antitrust Law to actions that have been taken with an intent to impact the US and that substantially affect the country, even when such actions were taken outside the territory of the US.

Under the “effects doctrine” described above, competition laws can be applied extraterritorially only in cases where actions taken outside a country have a direct and substantial impact on competition in the domestic markets. Therefore, the attempt to extraterritorially apply competition laws to actions outside the country that do not have a direct and substantial impact on competition in the domestic market (for example, an import cartel in an importing country that harms exporters’ interest in an exporting country) can go beyond the scope of the international consensus on the extraterritorial application of competition laws under the “effects doctrine.” Rather than focusing on the exporters’ interests, the exporting country should take issue with the actions under the competition law of the importing country, because such actions likely harm competition within the importing country.

The US Congress established a law on extraterritorial application (the Foreign Trade Antitrust Improvements Act (FTAIA)) in 1982, but the US temporarily adopted the policy of not applying antitrust laws to actions outside its territory even if the actions harmed the interests of US exporters, as long as such actions had no direct impact on US consumers. However, in 1992 the US changed its policy and has since interpreted the effects doctrine broadly and announced and maintained guidelines that require the application of its antitrust laws to actions outside its territory if the actions restrict US exports. This policy was announced on the basis that such actions “have an effect on exporters within US territory” regardless of whether they have a “substantive effect” on the domestic market. The US has maintained this policy since then.<sup>2</sup> Regarding the effects doctrine, some notable movements have been seen in the US, such as the ruling of the 7th US Circuit Court of Appeals in the Potash Corp international cartel case and the court decisions in the TFT-LCD international cartel cases, which took into account the situation that companies’ component production bases, final product assembly factories, and distribution bases are scattered beyond national borders amid the globalization of economy, as well as the fact that commodity prices, especially prices for general-purpose products, are evermore interrelated beyond regions.<sup>3</sup> This policy of the US, alleging that conduct in foreign countries restricting its exports adversely impacts its exporters, appears to go beyond the internationally recognized effects doctrine and no other countries take the same approach.

In light of the above, while they may not strictly be cases of extraterritorial application in practice, there are several cases where the Japan Fair Trade Commission executed cease and desist orders, etc. against foreign companies due to violation of the Antimonopoly Act (see page 724 of the 2016 edition for concrete examples). In addition, as discussed later, the Fair Trade Commission frequently conducts merger reviews of M&A cases between foreign businesses (so-called offshore

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<sup>2</sup> See page 615 of the 2016 edition for the history regarding extraterritorial application by the US.

<sup>3</sup> For more details, see page 729 of the 2016 edition.

cases). In some cases, the Commission approved mergers upon a premise that the foreign businesses concerned take concrete remedial measures.<sup>4</sup> In addition, the Fair Trade Commission also processed some cases of actions taken by a single foreign company (such as the use of unfair transaction means) in the same manner as similar investigations conducted by foreign authorities, based on a premise that the Commission has the power to render a relevant order to foreign companies.<sup>5</sup>

## ***2. SUBSTANTIVE CONSTRAINTS ON THE EXTRATERRITORIAL APPLICATION OF COMPETITION LAWS DUE TO THE LIMITS OF ENFORCEMENT JURISDICTION***

As noted above, an international consensus is emerging on the extraterritorial application of competition laws based on the “effects doctrine.” Competition authorities are expected to exercise restraint in the extraterritorial application of these laws in a direct manner with respect to companies located overseas (foreign companies). There are two types of jurisdiction - legislative jurisdiction, which pertains to the establishment and application of laws, and enforcement jurisdiction, which pertains to their enforcement. The effects doctrine discussed earlier is grounded in legislative jurisdiction. Competition authorities’ enforcement jurisdiction over foreign companies requires separate consideration.

Because of the basic principle that one country cannot exercise its power in the territory of another country without the latter’s official permission, if, for example, Country A applies its competition laws extraterritorially to a company in Country B, the institution of exclusionary measures or the imposition of fines or other compelling measures against that company within the territory of Country B without the consent of Country B’s government is a violation of international law. Contacting the company in Country B as part of the procedures pertaining to these compelling measures could also be considered an exercise of governmental authority in violation of the above-mentioned principle.

The issue of enforcement jurisdiction has become particularly prominent in recent cases where foreign competition authorities have sent inquiries by fax or email without prior notice to foreign companies or their contact personnel and thereby started investigations in the context of competition law enforcement.

Competition authorities have employed a number of methods to avoid this problem. Where the competition authorities in one country wish to pursue investigations with respect to a company in another country, they can, for example, utilize the cooperation agreements described below to request the cooperation of the counterpart institution. Inquiries are also sometimes addressed to subsidiaries, branches or agencies of the company which have been established within their own territory. Another option is to ask a representative from the foreign company to come in to deal with the issue. However, the authority of subsidiaries and branches to represent their parent company interests is doubtful<sup>6</sup>.

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<sup>4</sup> For example, the merger of NXP Semiconductors N.V. and Freescale Semiconductors Ltd. (2015), the merger of Zimmer and Biomet (2014), and the merger of ASML and Cymer (2013).

<sup>5</sup> For example, the Fair Trade Commission publicized the disposition against violation of the Antimonopoly Act by One-Blue LLC rendered on November 18, 2016. The Commission also publicized a report concerning ebook-related contracts from Amazon Services International, Inc. dated August 15, 2017.

<sup>6</sup> For procedures concerning service of documents to overseas companies, see page 612 of the 2017 edition.

### 3. **RECOMMENDED ACTIONS**

The exercise of legislative and enforcement jurisdiction exceeding the scope for which international consensus based on the concept of effects doctrine is established should be deemed as constituting “excessive” extraterritorial application of competition laws. “Excessive” extraterritorial application of competition law tends to bring about serious conflicts between the involved parties, rather than encouraging those parties to settle the disputes.

As an example of extraterritorial application of the US Antitrust Law, when the Department of Justice changed its policy in 1992 to include even restrictions on US exports by overseas governments into the scope of the US Antitrust Law, Japan expressed regret and concern that this was exactly the type of extraterritorial application of US domestic laws that is not justified under international law. Japan requested that the United States proceed with caution in applying its new policy.<sup>7</sup> In addition, regarding individual court cases, the government of Japan also expressed in its *amicus curiae* briefs the position that the Department of Justice’s extraterritorial application of the US competition laws was not valid under international law.

It is important to insist actively and continuously that countries refrain from unilateral and “excessive” extraterritorial application of their competition laws and to promote bilateral or multilateral co-operation in order to prevent the violation of such laws. We note that countries such as the United Kingdom and Australia have even enacted blocking statutes that refuse to approve or implement decisions by foreign courts in response to extraterritorial application by the United States. These blocking statutes also forbid private firms from obeying an order for submitting information and other actions issued by a foreign government or court.

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## EXPECTED RESTRAINT OF EXTRATERRITORIAL APPLICATION THROUGH INTERNATIONAL COOPERATION

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### 1. **“INTERNATIONAL COMITY” AND EXTRATERRITORIAL APPLICATION**

“International comity” was traditionally used to prevent international disputes from arising through a conflict of jurisdiction caused by the extraterritorial application of domestic laws. Considering international comity in the context of extraterritorial application of domestic laws means to restrain their judgment in certain cases even though they may technically have jurisdiction, with a degree of respect to foreign governments, in consideration of international relations<sup>8</sup>.

To solve the problem of duplication or conflicting jurisdiction caused by extraterritorial application of competition law, it is important to harmonize competition laws in conjunction with international cooperation on enforcing competition laws.

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<sup>7</sup> For the written opinions from the Japanese government concerning the Thermal Fax Paper Case (1999), the ruling of the US Supreme Court in June 2004, the Vitamin Carter Case (2000), etc., see pages 614-615 of the 2017 edition.

<sup>8</sup> Irrespective of the recognition of the international comity principle in various treaties and in the mutual assistance provisions within these treaties, international law imposes no obligation with regard to either positive or negative comity, both of which remain a matter of national policy. Unless a specific bilateral agreement has been reached in this regard, violators of the international comity principle can only be criticized on moral and political grounds, with no legal liability.

## ***2. INTERNATIONAL COOPERATION ON THE ENFORCEMENT OF COMPETITION LAWS***

Since the 1970s, multilateral and bilateral instruments for cooperation in notification and information regarding competition law enforcement have been created<sup>9</sup>. Other international cooperation agreements regarding the enforcement of competition laws include the OECD Council Recommendation, which advances convergence of national laws prohibiting hardcore cartels as a particularly egregious violation of competition law and stipulates international cooperation and comity with regard to enforcement, and Recommendation of the Council on Merger Review, which provided coordination and cooperation on international merger review among competition authorities.<sup>10</sup> Furthermore, the “OECD Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings” was adopted in September 2014. This Recommendation promotes free information exchange among competition authorities, and further advances cooperation between competition authorities of the member countries by prompting them to achieve consistency between the leniency/amnesty systems. This OECD Recommendation affects the cooperation between competition authorities of the member countries, and, hopefully, the establishment and revision of bilateral agreements in the future<sup>11</sup>.

More than ten bilateral cooperation agreements have been concluded among the US, EU, and other countries,<sup>12</sup> in which parties agree on frameworks for preventing clashes caused by extraterritorial application of competition laws and to foster cooperation in dealing with anti-trust activities occurring beyond a country’s borders.

Influenced by development in global cooperation, Japan and the US signed an agreement concerning cooperation on “anti-competitive activities” in October 1999. This agreement is designed to: (1) strengthen the enforcement of competition laws against anti-competitive activities with international aspects; (2) develop cooperation between Japan and US antitrust authorities; and (3) deal with the problems of extraterritorial application of US antitrust laws. Japan signed a similar agreement with EU in August 2003 and with Canada in October 2005. In May 2017, Japan agreed on the enforcement rules of the agreement with Canada to secure mutual cooperation among the authorities on the communication of enforcement activities, in the same manner as the agreement with Australia, which will be discussed later. Japan also commenced negotiations on the amendment of the agreement with the EU in October 2017, with a view to enabling similar information exchange.

Within the framework of regional economic partnerships, measures have been taken aimed at cooperation in the area of competition policy. Specific agreements formed include the “Japan-Singapore Agreement for a New-Age Economic Partnership” (effective in November 2002), the Japan-Mexico EPA (effective in April 2005), the Japan-Malaysia EPA (effective in July 2006), the Japan-Chile EPA (effective in September 2007), the Japan-Thailand EPA (effective in November 2007), Japan-Indonesia EPA (effective in July 2008), the Japan-Philippines EPA

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<sup>9</sup> One such multilateral instrument is “Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade,” which referred to the use of the notification and consultation mechanisms (revised in 1979, 1986, and 1995).

<sup>10</sup> Recommendation of the Council on Merger Review 2005 (adopted in March 2005)

<sup>11</sup> For example, the EU-Switzerland cooperation agreement which came into force in December 2014 provides for the handling of classified information among competition authorities, reflecting the OECD Recommendation in a proactive manner.

<sup>12</sup> US-Germany (1976), US-Australia (1982, amended in 1999), US-Canada (concluded in 1984, revised in 1995, amended in 2004), Germany-France (concluded in 1984), US-EU (concluded in 1991, amended in 1998), Australia-New Zealand (1994, revised in 2007), US-Israel (1999), EU-Canada (1999), US-Brazil (1999), US-Mexico (2000), Canada-Australia-New Zealand (2000), and Canada-Mexico (2001)

(effective in December 2008), the Japan-Switzerland EPA (effective in September 2009), Japan-Viet Nam EPA (effective in October 2009), the Japan-India EPA (effective in August 2011), the Japan-Peru EPA (effective in March 2012), the Japan-Australia EPA (effective in January 2015) and Japan – Mongolia EPA (effective in June 2016), all of which include bilateral cooperation concerning competition policy, although the level of cooperation varies. To provide detailed implementation rules for the Japan-Australia EPA, the competition authorities of the two countries concluded the Cooperation Arrangement Between the Fair Trade Commission of Japan and the Australian Competition and Consumer Commission in April 2015. This agreement provides that each competition authority will notify and adjust enforcement with the other competition authority as cooperation in addressing anticompetitive activities. In addition, it provides that each competition authority will (where practicable and to the extent consistent with the laws and regulations of its country) give due consideration to sharing information obtained during the course of an investigation (Article 4.3), as an exchange of information in enforcement. This agreement more strongly promotes cooperation and coordination between competition authorities than the cooperation frameworks, such as antimonopoly agreements and EPAs, that Japan concluded in the past. Japan has also promoted international cooperation including information exchange among competition authorities in Japan and other countries as necessary.<sup>13</sup>

The Fair Trade Commission concluded a memorandum, etc. on cooperation between competition authorities with Brazil in April 2014, with the Republic of Korea in July 2014, with the National Development and Reform Commission of China in October 2015, with the Ministry of Commerce of China in April 2016 and with Kenya in June 2016.

Where anti-competitive conducts are punishable under criminal law, countries have recently begun to make use of Mutual Legal Assistance Treaties in Criminal Matters (MLATs) and other mutual assistance procedures for international investigations to engage the cooperation of other countries in acquiring the necessary proof for domestic criminal prosecutions. Where cooperation agreements on competition laws are used to provide the necessary information for achieving administrative ends, international investigation assistance focuses on the provision of proof in criminal cases.

### **3. COMPETITION LAW HARMONIZATION**

As for harmonizing competition law, it may be useful to conduct multilateral discussions at the OECD, WTO and other fora to consider the convergence of competition laws. It would also be useful to introduce, through legislative assistance, appropriate competition laws in the countries that have yet to establish competition policies. This effort also has importance as it could restrain countries to design or operate the competition law inappropriately.

Since July 1997, the WTO Working Group on the Interaction between Trade and Competition Policy discussed the impact of trade measures on competition and other issues. At the Fourth Ministerial Conference held in November 2001, Members agreed to begin preparatory work toward launching negotiations after the Fifth Ministerial Conference on establishing a framework for competition policy. Subsequently, the Working Group focused on the clarification of core principles, including transparency, non-discrimination and procedural fairness, as well as on provisions governing hard core cartels, modalities for voluntary cooperation, and support for progressive reinforcement of competition institutions in developing countries through capacity building. At the Fifth Ministerial Conference held in September 2003, Members did not reach agreement on commencing negotiations on reaching a framework, partly due to opposition from

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<sup>13</sup> For examples of information exchange cases, see Note 12 on page 618 of the 2017 edition.

developing countries including new fields in the negotiations. Subsequently, the inclusion of four new areas of negotiation was discussed, namely trade facilitation, investment, competition and transparency of government procurement (Singapore Issues). As a result, it was decided that, in the current Round, preparatory work toward launching negotiations would be carried out only concerning trade facilitation.

On the other hand, coordination among competition authorities has been advanced. In 2001, competition authorities from the US, the EU and several developed countries launched the International Competition Network (ICN) to seek consensus on proposals for procedural and substantive convergence in antitrust enforcement. Because this is a voluntary organization, even where consensus is reached the implementation thereof is left to the discretion of individual members. Now that the occasions for authorities to apply their competition laws under multiple jurisdictions are on the rise, the ICN has proven to be a useful arena for broad discussion among related personnel and a means for addressing the issues in terms of their procedural and substantive aspects. As of the end of January 2018, 136 competitive authorities from 123 countries/regions participated in the Network.

Meanwhile, Japan has also amended its Antimonopoly Act with an eye to international harmonization, such as amendment of the fine rates, introduction of the leniency system, and abolishment of the trial system.<sup>14</sup>

The Act on Amendments to Relevant Acts Due to the Conclusion of the Trans-Pacific Partnership was established on December 9, 2016 (the Act will come into effect at the time the TPP comes into effect). The Act includes partial revisions to the Anti-Monopoly Act and aims to introduce a system for voluntarily solving competition-related issues through an agreement between the Fair Trade Commission and companies (the commitment procedure). In line with this, the Fair Trade Commission proceeded with necessary preparations for enforcing the same act. It is expected that further progress will be made in the systemic revision, taking into consideration the international harmonization of competition laws.

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## PROBLEMS IN DESIGN AND OPERATION OF CORPORATE MERGER REVIEW

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### ***1. PROBLEM AREAS***

Competition authorities in various countries examine whether or not M&A activities including corporate merger and acquisition of stocks would cause problems with competitive strategies within a framework of competition laws. When a problem is determined through the review, such agencies may order the taking of problem-solving measures such as imposing the obligation that business transfer or supply occur at certain prices, or prohibiting the M&A itself. Thus, competition authorities implement corporate merger review to assess the desirability of the M&A activities from the perspective of competition policies. Competition laws including corporate merger review in various countries are designed and operated based on assumptions relating to each country's distinctive economic structures and market practices, and from the perspective of rule consistency of course it cannot be "unfair" to say that the system and operation differ by country. In many cases, the design and operation of corporate merger reviews by competition authorities of each country may be considered as an issue of whether or not competition laws/policies are undertaken

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<sup>14</sup> For details, see pages 619-620 of the 2017 edition.

appropriately. However, in some cases they may be an issue subject to the WTO Agreement, IPAs, and jurisdiction<sup>15</sup>.

For companies, the schedule of merger review is a very important factor in M&A planning. M&A activities by exporting companies and internationally based companies are typically subject to preliminary reviews prior to merger reviews in overseas countries. Delayed commencement of merger reviews and unduly prolonged review periods cause a delay in the entire M&A process, and may compromise the synergy effects of the merger, and lead to increased costs or drop in stock prices. There is also a more fundamental issue that merger reviews conducted by a country that only has an insignificant relationship to the M&A activity in question, and dispositions against problems found in such reviews, including the prohibition of the merger, imposed by said country may constitute excessive extraterritorial application of competition law. While it requires closer scrutiny to answer the question of whether only obligating companies to submit merger notifications would constitute excessive extraterritorial application of competition law, countries should be well aware of the fact that companies would incur significant costs going under merger reviews.<sup>16</sup>

Recently, as formation of competition laws in many developing countries has been progressing, it is necessary to monitor the design and operation of corporate merger reviews by foreign governments. If necessary, requests to improve the design and operation may need to be taken into consideration. The relationship between the design and operation of corporate merger review and issues of the WTO Agreements and IPAs is examined below.

## **2. BARRIERS TO MARKET ACCESS**

When the cause of late start or a prolonged examination procedure is due to: lack of examiners at the authority; lack of cooperation within the companies; and the need to analyze complicated problems concerning competition laws, then it would not be appropriate to regard such problems as that of the WTO Agreements or IPAs.

On the other hand, in cases where an acquiring corporation is in the country where corporate merger examination is undertaken and when the late start or prolonged examination is not based on reasonable reasons, it may be claimed that this would be a trade barrier measure for foreign companies' market access and investment. Practically, controversial patterns of delay include: (1) the application for examination will not be accepted until execution of the final agreement of the M&A<sup>17</sup>; (2) requirement of prolonged communication with the competition authority prior to official acceptance<sup>18</sup>; (3) no acceptance of application or delay in examination upon facing political challenge; and (4) a long review term is set without following the international standard and results in prolonged review without reasonable reasons<sup>19</sup>. As regards delay without reasonable reasons, if

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<sup>15</sup> For details, see pages 625-627 in the 2017 edition.

<sup>16</sup> For more specific issues in this context, see also page 627 in the 2017 edition.

<sup>17</sup> In China, at the moment, notifications cannot be submitted before the conclusion of final contracts, in principle.

<sup>18</sup> Upon submitting the notification to the authority within the EU, the applicants use Form CO. Prior to official acceptance of notification, communication between the applicants and the authority can be required with prepared draft of notification to detect defects in documentation (*Best Practice on the conduct of EC merger control proceedings*, paragraph 5 to 7, January 20, 2004.) Going through such a procedure would take a few months until official acceptance. Also the length of such procedure could determine the date of official notification, such difference could determine the consequences of the following corporate merger examination (*See the case studies on corporate merger of Samsung HDD by Seagate, and former Hitachi group HDD by Western Digital.*)

<sup>19</sup> The ceiling for the duration of Japanese corporate merger examination is set either 120 days from the receipt of notification or 90 days from the receipt of all the relevant reports. On the other hand, some countries adopt longer examination period, including 330 days from the receipt of notification in Brazil, 270 days in Russia, and 210 days in India. However, cases involving little problem



the concerned M&A case is related to situations where the market access is secured under GATS by the country, infringement of GATS liberalization agreement may be examined. In case a liberalization-oriented Investment Protection Agreement (IPA) is concluded with the country which prolongs the corporate merger review<sup>20</sup>, then whether or not such delay would infringe liberalization obligations may be considered. In any case, closer examination would be necessary regarding whether or not delaying the M&A though not prohibiting it could be considered as infringement of the liberalization agreement.

### **(Reference) Foreign Investment Regulation from the National Security Perspective**

Merger review conducted under competition law is not the only factor that contributes to the delay of the acquisition process, when the company to be acquired is based in the country conducting the merger review in question. Foreign investment regulation for national security purposes, which has been notably increasing in recent years, can also significantly affect the acquisition timeline. One of the recent prominent examples of such regulation is foreign acquisition review conducted by the Committee on Foreign Investment in the United States (CFIUS) in accordance with the Exon–Florio Amendment (which has given the President the authority to take necessary measures in a timely manner to suspend or ban transactions that may threaten national security).<sup>21</sup> Other countries are starting to take similar measures, too. For example, there is an ongoing discussion in the UK about the enhancement of foreign investment regulation in a similar manner as the CFIUS.

Foreign investment regulation for national security purposes as explained above is not always conducted based on clear criteria. There is a risk that the transparency of the review process might be compromised or companies from specific countries might be subjected to discriminatory treatment. The future development of this trend needs to be closely watched so that foreign investment regulation will not result in unreasonable inhibition of smooth transactions in international mergers.

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have actually been approved in shorter periods.

<sup>20</sup> For instance, the Japan–Kuwait Investment Agreement, and Japan–Colombia Investment Agreements.

<sup>21</sup> For details concerning the CFIUS, see page XX of this Report. Similar foreign investment regulation has been in place in resource-rich countries, such as Australia, Canada, and South Africa. In particular, Australia has actively applied such regulation on actual transactions.