# CHAPTER 1

# CHINA

## [COMMITMENTS UPON ACCESSION]

China now has obligations under the provisions of Article X of the GATT, Article VI of GATS, etc. to administer all measures in a reasonable, objective, and impartial manner. Furthermore, 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. China has also committed to: (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Previously, many laws and regulations had been unpublished and even those that were published, particularly regulations at the local level, were difficult to obtain.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 to introduce a comment period and to allow the holding of a public hearing prior to the actual promulgation of laws and orders. However, there are cases where the existence of unpublished laws/regulations and instruction documents are pointed out. In other cases, the content of the promulgated laws/regulations is abstract and the contents of the regulations are unclear. Examples include Order No. 551 and the list of "安可" (secure and controllable) products and services in relation to government procurement (see the Government Procurement section for details).

In addition, notification of subsidies required by the WTO agreements has been pointed out to be insufficient by the WTO Subsidies Committee, etc. This is an example of imperfect transparency (for details, refer to the section on subsidies).

With regards to laws/regulations on information disclosure, 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 and policy information.

After the enforcement of the Government Information Disclosure Ordinance, the basic policies on the promotion of government information disclosure are indicated in major policy documents. The "opinion on deepening of administrative information disclosure and reinforcement of administrative services" issued on June 8, 2011 demands reinforcement of the implementation of the Government Information Disclosure Ordinance, disclosure of internal items of government institutions, etc. The "Resolution of the CPC Central Committee on Certain Major Issues Concerning Comprehensively Advancing the Law-Based Governance of China", which was approved in the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China on October 23, 2014, clearly described promotion of openness of administrative information and to uphold "always remaining transparent other than in exceptional cases, and ensure that decision-making, implementation, management, services, and outcomes are all open to the public". The "Opinions on Overall Promotion of Government Information Disclosure" released on February 17, 2016 by the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council stipulated the establishment of the negative list for administrative information disclosure. It clearly indicated that items outside of the list are disclosed in principle. "Notice of Administrative Instructions for the 'Opinions on Overall Promotion of Government Information Disclosure'" issued on November 10 of the same year by the General Office of the State Council promotes disclosure of information on five items of administrative decisions, enforcement, management, services, and results, and demands proactive response to interests of public opinions and establishment of the platform to disclose government information.

In addition, on July 30, 2016, the General Office of

the State Council issued the Notice on Better Responses to Public Opinion on Administration in Administrative Information Disclosure Activity by the General Office of the State Council. This action was driven by a statement made by Premier Li Keqiang on February 17, 2016, that a modern government should respond to expectations and concerns of its people in a timely manner. It also was driven by an idea that administrative information disclosure and responses to public opinion regarding administration should be enhanced against the background of the frequent occurrence of expressions of public opinion due to the growth of the Internet and new media. The Notice demands respective local governments and respective sections of the government to reinforce the response to public opinions regarding misunderstanding and misinterpretation of policies and measures or matters related directly to and having a relatively large impact on public interests. Deadlines are also clarified by requiring a press conference to be held within 24 hours after the occurrence of a special serious incident or serious emergency incident.

The Government Information Disclosure Ordinance was revised on April 3, 2019, and was enforced starting on May 15 of the same year. The revised Ordinance consists of six chapters and 56 articles. It greatly expanded the provision contents from the former Ordinance, including expansion of the scope of disclosure, clarification of subjects and responsibilities of disclosure, and refinement of procedures. The chapter structure after the revision is:

Chapter 1: General rules (Articles 1 through 9) Chapter 2: Subjects and scope of disclosure (Articles 10 through 18)

Chapter 3: Voluntary disclosure (Articles 19 through 26)

Chapter 4: Disclosure by disclosure request (Articles 27 through 45) Chapter 5: Supervision and security (Articles 46 through 53) Chapter 6: Appendix (Articles 54 through 56). Main revisions include clarification of the fundamental rule to always disclose in principle (Article 5), expansion of the scope of voluntary disclosure (Articles 19 through 21, 26), clarification of the subject responsible for information disclosure (Article 10), refinement of provisions regarding disclosure procedure in response to disclosure request (Article 33, etc.).

The Data Security Law, which went into effect on September 1, 2021, stipulates that state agencies must release administrative information in a timely and accurate manner and should establish an open platform for administrative information. This Law defines the subject of public disclosure as "state organs," expanding the scope of the subject of public disclosure beyond the administrative organs covered by the Government Information Disclosure Ordinance (for details on the Data Security Law, see the Trade in Services section).

In recent years, the State Council has been distributing the “notification of the summary for government information disclosure activity” to each province, self-governing district, direct-controlled municipality, committee of each division of the State Council, and organization under direct control every year and instructing them to thoroughly promote the contents.

The said notification in June 2020 required the enhancement of administrative information disclosure.For instance, it includes ensuring fairness of market supervision and management by fully disclosing the market supervisory rules and standards to market entities, providing more accurate and convenient policy consultation to market entities by enhancing counter services in each section, and improving transparency and convenience of administrative services, etc. The said notification, published in April 2021, set forth the policy of (i) improving the quality of public disclosure application work, (ii) establishing examination standards for administrative appeal cases of government information disclosure, and (iii) strengthening the establishment of related systems. With regard to (ii), the "Guiding Opinion on Some Issues Concerning Government Information Disclosure Appeal Cases" went into effect in January 2022 and the scope of acceptance of government information disclosure cases was stipulated. Regarding (iii), the "Measures for Establishment of Rules on Information Disclosure by Public Enterprises and Business Units" went into effect in January 2021, and it was announced that information disclosure by public enterprises and business units would be promoted intensively.

The State Council has established “政務公開在行動”, which is a special website to externally transmit administrative information disclosure status, since 2016 and has been disclosing policies on administrative information disclosure through a special page in a chronological order.

As for the recent efforts related to judicial organizations, the Supreme People's Court released “opinions of the Supreme People's Court on further deepening of judicial information disclosure” in November 2018. The opinions stipulated that information on trials is swiftly disclosed, that disclosure is the principle and non-disclosure is exceptions, that public opinion supervision by the media is proactively accepted, etc. According to the “Judicial Reform of Chinese Courts (2013-2018)”, which was released by the Supreme People's Court on February 27 of 2019, information disclosure has been promoted on the internet since 2013, and information has already been disclosed through websites, as of January, 2022, such as “China Judgments Online (containing approximately 129.02 million juridical documents)”, “China Trials Online (disclosing approximately 17.37 million live court trial videos)”,

"China Judicial Process Information Online (has disclosed approximately 1.5 billion information cases regarding juridical process)", "China Enforcement Information Online (releasing approximately 7.15 million subjects of enforcement)", and "National Enterprise Bankruptcy Information Disclosure Platform (has disclosed approximately 170,000 cases of bankruptcy and compulsory liquidation)".

**<PROBLEMS UNDER INTERNATIONAL RULES>**

Although a certain level of progress has been observed since the revision in 2019, transparency can be considered insufficient, considering that the progress seen in public disclosure (including implementation details) since the above Government Information Disclosure Ordinance went into effect has been inadequate, due to the absence of an administrative system for the dissemination of administrative instructions, information in which the public is greatly interested is not often disclosed, and claims by some local city governments that the information requested either qualifies as state secrets or is not available. Furthermore, even if public comments are solicited, most of the public hearing periods are set to be approximately 30 days. The relative shortness of these periods is pointed out. 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, and Article 10 (Transparency) of the Agreement among Japan, Korea and China for the Promotion, Facilitation and Protection of Investment.

## (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.

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. And the central government and some local governments have undertaken to simplify/merge government institutions.

However, the vertical management has made little progress 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.

**<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 of applicants for the Administrative Reconsideration. 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 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 Decision of the Standing Committee of the National People's Congress on Revising the Administrative Procedure Law of the People's Republic of China was adopted at the 11th Session of the 12th Standing Committee of the National People's Congress of the People's Republic of China on November 1, 2014. The decision came into effect May 1, 2015. This was the first revision of the

Administrative Procedure Law since it entered into effect October 1, 1990. Under the conventional Administrative Procedure Law, it was difficult to bring a lawsuit, conduct a review, and execute a judgment or order. Therefore, issues that should be resolved through a lawsuit were often addressed through complaint letters and petitions, causing people these procedures instead of resorting to law. With regard to such issues, the 2015 revision lowered hurdles for lawsuits, expanded the scope of cases acceptable, eliminated obstructions against accepting a case, made the review standards stricter, and strengthened the responsibility to respond to an action. The Administrative Procedure Law was further amended in June 2017 to add a provision providing that if a government institution fails to perform its duties in accordance with laws, the People's Procuratorate shall file a lawsuit to the People's Court according to laws.

#### <PROBLEMS UNDER INTERNATIONAL RULES>

If a court unduly refuses to accept an administrative case as described above, it may constitute 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

China updated the adjustment table for duty rates and temporary duty rates on November 1, 2006. Since then, they have changed duty items and duty rates on multiple occasions.

However, China has expressed that they are discontinuing all duties and surcharges on export items, excluding the cases where duties are imposed on products (13 items, including ferromanganese, ferrochrome, crude steel, anode copper for electrolytic refining and copper and aluminum scrap) included in Annex 6 (list of exemptions from the ban on taxation on exports) under Item 2, Article 11 of the WTO Accession Protocol or cases where duties are imposed in conformity with the provision under Article VIII of the GATT. Due to this, if they impose taxation on products other than these exemptions, they are considered to be in violation of the treaty in the WTO Accession Protocol.

As for duty imposition measures for rare earths, tungsten, and molybdenum, the WTO dispute settlement processes (DS431,432, 433 (Refer to: CHINA – MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN, AND MOLYBDENUM: Part II, Chapter 3, 4. Major cases (5)) determined that it was not in conformity with the agreement. China abolished it in May 2015.

Refer to pages 18-21 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA - for details.

## (2) EXPORT RESTRICTIONS ON RAW MATERIALS

#### <OUTLINE OF THE MEASURES>

On January 1, 2002, China issued the "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.

In the "2015 Catalog of Goods Subject to Export License Administration," the number of items subject to export licenses has increased to 591.

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 China's export restriction measures for raw materials and intermediate products gives 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" but it is not entirely clear whether such domestic restrictions have 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 rare earth and other materials 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 October 2016, the United States (DS508) and the EU (DS509) requested the establishment of a panel on export regulatory measures (export duties, export volume limitations, etc.) for antimony, indium, chromium, cobalt, copper, graphite, lead, magnesia, talc, tantalum, and tin. However, the panel has not been established.

## (3) EXPORT CONTROL LAW

**<OUTLINE OF THE MEASURE>**

The Chinese Government had the Security Export Control System which only regulated items related to weapons of mass destruction. However, in June 2017, many consumer goods and technologies related to ordinary weapons were added to the control subjects and at the same time Export Control bills (the Exit Management System Law) (first draft), which include new measures such as retaliatory measures, re-export control and deemed export control, were published. The second draft and the third draft were published in December 2019 and July 2020, respectively, and after receiving public comments and revising the draft, the Export Control Law was enacted on October 17, 2020 and enforced on December 1 of the same year. On the next day, December 2, a list of the controlled goods under the Export Control Law and the Cryptography Law was published (enforced on January 1, 2021), and import and export of cryptography related devices are now subject to application for license (these items were merged into a single list with items related to weapons of mass destruction, etc., which had previously been subject to export control in China, at the time of the regular revision of the list of items under import and export control on January 31, 2021). The whole picture of the System is still unclear. However, there are provisions which are suspected to be inconsistent with the WTO Agreement as shown below. The system has a risk to affect the trade and investment environment between Japan and China depending on its operation.

**<PROBLEMS UNDER INTERNATIONAL RULES>**

The following measures referred to in (a) to (c) which can be included in this Law may be excessive as export control, not meeting the requirement of GATT Article XXI that the imposing country "considers (such measure) necessary for the protection of its essential security interests", and thus may violate GATT Article XI that prohibits import and export restrictions.

(a) Risk of Excessive Expansion of Control Subject Items

This Law provides that a list of control subject items is established "in accordance with the export control policy based on this Law and relevant laws/administrative regulations" (Article 9), and the said Article itself does not clearly describe specific matters to be considered. However, the "Concept of Overall National Security" (Article 33) mentioned as the purpose of export control practice under the Law is China's unique national security concept, which includes a wide scope of factors (including security of economy, culture, society, science technology, resources, etc.), and is not limited to the purpose of national security in the narrow sense, but may include the purpose of industrial/trade protection. In addition, the "national security and interests" are mentioned as the purpose and factors to consider throughout the Law. However, since the "national interests" was added in the final draft to the "national security" mentioned in the first and second draft, it may be understood that industrial policy is expected to be taken into account. Furthermore, a wide range of regulations can also be implemented based on temporary control of items not included in the list (Article 9(2) and Article 12(2)) and the blacklist system (Article 18), etc.

Considering that the "protection of important strategic scarce resources" was mentioned as a necessity for legislation in the explanation of drafting this Law, there is a concern that, for instance, control subject items may be excessively expanded by regulating strategic scarce resources such as rare earths, etc. based on the "resource security" included in the "Concept of Overall National Security".

(b) Risk of Requests to Disclose Technologies

This Law provides the obligation to submit relevant materials as they are in accordance with laws/regulations for the application for export license of dual-use items (including technologies and services) (Article 21). It also provides the obligation regarding end users and end use to submit the exporter's certificate (Article 15) and evaluation and investigation by the Chinese authorities (Article 17). Because of these provisions, there is a concern that this may allow the Chinese regulatory authorities to require excessive disclosure of important technological information such as source codes in determining the applicability, or to directly access and steal sensitive information of Japanese companies legally through the process of examining end users and end use. Since the details of both measures are left to the implementing regulations, we must pay close attention to specific provisions and operation of submitted documents by subordinate laws and regulations in the future.

(c) Provisions of Retaliatory Measures (Equal Principles)

This Law includes a provision providing that when other countries abuse export restrictions against China and endanger China's national security and interests,

China may take “appropriate measures” against such countries (Article 48). This provision was included in the draft prepared by the Ministry of Commerce, but deleted in the first and second draft, and then restored in the final draft. Based on this provision, there is a risk that unilateral export control measures whose purpose is not necessarily security may be taken.

In addition, in June 2019, Chinese Ministry of Commerce announced, as a measure in accordance with the Foreign Trade Law/Anti-Monopoly Law/National Security Law, etc., that China will introduce an “Unreliable Entities List" regime. Accordingly, foreign companies, organizations or individuals that violate market rules, break the contractual spirit, boycott, or cut off supplies to Chinese companies for non-commercial reasons, and causing serious damages to the legitimate rights and interests of Chinese companies would be listed as “Unreliable Entities".

Other than the above, this Law also includes the provisions of (d) re-export control and extraterritorial application. In other words, violations of this Law by organizations/individuals outside of China are also subject to the discipline under the Law (Article 44) and the control of re-export is to be implemented (Article 45). But their details are left to the implementing regulations. For these provisions, there is a concern that, depending on the implementing regulations and specific operations, excessive extraterritorial application of domestic laws, which is not allowed under the international law, may take place. In addition, there is concern that re-export restrictions may be enforced by using the unreliable entity list provision that went into effect in September 2020. (For details on the unreliable entity list provision, see the Unilateral Measures and Others section.)

<Recent Developments>

The Japanese industries submitted written opinions to China regarding the first draft to realize a transparent system suitable to international rules and practices (in July 2017 by Center for Information on Security Trade Controls (CISTEC), in December 2017 by six organizations including CISTEC and the Japan Machinery Center for Trade and Investment, and two organizations including the Japan Business Federation). In addition, in February 2018, 13 industry organizations including CISTEC, the Japan Machinery Center for Trade and Investment, the Japan Business Federation and the National Association of Manufacturers submitted written opinions to China. In January 2020, 14 organizations from Japan, U.S., and Europe (CISTEC/Japan Business Federation/Japan Machinery Center for Trade and Investment, etc.) submitted written opinions regarding the second draft based on the similar perspective. In November 2020, 10 industrial organizations in Japan, including CISTEC, Japan Business Federation, and Japan Machinery Center for Trade and Investment, submitted a written request entitled “Extraterritorial Application Regulations of China and the United States” to point out the concerns regarding the Export Control Law of China and to request for response at the government level. In the same month, the Minister of Economy, Trade and Industry urged industries to identify the risks in their supply chains, and told that excessive withering beyond the respective countries’ measures is unnecessary. The Minister also stated that the Ministry of Economy, Trade and Industry will provide support at the front end if any unreasonable requests are made.

Japan has urged China in the WTO Council for Trade in Goods since March 2018, the vice-ministerial-level regular consultation between the Ministry of Economy, Trade and Industry and China’s Ministry of Commerce in December 2019 and other meetings to realize a fair and transparent system in accordance with international rules and practices.

# RIGHT TO TRADE (APPROVAL SYSTEM FOR TRADING)

Refer to page 22 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA -.

# TARIFFS

## 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 MEASURES>**

The Customs Law, the Import and Export Customs Ordinance, the Import and Export Tax Measure and related regulations provide for import duties, export duties and special duties (such as anti-dumping duties, countervailing duties and safeguard duties). MFN or EPA (the Regional Comprehensive Economic Partnership (RCEP) ) tariff rates are applied to products imported from Japan. In addition, preferential tax treatments (exemption, reduction and refund of customs duties and value-added taxes) are applied to goods, raw materials and equipments intended for reexport and to products recommended for export by the government.

Although the average bound tariff rate on non-

agricultural products in 2020 is 9.1%, there are high bound tariff products including motorcycles (maximum 45%), photographic or film materials (maximum 35%), color monitors (20%), automobiles (15%), TVs (15%), projectors (maximum 12%), etc. Furthermore, the binding coverage on non-agricultural products is 100% and the simple average applied tariff rate for non-agricultural products in 2020 was 6.5%.

**<CONCERNS>**

As long as the high tariff itself does not exceed the bound tariff, there is no problem in terms of the WTO Agreements, but in light of the spirit of the WTO Agreements that promotes free trade and enhances economic welfare, it is desirable to reduce tariffs as much as possible.

In April 2003, the ITA (Information Technology Agreement) Committee approved the participation of China in the ITA that China promised at the time of WTO accession in 2001. However, multifunction machines and projectors connected to computers are tariffed, although they should be tax free as the ITA subject items. There remains uncertainty in the fulfillment of the ITA.

**<RECENT DEVELOPMENTS>**

With regard to the ITA expansion negotiations concluded in December 2015 to promote greater market access for IT products (see 2. (2) “Information Technology Agreement (ITA) Negotiation” in Chapter 5 of Part II for details), China began eliminating tariffs on 201 subject items in September 2016. For example, high tariff items include television cameras (35%), recorders and players (30%), and television receivers (30%).Tariffs on all the subject items including these will be eliminated by 2023.

In the Boao Forum for Asia held in April 2018, President of the People's Republic of China, Xi Jinping announced a key lecture and raised expansion of proactive import as one of the measures to expand the opening of the domestic market to foreign countries. Specifically, this included drastic reduction of automotive import duties and import duty reduction of other products.

On May 22, 2018, the Chinese Customs Tariff Commission announced that the import duties for the total of 218 items, including automobiles and automotive parts, starting on July 1 of the same year (Public announcement by the Customs Tariff Commission [2018] #3). The duty was reduced from 20%~25% to 15% for automobiles, and it was reduced from 8%~25% to 6% for automobile parts. In the Standing Committee meeting of State Council held on May 30 of the same year, reduction of import duty rate for daily goods covering a wide scope was decided. In the Standing Committee meeting of State Council held on September 26 of the same year, reduction of import duty rate for 1,585 industrial products, etc. starting on November 1 of the same year was announced (Public announcement by the Customs Tariff Commission [2018] #9).With this measure, China’s simple average applied tariff rate on non-agricultural products was reduced from 8.8% to 6.5% in 2019, as previously mentioned. In addition, in accordance with the opening of the domestic market to foreign countries announced in the 1st China International Import Expo held in November of the same year, an announcement was made on December 22 of the same year that the import/export duties for some products are to be adjusted starting on January 1, 2019 (Public announcement by the General Administration of Customs [2018] #212). Duties were abolished for rapeseed meal and some raw materials for chemicals among the 706 target items on the same day. On December 13, 2021, the Customs Tariff Commission of the State Council issued the “Notice on the Tariff Adjustment Plan for 2022 from the Customs Tariff Commission of the State Council,” implementing tentative import tariff rates for 954 tariff lines (not including tariff quota amounts) effective January 1, 2022.

The following measures were taken in response to the spread of COVID-19:

(i) Temporary elimination of import duty, indirect import value-added tax, and consumption tax on free (donated) imported goods (medical supplies and pharmaceuticals, medical devices, daily necessities, food and beverages, reagents used to prevent the spread of the disease condition, disinfectant products, medical masks, protective clothing, medical goggles, medical rubber gloves, etc.) used for COVID-19 epidemic prevention activities (from January 1, 2020 to September 30, 2020)

(ii) Exemption of collection of import duty, indirect import value-added tax, or consumption tax on freights for which export declaration was made from January 1,2020 to December 31, 2020 and which were re-imported within a year, and return of import duties already collected

# ANTI-DUMPING MEASURES

## [COMMITMENTS UPON ACCESSION]

Upon accession to the WTO, 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[1].

Additionally, when another Member conducts an investigation in relation to anti-dumping measures on Chinese products and performs price comparisons (calculation of margins of dumping), that member is allowed to compare export prices with sales prices of an appropriate third country instead of China's domestic sales prices (Article 15 of China's WTO Accession Protocol).

The idea behind this is that market economy conditions do not prevail in China and there are no appropriate domestic sales prices. Article 15 (a) (ii), a part of Article 15 of China's WTO Accession Protocol, provides a basis for the above arrangement, but subparagraph (a)(ii) of that article expired in December 2016, 15 years after the accession of China. After the special treatment expired, the status of China's market economy became an issue of international debate (what is known as the issue of China's Market Economy Status). For details, refer to Part II, Chapter 6 of the Report.

## [INDIVIDUAL MEASURES]

China has initiated 292 AD investigations since 1995[2]. Out of them, Japanese domestic products are involved in the 53 cases[3] and for 44 of them, AD measures are imposed[4] ((as of the end of June 2021 for both numbers). China's AD duties on Japanese 22 products are currently continuing (as of the end of June 2021).

As seen in the following cases, China's AD investigation and AD measures have points that are not consistent with the AD Agreement such as lacking objectivity in terms of determining injury and the causal link. Also, concerning China's AD measures in the past, problems such as inappropriate sampling surveys and lack of transparency of procedures have been pointed out. Upon accession to the WTO, China committed to bring its regulations and procedures on AD measures into conformity with the AD Agreement and we will continue to focus on the consistency with the WTO Agreement and ask for improvements if necessary.

## (1) AD MEASURES ON JAPANESE-MADE POLYVINYLIDENE CHLORIDE (PVDC POLYMER)

In April 2017, the Chinese government decided an AD measure on Japanese-made polyvinylidene chloride. There is an issue regarding this decision that the explanations for setting of the price reduction and causality are both insufficient. The Japanese government pointed out the above aspect through public hearing for the matter and AD Committee meetings and requested improvement by submitting government opinions, etc. until the final decision was made. However, a decision, whose conformity to the WTO Agreements was questionable, was ultimately made. For details, refer to page 10 of the 2018 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA -.

## (2) AD MEASURES ON JAPANESE-MADE ACRYLONITRILE-BUTADIENE RUBBER (NBR)

### <OUTLINE OF THE MEASURES>

In November 2017, upon the request of the Chinese domestic companies, the Chinese government initiated an AD investigation on the imports of acrylonitrile-butadiene rubber (NBR) from Japan and Korea. In November 2018, the Chinese authorities made a final determination on the import of such product that there was dumping as well as injury to the domestic industry caused by the dumped imports.

### <PROBLEMS UNDER INTERNATIONAL RULES>

When comparing Japanese products, Chinese products, and Korean products, even if indicators such as sales of the Chinese domestic industries seem deteriorated a careful consideration is needed to determine whether the cause is exports from Japan because price differences is anticipated and the Chinese companies are over-expanding production capacity compared to growth in domestic demand. However, there is a problem that the causal link is recognized without such consideration. In addition, there is an issue of the "normal price" is not correctly because the Chinese government considered expenses that should be ignored, and used of inappropriate pricing for raw materials costs, and then the dumping margin was resulted in being unfairly high.

### <RECENT DEVELOPMENTS>

The Japanese government participated in the public hearing held in May 2018, voicing concerns regarding international rules in this investigation as well as submitting an official government opinion. Furthermore, Japan also spoke at the AD Committee held in April and October 2018, indicating issues in the "International Rules issues" above. In this way, Japan has been cooperating with the industry and urging the

[1] China's WTO Accession Protocol (WT/L/432)

[2] https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf

[3] https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsRepMemVsExp.pdf

[4] https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresRepMemVsExp.pdf

Chinese government so that the investigation will be conducted in consistent with the WTO Agreement. However, in the end the Chinese government made the final determination in which there are doubts as to the WTO consistency. Japan will, in cooperation with the industry, continue to focus on China so that they will promptly terminate/correct AD measures that are inconsistent with the WTO Agreement.

## (3) AD Measures on Japanese-Made Orthodichlorobenzene

### <Outline of the Measures>

In January 2018, upon the request of the Chinese domestic companies, the Chinese government initiated an AD investigation on imports of orthodichlorobenzene from Japan and India. In January 2019, the Chinese authorities made a final determination on the import of such product that there was dumping as well as injury to the domestic industry caused by the dumped imports.

### <Problems under International Rules>

In recent years, the volume of exports from Japan to China has significantly decreased, and it is hard to say that Japanese products are affecting the Chinese domestic industry. In addition, despite the fact that chemical China, which is the main supply destination of the products to be surveyed, have reduced the demand for such products due to strengthened domestic environmental regulations, Chinese companies seem to be excessively expanding their production capacity. Even if indicators such as sales of domestic Chinese industry are deteriorating, careful consideration is needed as to whether the cause is exports from Japan.

### <Recent Developments>

Japan will, in cooperation with the industry, continue to focus on China so that they will promptly terminate/correct AD measures that are inconsistent with the WTO Agreement.

## (4) AD Measures on Japanese-Made Stainless Products (DS601)

### <Outline of the Measures>

In July 2018, upon the request of the Chinese domestic companies, the Chinese government initiated an AD investigation on stainless steel slabs, hot rolled stainless steel plates (cut sheets and thick plates), and hot rolled stainless steel coils from Japan, the EU, Indonesia, and the Republic of Korea. In July 2019, they made a final determination on AD tax imposition for the import of such product that there was dumping as well as injury to the domestic industry caused by the dumped imports.

### <Problems under International Rules>

The physical characteristics, price ranges, commercial flows, and uses of the stainless products (slabs, hot rolled steel plates (cut sheets and thick plates), and hot rolled steel coils) subject to the investigation vary significantly and they contain a wide variety of products with no mutual substitutability. However, in finding the existence of the price effect, the Chinese government pointed out only the decreasing trend of the average price of those wide variety of products and did not substantially analyze the impacts of the imported products concerned on domestic prices. Therefore, there is a concern that it is inconsistent with Article 3.2 of the AD agreement.

In addition, cumulative (collective) assessment of the effects caused by imports from countries/regions subject to the investigation (Japan, EU, Indonesia, and Republic of Korea) were conducted. The cumulative assessment needs to be appropriate in terms of the conditions of competition among the importing/subject countries. However, it is suspected that in this case the products from four countries/regions with totally different prices ranges and product characteristics were assessed cumulatively without reasonable grounds. Therefore, there is a concern that it is inconsistent with Article 3.3 of the AD agreement.

### <Recent Developments>

Japan has been expressing its concerns to the Chinese government regarding issues in the aforementioned international rules at the WTO AD Committee and bilateral consultations.In June 2021, Japan submitted a request to the WTO for bilateral consultations, and in July of the same year, bilateral consultations were held, but no resolution was reached. Therefore, in August of the same year, Japan requested the WTO to establish a panel for this case, and the panel was established in September of the same year. However, duties questionable under the WTO Agreements are still continuing. Japan will, in cooperation with the industry, continue to request the Chinese government to promptly eliminate/correct the AD measures concerned that are inconsistent with the WTO Agreement through all possible means.

## (5) AD Measures on Japanese-Made Polyphenylene Sulfide (PPS)

### <Outline of the Measures>

In May 2019, upon the request of the Chinese domestic companies, the Chinese government initiated an AD investigation on imports of polyphenylene sulfide (PPS) from Japan, United States, Republic of Korea, and Malaysia. In November 2020, the Chinese government made a final determination to impose AD duties on these products based on the finding of dumping, injury to the domestic industry, and a causal

relationship between them.

**<PROBLEMS UNDER INTERNATIONAL RULES>**

Although China's import volume of PPS increased during the period from 2015 to 2018, the sales volume of Chinese domestic products also increased at higher rate and the share of imported products is decreasing in China. This indicates that the PPS industry in China rather is growing as the production volume and the sales volume are increasing. Based on these facts, it is unlikely that injury has been caused to Chinese domestic industry. Therefore, there is a concern that the measures may be inconsistent with Article 3.4 of the AD agreement.

In addition, even if there is injury or threat of injury in China, it is due to the impact other than of imports from Japan, including the impact of excessive investment resulting from increased production capacity of the domestic industry, as mentioned above, and slump in sales of textile and extruded products which use the PPS products of the applicant. Therefore, there is a concern that the measures may be inconsistent with Article 3.5 of the AD agreement.

**<RECENT DEVELOPMENTS>**

Japan has repeatedly expressed its concerns to the Chinese government regarding issues in the aforementioned international rules at the WTO AD Committee and bilateral consultations. However, they made the final determination in which there are doubts as to the WTO consistency.

Japan will, in cooperation with the industry, continue to focus on China so that they will promptly terminate /correct AD measures that are inconsistent with the WTO Agreement.

# SUBSIDIES

## [COMMITMENTS UPON ACCESSION]

Upon accession, China made a commitment to abolish the export subsidies and domestic product priority use subsidies stipulated in Article 3.1(a) and (b) of the Agreement on Subsidies and Countervailing Measures (ASCM) and reserved the right to benefit from part of the provisions regarding special treatment of developing countries while confirming it would not seek to invoke the application of other parts of the provisions regarding special treatment of developing countries. China made commitments exceeding part of the provisions of the Agricultural Agreement, such as not maintaining/introducing export subsidies for agricultural products. Refer to page 29 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA - for details.

**[CROSS-CUTTING ISSUES (INCLUDING REPORTING)]**

**<OUTLINE OF THE MEASURES>**

In recent years, China has been increasing its subsidies (subsidies in the broad sense defined in the WTO Agreement, including low-interest loans, tax incentives, and debt forgiveness) for key industries, while WTO members and others have been pointing out the lack of transparency in such spending. The lack of transparency in subsidy spending is likely to encourage the granting of subsidies that may distort the market, and China's subsidies are suspected of contributing to the issues of overcapacity in sectors such as steel and aluminum. Furthermore, there are concerns that China is useing a variety of tools, such as loans through state-owned banks and state investment funds. Specifically, (i) government influence over companies may be strengthened as a result of government financial support, (ii) government support may encourage a concentration of private capital, resulting in a large flow of funds into specific industries and consequently leading to overcapacity issues, and (iii) government support may be used to finance the acquisition of foreign companies with advanced technologies.

**<PROBLEMS UNDER INTERNATIONAL RULES>**

There is an obligation in the ASCM to submit a detailed notification on subsidies every second year. Notified subsidies are reviewed at Subsidies Committee meetings. The first notification China submitted after its accession in 2001 was only in April 2006 and for the first time in July 2016, China submitted a notification on local subsidies. However, there is a problem that subsidies that should be notified are not notified.

China's massive government support, including unclear subsidy spending, has caused excess capacity in industries such as steel, aluminum, and others. In particular, the issue of overcapacity in China due to various subsidies to the aluminum industry may be inconsistent with Article 5 of the ASCM as having a adverse effects to the interests of other Members. Since 2017, the US has made a request for consultations on China's subsidies (policy finance and provision of inputs (coal, alumina, electricity) at low prices) to the aluminum ingot industry concerning inconsistency with the ASCM (DS519), and has also decided to impose antidumping duties and countervailing duties on Chinese aluminum sheet materials finding damages to the domestic industries, respectively. Furthermore, in its report on Section 232 for aluminum (refer to Chapter 3 Unilateral Measures (2)), the US recognized that the worldwide excessive amount of aluminum due to the subsidies of foreign governments such as China had a major negative impact on the production capacity of the aluminum ingot industry in the US. (For details, see "2021 Report on Compliance by Major Trading Partners

with Trade Agreements -WTO, EPA/FTA and IIA-", Part I, Subsidies, (1) Subsidies for Aluminum.)

**<RECENT DEVELOPMENTS>**

In recent years, China has positioned new energy automobiles and other industries as national strategic industries and is rapidly expanding government support. There is concern that overcapacity and other problems will spread to advanced industries that are important for the competitiveness of each country's industries in the future. In addition, the methods of support of China seem to be diversifying to include not only subsidies and preferential taxation, but also low-interest loans through government-affiliated financial institutions and large-scale investments by national investment funds, which are further decreasing transparency. For example, national investment funds to support the semiconductor industry are set up by both central and local governments, but China has not reported many of these funds to the WTO, claiming that they do not constitute subsidies, so information publicly available on such support is limited. In the 2021 Trade Policy Review (TPR) of China, many Members have expressed concern about China's opaque industrial support and extensive intervention in the market using state-owned enterprises (see column, "Twenty Years of China's WTO Accession and the WTO Trade Policy Review (TPR) Meeting with China").

Japan has requested increased transparency in subsidy policies at bilateral meetings with China, and together with the US, EU, and other Members, has raised the issues of subsidies and overcapacity at the WTO Subsidies Committee meetings and at the 2021 TPR of China. Japan has also called for concerted efforts on addressing overcapacity in key industrial sectors at the G7 and G20 meetings. In cooperation with other WTO Members, Japan will continue to urge China at the WTO and other international fora and bilateral meetings to comply with its commitments made at the time of accession, ensure improved reporting and transparency, and operate its subsidy programs in accordance with the ASCM.

## [INDIVIDUAL MEASURES]

## (1) CHANGES IN EXPORT VALUE-ADDED TAX REFUND RATE

With regards to China’s value-added tax refunds at the time of export, the period from the announcement of laws/regulations on refund rate adjustment to the enforcement is often short.

For example, the reduction of value-added tax rate enforced on May 1, 2018 for industries, such as manufacturing industry, transportation, and basic communication services, and agricultural products, etc., was announced in March 28 of the same year. There was only approximately 1 month between the announcement and the enforcement. Furthermore, the increase of the refund rate for export value-added tax enforced on September 15, 2018, targeting 397 items, including integrated circuit and books, was announced on September 5 of the same year. There were only 10 days between the announcement and the enforcement. While this short period has been improved compared to before, it is still difficult for companies to respond to policy changes with sufficient time.

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 believes that China's economic and trade policies should be conducted in ways to secure transparency and predictability.

As many as four tax rate adjustments, including the above, were made during the two years of 2018 and 2019. 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 VAT is arbitrarily controlled as part of industrial policies. Arbitrary control of the VAT is 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) SUBSIDIES FOR SHIPBUILDING

**<OUTLINE OF THE MEASURES>**

In China, it is reported that government support through subsidies for production facilities and public funds such as large-scale financial support by government-related financial institutions is being provided to the nation's shipbuilding industry. These measures distort the market and risk obstructing prompt resolution of the issue of overcapacity.

**<PROBLEMS UNDER INTERNATIONAL RULES>**

Public financial support for China's shipbuilding industry by the government has delayed resolution of the excessive capacity that the shipbuilding industry faces, and may negatively impact other countries.

**<RECENT DEVELOPMENTS>**

At the high level economic discussions between Japan and China in April 2018, the Japan-China-Korea summit in the following May, and Japan-China-Korea summit in December 2019, Japan stressed the necessity of early resolution to the excessive capacity issue in the shipbuilding industry. In addition, at the 132nd OECD

Council Working Party on Shipbuilding in May 2021, discussions were made on shipbuilding policies, including the structure of the Chinese shipbuilding industry, public support, etc. We will continue to make efforts to collect more information regarding public aid in China and keep a close eye on its WTO-consistency.

# TRADE-RELATED INVESTMENT MEASURES (TRIMS)

## [COMMITMENTS UPON ACCESSION]

Upon accession, China agreed to eliminate measures banned in the TRIMs such as 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 (giving 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 (paragraph 3, Article 7 of the Accession Protocol).

Furthermore, as promises concerning specific sectors, China committed to: (1) regarding the authorization to manufacture automobiles, while maintaining the permission system by category, within two years after accession, restrictions on types, forms or models of automobiles are to be abolished and the maximum amount approved at the local level is to be raised from the current 30 million dollars to 60 million dollars after one year of accession, to 90 million dollars after two years of accession and to 150 million dollars after four years of accession. Finally, (2) China committed to removing the 50% foreign equity limit for joint-ventures regarding the manufacture of motor vehicle engines.

## [STATUS OF IMPLEMENTATION]

In line with the above commitments, from October 2000 to July 2001, China amended the "Foreign Capital Law" applied to 100% foreign-owned enterprises, the "Chinese-foreign Contractual Joint Venture Business Corporate Law" applied to contractual joint ventures, the "Chinese-foreign Joint Venture Business Corporate Law" applied to equity joint venture companies and these Implementation Guidelines and the provisions relating to export requirements, local content requirements, import/export balanced foreign currency balance requirements were deleted. These three foreign investment laws were partially amended in September 2016. As a result, matters that were previously subject to examination/approval now are managed through notifications.

Furthermore, on January 19, 2015, the Ministry of Commerce announced a draft of the "Foreign Investment Law of the People's Republic of China" as a basic legislation related to investment in China by foreign companies, which consolidated the aforementioned three laws of foreign companies which include amendment of the Company Law and other related laws and ordinances to reflect changes of the relevant circumstances in times. The Ministry of Commerce invited public comments for the draft by February 2015, but there has been no response to the submitted public comments and in the end the draft was not made public. However, the State Council announced a new draft for the Foreign Investment Law in December 2018, and accepted public comments until February 2019.

The Foreign Investment Law was established at the 2nd session of the 13th National People's Congress (NPC) of the People's Republic of China held in March 2019, and the enforcement took place on January 1, 2020. The Foreign Investment Law is the basic law regarding foreign companies' investments in China and consists of 6 chapters (General Provisions, Investment Promotion, Investment Protection, Investment Management, Legal Liability, and Supplementary Provisions) and 42 articles. In addition to clearly indicating prohibition of transfer of technology by force (Article 22), this law provides treatment given to domestic citizens prior to joining the market (Article 4, etc.), equal treatment of Chinese products of foreign-funded enterprises in a government procurement (Article 16), free transfer of money overseas (Article 21), establishment of a complaint mechanism for foreign-funded enterprises (Article 26), etc. On the other hand, there are regulations regarding which other countries have concerns, such as the establishment of the safety review system for foreign investment (Article 35, etc.) and retaliation regulations against discriminatory measures by other countries (Article 40). Furthermore, the Foreign Investment Law itself does not stipulate specific contents, and the actual contents and impact of measures based on the said Law are largely dependent on the operation, including the detailed provisions.

When this came into effect, the Law of the People's Republic of China on Chinese-foreign Joint Ventures, Sole Proprietorship Enterprise Law, and Law of the People's Republic of China on Chinese-foreign Cooperative Enterprises, which were the existing laws for foreign investments, were abolished. In joint ventures, the board of directors possesses the highest authority. There used to be unique systems, such as unanimous agreement of the board of directors being required for dissolution, etc. of joint ventures. However, these systems were abolished along with the

abolishment of the three foreign investment laws and unified into the system according to the Company Act.

## [PROBLEMS]

Although there have been efforts, such as the above-listed amendments, to make domestic laws in China consistent with the WTO Agreement, non-conformance with the Agreement and restrictive measures on investment still exist and should be rectified speedily.

## [RECENT DEVELOPMENTS]

At the vice-ministerial-level consultation between the Ministry of Economy, Trade and Industry and China's Ministry of Commerce on December 9, 2019 and the Japan-China Economic Partnership Consultation on November 9, 2020, Japan requested China to ensure effective operation of the Foreign Investment Law around the country, including by local governments, and establish a complaint resolution mechanism as provided for in the Foreign Investment Law in a manner consistent with the intent of the system.

## (1) NEW ENERGY AUTOMOBILE-RELATED INVESTMENT REGULATIONS

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. In addition, the purpose of the "Provisions on Administration of Newly Established Pure Electric Passenger Vehicle Enterprises" (Decree No. 27 of 2015) (enforced on July 1 of the same year) promulgated by the National Development and Reform Commission on June 4, 2015 was to remove industrial barriers and to have parties with superior technological capabilities in the market take part in competition in the electric passenger vehicle industry. While the scope of parties that can enter the industry was expanded, strict requirements were set for their research and development capabilities and innovation power. Also, in the Attachment 1 "New Energy Vehicle Production Companies and Product Entry Management Regulations" of the "New Energy Vehicle Production Companies and Product Entry Management Regulations" published in 2017 (promulgated on January 6, 2017 and enforced on July 1, 2017), requirements are imposed in order to obtain permission to enter the new energy automobile manufacturing industry. The manufacturers are required to indicate that they "understand and master" related technologies. Although this requirement does not require a technology transfer to China on the text, due to the joint venture regulation and the investment ratio regulation, it is necessary for a foreign-owned automobile manufacturer to establish a joint venture in China to operate in China and to have 50% or less of the equity ownership ratio. Therefore, there was a concern that it would practically be applied to foreign-affiliated car manufacturers in a manner requiring relocation of related technologies of new energy vehicles to China, and it might violate Article 7, paragraph 3 of the China accession protocol which bans the request for technology transfer accompanying investment.

**<RECENT DEVELOPMENTS>**

I In February 2020, the Ministry of Industry and Information Technology released a draft revision of the above "New Energy Vehicle Production Companies and Product Entry Management Regulations" (first draft) and accepted public comments until March of the same year. In the first draft, the provisions to demand foreign-owned enterprises, etc. to have research and development bases for the overall new energy automobiles/core parts/core technologies and technology information database in joint ventures (within China) were deleted, and the requirements for manufacturers were simplified mainly into (1) to possess technology assurance capabilities responding to the new energy automobiles to be manufactured (no specifications regarding parts and technology fields), and (2) to possess testing capabilities.

On April 7 of the same year, the Ministry of Industry and Information Technology published a new draft revision of the said provisions (second draft) and accepted public comments until May 7 of the same year. In the second draft, the technology hurdle was lowered by deleting "product design and development capabilities" (Article 5) from the conditions for entry. In addition, the provisions on "public disclosure of NEV companies that have terminated production for 12 months or more" (Article 23) was revised by replacing "12 months or more" with "24 months or more" to allow longer production termination period. On August 19 of the same year, the Ministry of Industry and Information Technology promulgated the revised "New Energy Vehicle Production Companies and Product Entry Management Regulations" (full text), which was enforced on September 1 of the same year.

In the revised Law, the conditions for entry into the new energy automobile manufacturing industry were relaxed. Therefore, in conjunction with the abolition of the limitation on the foreign investment ratio in new

energy automobile manufacturing in 2018, a concern over practical technology transfer, etc. based on these regulations is considered to have been mostly resolved.

## (2) Automobile Industry Investment Management Regulations

**<Outline of the Measures>**

In July 2018, the National Development and Reform Commission (NDRC) announced the Automobile Industry Investment Management Regulations (bill), which stipulate the investment conditions for new investments and/or expansion of existing production by automobile manufacturers. The Regulations came into effect in January 2019.

The purpose of these provisions is to prepare the criteria for participating in the automobile industry investment project and to lead private capital to rational investments as well as to control new manufacturing capacity of conventional fuel vehicles and to enhance development of new energy vehicle. Furthermore, specific licensing requirements of the investment project are stipulated according to the drive system of the manufactured vehicle and the category of manufactured parts. Main examples of provisions of these licensing requirements are listed below.

(i) Fuel vehicles: Automobile that runs using an engine. This includes conventional fuel vehicles, normal hybrid vehicles and plug-in hybrid vehicles.

- New investment by individual automobile manufacturers is prohibited.
- Manufacturing expansion by existing automobile manufacturers requires that all of the following conditions be met. (however, (b) and (e) do not apply to the plug-in hybrid vehicle investment project)
  - (a) The automobile manufacturing capacity use rates for both of the preceding two fiscal years exceed the average rate for the industry.
  - (b) The ratio of manufactured new energy vehicles for both of the preceding two fiscal years exceeds the average ratio for the industry.
  - (c) The research and development expense accounts for at least 3% of the main business proceeds for both of the preceding two fiscal years.
  - (d) The product has international competitiveness.
  - (e) The automobile manufacturing capacity use rates of the province where the project is located have exceeded the industry average rates for the same product category for both of the preceding two fiscal years, and there is no fuel vehicle corporation in the same province in the same product category subject to special public notification in the industry management department.

(ii) Pure electric vehicles: Automobile that runs using a motor. Includes fuel-cell vehicles.

- Regarding new investment in independent pure electric vehicle corporations, the province where the investment project is located, the company that newly establishes the investment project and stockholders must each fulfill the following conditions.
  - (a) Affiliated province: The automobile manufacturing capacity use rates have exceeded the industry average rates for both of the preceding two fiscal years, or the pure electric vehicle company investment project in the same category as the existing new independent one is complete, and the number of annual vehicles produced has reached the construction scale.

  Company: The company has a product research and development institution and/ or research and development expert team, and the experience and capability for concept design/system and structural design, has researched and developed products with a high main technical index in the industry, has the
  - (b) intellectual rights of its core technology, and has obtained authorization/confirmation.
  - (c) Stockholders: Will not withdraw capital until the project is complete and the annual manufactured number of vehicles has reached construction scale, and owns the intellectual rights and has the production capacity for the core parts, etc.
- For manufacturing expansion of pure electric vehicles of the same category by an existing automobile manufacturer, a fuel vehicle company must have an automobile manufacturing capacity use rates for both of the preceding two fiscal years that exceed the average use rates for the industry, and a pure electric vehicle company must have an annual production number of vehicles that reaches the construction scale of the previous fiscal year.

(iii) Battery to install in vehicle

- New investment has the production capacity of the core parts and a research and development facility and expert research and development team.

**<Problems under International Rules>**

For the licensing requirements for the investment project of (1) requiring establishment of a research and development institution, and (2) requiring ownership

of the intellectual property rights of the core technology of the company establishing the investment project and acquiring authorization/confirmation, what effects the wording of the laws actually has should be examined.

Specifically, regarding (1), in case establishment of a research and development facility in China is required in effect, and in case (2) is applied in effect in the form of requiring transfer of new energy car related technology to China for foreign automobile manufacturers through the combined application with the joint venture regulations and investment ratio regulation (see (1) above), such distribution of investment rights possibly violate Article 7 Paragraph 3 of the Accession Protocol of China, which stipulates that China shall ensure that the distribution of the right of investment is not conditioned on performance requirements of any kind (including request for transfer of technology, and request for research and development to be implemented in China).

**<RECENT DEVELOPMENTS>**

After implementing the public comment for this bill, Japan indicated concern for possible violation of the WTO agreement and demanded the relevant amendments, to the NDRC multiple times, including through high level discussions. The Japanese industry also submitted public comments. As a result, the requirement that ratio of exported vehicles to the number of manufactured vehicles had to meet a certain level, was deleted in the enforcement, after being included in the initial draft for manufacturing expansion of fuel vehicle investment projects. However, as there are still conditions that may violate the WTO agreement when applied, operational status must be watched carefully going forward

**<Figure I-1-1> Matters concerning major trade related investment measures revised after WTO accession**

| | Amended regulations | Revised matters |
|---|---|---|
| Establishment of a company, performance requirements, etc. | "Administrative Provisions on the Registration of Foreign-Funded Partnership Enterprises" (March 2010) | ★ The provisions prohibit the establishment of foreign-funded partnership enterprises for industries requesting a foreign capital ratio or industries using the statements such as "limited to equity joint ventures," "limited to contractual joint ventures," "limited to equity joint ventures or contractual joint ventures," "Chinese partner shall hold the majority of shares" or "Chinese partner shall hold the relative majority of shares."<br>* A revision was made on March 1, 2014 related to the change of the management method of all companies including domestic companies from the annual inspection method to the annual report method, however no substantial changes were made. |
| | Circular of the General Office of Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors (February 2011) | ★ A security review system for mergers and acquisitions of domestic enterprises by foreign investors is established. The National Development and Reform Commission and the Ministry of Commerce are to lead the initiative in cooperation with related government agencies, depending on the related industries and fields of the merger or acquisition. |
| | Provisions on Implementation, by the Ministry of Commerce, of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors (August 2011) | ★ The provisions stipulate the procedures to be followed when the Ministry of Commerce implements the security review system for mergers and acquisitions of domestic companies by foreign investors. |
| | Notice on Further Improving Management Measures Concerning Foreign-invested Companies by Ministry of Commerce and State Administration for Foreign Exchange | ★ The circular prohibits use of domestic loans of foreign-funded investment companies for reinvestment in China.<br>★ With the approval of a local foreign exchange bureau, foreign-invested companies may directly use their legitimate income obtained in China for reinvestment in China. (Conventionally, income could be used for reinvestment in China only after registering capital) |

| | | |
|---|---|---|
| | (December 2011) | |
| | Measures for Handling Complaints of Foreign-invested Enterprises (October 2020) | ★ China's Ministry of Commerce provided the rules on handling complaints to government institutions by foreign-invested enterprises aimed at strengthening protection of interests of foreign-invested enterprises and improving the investment environment.<br>★ National Center for Complaints of Foreign-Invested Enterprises was established within the Investment Promotion Agency of the Ministry of Commerce, and the counters in charge are opened in each province, municipality, and self-governing district (the Measures provide that a counter in charge of handling complaints shall be established in provinces and higher level governments). |
| | Measures for National Security Review of Foreign Investment (January 2021) | ★ China's Ministry of Commerce and National Development and Reform Committee promulgated the rules on security review when foreign-invested enterprises make investments in China in accordance with the Foreign Investment Law and the National Security Law.<br>★ The scope of application is provided to be "military-related matters, important agricultural products related to national security, critical energy and resources, manufacture of critical equipment, important infrastructure, important transportation services, important cultural products and services, important information technologies and internet products/services, important financial services, key technologies, and other important fields", but the specific scope is unclear. |

(Note) For major trade-related investment measures amended in or before 2009, see the 2013 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPAs, and BITs -.

## (3) NEGATIVE LIST FOR FOREIGN INVESTMENT ENTRY

On December 27, 2021, the "Special Administrative Measures for Foreign Investment Access to Pilot Free Trade Zones (Negative List) 2021" (hereinafter referred to as the "2021 Negative List for Foreign Investment Entry") was publicized (Order No. 47 of Ministry of Commerce and National Development and Reform Committee, enforced on January 1, 2022).This is the eleventh revision since the first promulgation of the List in 1995. There are 33 restrictive measures included in the 2020 version, but in the "2021 Negative List for Foreign Investment Entry", this has been reduced to 31 items.

Those designated as restricted industries and prohibited industries in the "2021 Negative List for Foreign Investment Entry" are as follows.

● List of industries restricting foreign investment

1. The equity ratio on the Chinese side in the selective breeding and seed production of new varieties of wheat shall not be less than 34%. The equity ratio in the selective breeding and seed production of new varieties of corn shall be controlled by the Chinese side.
2. The equity ratio in the printing of publications shall be controlled by the Chinese side.
3. The equity ratio in the construction and management of nuclear power plants shall be controlled by the Chinese side.
4. The equity ratio in domestic water carriers shall be controlled by the Chinese side.
5. The equity ratio in public air carriers shall be controlled by the Chinese side, the proportion of investment by foreign investors and their affiliates shall not exceed 25%, and legal representatives must be Chinese nationality holders. Legal representatives of general air carriers must have Chinese nationality, general air carriers in agriculture, forestry and fishery shall be limited to joint ventures, and the equity ratio of other general air carriers shall be controlled by the Chinese side.
6. The equity ratio in the construction and management of private aerodromes shall be controlled by the Chinese side. Foreign enterprises must not be involved in the construction and operation of airport control towers.
7. Telecommunications carriers: The percentage of foreign investment in value-added telecommunications services, only within the scope where opening was approved at the time of China's WTO accession, shall not exceed 50% (excluding e-commerce, domestic multiple communication, data storage/transfer, and call centers). The equity ratio in basic telecommunications services shall be controlled by the Chinese side.
8. Market research shall be limited to joint ventures. Of these, the equity ratio in radio and television rating survey shall be controlled by the Chinese side.
9. The operation of preschool educational institutions, ordinary upper secondary education institutions, and higher educational institutions shall be limited to the partnership between China and other countries and led by China (principals or main business managers shall have the nationality of China and the percentage of Chinese members in the executive board or the Joint Management Committee shall not be less than 1/2).
10. Medical institutions shall be limited to joint ventures.

● List of industries banning foreign investment

1. Research and development, cultivation of Chinese unique, rare, and good breeds, and production of related propagating materials (including good genes in the business of cultivation, cattle breeding and fishery)
2. Selective breeding of genetically modified species of agricultural crops, livestock, poultry, and fishery seedlings and production of genetically modified seeds thereof

3. Catch of marine products in China's jurisdictional area and inland waters
4. Exploration, mining and beneficiation of rare earths, radioactive minerals, and tungsten
5. Application of processing technology such as steaming, roasting, baking in the traditional Chinese medicines and production of secretly prescribed Chinese medicine products
6. Wholesale and retail of leaf tobacco, cigarette, re-dried leaf tobacco and other tobacco products
7. Postal business entities, domestic delivery service of postal mails
8. Internet news information services, online publishing services, online program viewing services, management of products related to Internet cultures (excluding music), information dissemination services for general public by Internet
9. Legal affairs consulting in China (excluding provision of information on the influence of the Chinese legal environment) and becoming a partner with a Chinese domestic legal firm are not allowed
10. Social research
11. Development and application of human stem cells, gene diagnosis and therapeutic techniques
12. Research institution of humanity and social science
13. Geodetic survey, marine charting, aerial photography for mapping, surveying using ground mobile body, administrative mapping, topographic maps, the world administrative map, the national administrative map, administrative maps of the provincial level and below, national teaching maps, compilation of local teaching maps and 3D maps; compilation of navigation electronic maps; surveys relating to regional geological mapping, mineral geology, geophysics, geochemistry, hydrological geology, environmental geology, geological disaster and remote sensing geology
14. Required education facilities and religious education facilities
15. Press (including but not limited to news service agencies)
16. Editing and publishing business of books, newspapers, and periodicals
17. Radio stations, TV stations, radio and TV channels, radio, and television broadcasting networks (originating stations, relaying stations, radio and TV satellites, satellites' ground transmission stations, satellites' receiving and relaying stations, microwave stations, monitoring stations, cable radio and TV broadcasting networks), on-demand operations of radio and TV, installation services of terrestrial reception facilities of TV and radio satellites
18. Management company of radio and television program production (including import operations)
19. Film production company, issuing company, distribution and screening company
20. Auctioneers of cultural materials and works of art, shops dealing with cultural materials and works of art, and National Heritage Museum
21. Literary art performance groups

# STANDARDS AND CONFORMITY ASSESSMENT SYSTEMS

## [INDIVIDUAL MEASURES]

## (1) ENCRYPTION LAW/REGULATIONS FOR THE ADMINISTRATION OF COMMERCIAL ENCRYPTION

**<OUTLINE OF THE MEASURES>**

The Encryption Law was passed by the National People's Congress of the People's Republic of China in October 2019 and entered into effect on January 1, 2020. This Law classifies ciphers into core cryptographs, ordinarycryptographs, and commercial cryptographs, and for each of these cryptographs, stipulates the obligation to conform to the technical requirements of the national regulations, permission for sale and use, or import and export, inspection and certification. With enforcement of the "Encryption Law," a draft amendment to the Regulations for the Administration of Commercial Encryption put in force in 1999 was prepared and opened for public comment in August 2020. This draft positions as a subordinate law of the Encryption Law and stipulates the details of security screening of products and technologies that encrypt information that does not constitute state secrets (commercial encrypting products and technologies), obligations to comply with the technical requirements of national regulations, and import licensing and export restrictions, etc.

**<PROBLEMS UNDER INTERNATIONAL RULES>**

Regarding the Encryption Law and the Regulations for the Administration of Commercial Encryption, there are many unclear articles regarding the definitions of the terms used in the text, the concrete requirements of the review, details of regulations and conformity assessment procedures, the scope of regulations, etc. Depending on their operation, they could inhibit foreign companies from operating in China and entering the Chinese market, and might be more trade-restrictive than necessary to achieve the purpose of national security claimed by China. As well, the Encryption Law may violate Articles 2.2 and 5.1.2 of the TBT Agreement and Article 16 of the GATS. In addition, regarding the provisions for certification and import permission in the Encryption Law, if the conditions of competition for foreign products and services are effectively less favorable compared to domestic like products and domestic like services, there may be a violation of the national treatment obligation stipulated by Articles 2.1 and 5.1.1 of the TBT Agreement, Article III of the GATT, and Article 17 of the GATS. Furthermore, if international standards or guides of international standardization bodies are not used as the

basis for technical regulations or conformity assessment procedures in the Encryption Law, it may violate Articles 2.4 and 5.4 of the TBT Agreement. The Regulations for the Administration of Commercial Encryption may also violate Articles 2.1, 2.2, 2,4, 5.1.1, 5.1.2, and 5.4 of the TBT Agreement, depending on the content of concrete regulations and conformity assessment procedures and their operation..

**<RECENT DEVELOPMENTS>**

Regarding the Encryption Law, the Japanese Government submitted comments at the time of public comment in 2017 and 2019, and we have been expressing concerns together with other countries such as the US and the EU at the WTO TBT Committee (hereinafter "TBT Committee") meetings since June 2017. However, most of the concerns expressed by other countries were not reflected on the Encryption Law enforced in January 1, 2020, except for some improvements, such as the addition of a provision that prohibits requirements for disclosure of source code. Regarding the Regulations for the Administration of Commercial Encryption, the Japanese Government submitted its comments during the public comment in September 2020 concerning that the definitions of terms, the concrete requirements of the review, and the scope of regulations still being unclear. In addition, the Japanese Government also requested information on the status of consideration and pointed out problems at the TBT Committee meetings after October 2020, and at the WTO Trade Policy Review (TPR) meeting with China in October 2021. The Regulations for the Administration of Commercial Encryption are also included in the State Council's legislative work plan for 2021. Japan will continue to closely monitor developments in the Encryption Law and the Regulations for the Administration of Commercial Encryption, request clarification of the regulations and urge correction so that the regulations will not become unnecessarily strict through the TBT Committee, etc.

## (2) CHINESE CYBERSECURITY LAW

*For issues related to the "Standards and Conformity Assessment Systems" of this Law, see 1) Chinese Cybersecurity Law under "Trade in Services" (5) Chinese Cyber Data Regulations.

## (3) REGULATIONS ON COSMETICS

**<OUTLINE OF THE MEASURES>**

TBT notification was made in December 2018 by the China Cosmetic Management Bureau (reorganized into National Medical Products Administration (NMPA) in March 2018) regarding the draft of "Cosmetics Supervision and Administration Regulations" (hereinafter referred to as the "Supervision and Administration Regulation") to revise the "Cosmetics Hygiene Supervision Regulations" (hereinafter referred to as the "Hygiene Supervision Regulation"), which is the fundamental law for cosmetics. The Supervision and Administration Regulation was promulgated in June 2020 and enforced on January 1, 2021. The objectives of the Supervision and Administration Regulation are to standardize cosmetics production and sales activities, reinforce supervision/management of cosmetics, guarantee the quality/safety of cosmetics, and assure consumers' health. In response to the revision of the regulations, the Chinese Government has also announced and enforced sub-regulations to stipulate specific details. Many of them have already been enforced or notified to the TBT Committee. The Supervision and Administration Regulation and its sub-regulations are proposed in a manner that reflect part of the requests that Japan had repeatedly expressed at the TBT Committee and other occasions but concerns still remain as follows.

1) REGULATIONS ON NEW COSMETIC INGREDIENTS

In the "Cosmetics Hygiene Supervision Regulations", it was provided that a cosmetics producer or importer shall need to apply for permission to the China Cosmetic Management Bureau and need to undergo an examination by the China Cosmetic Management Bureau before it uses or imports for the first time a new cosmetic ingredient. The "Declaration of acceptance of administrative licensing requirements on cosmetics" (enforced in April 2010), which is the sub-regulation, and the "Guidelines on application and evaluation of new cosmetic ingredients" (July 2011), which are guidelines for application and evaluation of new cosmetic ingredients, clarified the definition of new cosmetic ingredients, compliance rules, application procedure, evaluation principles, etc. to a certain extent.However, while there were only eight new ingredients registered under the Hygiene Supervision Regulations, the production and export of cosmetics containing new ingredients remained restricted.

In addition, according to Article 3 II 2 (2) of the above Guideline in the Hygiene Supervision Regulations, 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 whose new substance is substantially hard to be isolated from the solvent, and even if a new substance is isolated, there is a possibility that the new substance will turn to a different one from those is actually compounded into cosmetics due to a chemical change in the process. Due to this, there is a concern that evaluation on single materials may not be adequate for safety.

There are cases in evaluation of new ingredients under the Hygiene Supervision Regulations that are required to disclose information which is related to confidential corporate information such as details on procedures, reaction process and reaction conditions in the manufacturing process, and there are cases where such information was posted on the China Cosmetic

Management Bureau website after the examination.In response to these aspects, under the Supervision and Administration Regulation, new cosmetic ingredients are now categorized and managed through registration applications (permits) and notifications in accordance with the risk, showing a certain improvement regarding the review speed.

However, the Supervision and Administration Regulation does not provide anything as to whether or not safety evaluation by complex ingredients is allowed, and those provisions in a "relevant information of ingredients is disclosed to the general public" regarding information on new ingredients. Depending on the scope of the relevant information, confidential corporate information may fall within the scope of disclosure. In addition, China notified to the TBT Committee of the draft "Instructions for New Cosmetic Ingredient Registration and Notification Dossiers", which is a related sub-regulation, in November 2020.The said draft Instructions require that the documents to be publicly released include the items that may contain confidential corporate information such as the limited quantity for use of raw materials and quality standards, etc., and that toxicological test items for new cosmetic ingredients are performed in accordance with the test methods provided in the "Safety and Technical Standards for Cosmetics", thus limiting the use of internationally recognized alternative test methods. In order to correct these problems, the Japanese government submitted a comment on the TBT notification in January 2021 and raised a problem at the TBT Committee in February of the same year. The "Instructions for New Cosmetic Ingredient Registration and Notification Dossiers" were promulgated in March 2021 and came into effect in May of the same year. Although some of the Japanese Government's requests were reflected to some extent in the final regulations, such as the reduction of some of the documents to be publicly released, the restrictions on alternative methods have not been improved, so Japan will continue to raise this issue in the TBT Committee.

### 2) Regulations on Cosmetic Labels

In November 2014, public opinion acceptance was announced for China's cosmetic labeling regulations, which were formulated under the Hygiene Supervision Regulation. In December of the same year, a notification was made to TBT committee from the China Cosmetic Management Bureau (the said regulations have not been enforced as of now).

The regulations stipulate "Cosmetic labels may not be amended or supplemented by means of adhesion, trimming, or modifying." There is a possibility that labeling by means of adhesion will be prohibited. If labeling by printing becomes required, companies will be required to manufacture products for China by using special packages for China in the first place.

In addition, the above regulations stipulate that the name of the manufacturer/processor must be included on the label in addition to descriptions, such as manufacturer name, all ingredients, and quality guarantee periods, etc. While they explain that the objective is to make it easy to accuse a producer of legal responsibility for an illegal product, it is sufficient to state a company which legally accepts responsibility for quality. The objective to require stating an actual manufacturer/processor is not explained.

In addition, the said regulations stipulate that a report showing the details of the testing concerned must be made public on the website designated by China Cosmetic Management Bureau and are subject to supervision when indicating the effect/efficacy testing results on the product labels.

In response to these, while the Supervision and Administration Regulation clearly states that labeling by means of adhesion is allowed, a new provision has been added saying "Adhesive Chinese labels shall be consistent with the original labels of the packaging". However, labeling for original packaging is designed to comply with the laws/regulations of the original country, so there is a concern that the contents may not necessarily comply with Chinese laws/regulations.

In addition, the Supervision and Administration Regulation includes a number of parties as those who should guarantee cosmetics quality/safety, including "manufacturer/seller", "registrant or filer", and "cosmetics manufacturing company", etc., and the party responsible for the product has not been unified. The name of the manufacturer continues to be required to be included in the label.

Furthermore, the Supervision and Administration Regulation states "the summary of the scientific basis for the promoted effect must be disclosed on the website specified by the chemical product management division of the State Council to undergo supervision by the general public". Research data and effect testing materials that are the basis for the promoted effect include company secrets, and some contents of "summary of the scientific basis" may require confidential corporate information to be disclosed.

In addition, China notified to the TBT Committee of the draft "Administrative Measures for Cosmetic Labelling", which were formulated under the Supervision and Administration Regulation, in November 2020. The draft Administrative Measures for Cosmetic Labelling require that the product safety and effect/efficacy descriptions contained in Chinese language labels to be adhered match the content displayed on the original package and that manufacturing companies, in addition to the registrant/filer (or person in charge within China for imported products) who are the person in charge of safety, are also displayed.

In addition, while it is an international practice to describe ingredients of less than 1% in the list of all ingredients in an arbitrary order, the draft Administrative Measures for Cosmetic Labelling provides that only the ingredients of 0.1% or less may be listed in arbitrary order only under the separate heading "Other Minor Components," and that the efficacy can only be indicated

as being “assessed and verified” if it is confirmed by tests conducted by testing institutions accredited in China. In order to correct these problems, the Japanese expressed its concern at the TBT Committee in October 2020 and February 2021, and submitted a comment on the TBT notification in January 2021.

The Administrative Measures for Cosmetic Labelling were promulgated in June 2021 and will come into effect in May 2022. Although the provision regarding the indication of "assessed and verified" was removed in the final regulations, the other concerns have not been resolved, and Japan will continue to raise these issues in the TBT Committee.

3) Other regulations

The “Regulation on Administration of Cosmetics Registration/Notification Examination” was notified to TBT Committee in February 2019, and was promulgated and enforced as the “Standard for Testing Work for Registration/Notification of Cosmetics” in September 2019. Concerns of the said Standard for Testing Work are as follows.

While testing institutions are required to obtain the China Inspection Body and Laboratory Mandatory Approval (CMA) prior to conducting testing for application of cosmetics, CMA can only be obtained by Chinese testing institutions. Due to this, results of tests conducted internally or in foreign testing institutions are not recognized.

In addition, China notified the TBT Committee of the draft “Regulation on Administration of Cosmetics Registration” in August 2020 and of the draft “Instructions for Cosmetics Registration and Notification Dossiers” in November 2020, and they were promulgated in January and March 2021, respectively, and came into effect in May of the same year. The said Regulation on Administration clearly states that trade secrets and undisclosed information must not be disclosed, reflecting the request that Japan has continuously been making. On the other hand, the Cosmetics Supervision and Administration Regulations provide that the content of registration/notification of cosmetics and new ingredients must be disclosed and that the summary of the scientific basis for the promoted effect must be disclosed on the website to undergo supervision by the general public. Therefore, it is important to continue to request that the said Regulations and other implementation rules also clearly state that trade secrets and undisclosed information must not be disclosed.In addition, the “Guidelines for Assessing the Promoted Effects of Cosmetics” notified to the TBT Committee in November 2020, promulgated in April 2021, and enforced in May of the same year, lists items that may contain confidential corporate information such as evaluation methods and decision criteria for efficacy as items to be included in the summary of the scientific basis for the promoted effect. Furthermore, while the Regulation on Administration and the Instructions above-mentioned provide that changes to the matters not relating to safety and promoted effects must be notified promptly, they provide that when changing product name or composition, registration/notification will be canceled and application must be made anew.

There is also a concern that the scope of the draft “Regulation on Administration of Toothbrushing” notified to the TBT Committee in November 2020 include solid toothpaste that has not previously been subject to cosmetics manufacturing permission.

**<PROBLEMS UNDER INTERNATIONAL RULES>**

As mentioned above, while the Supervision and Administration Regulation and its sub-regulations show signs of partial improvement, there are still measures whose necessity has not been sufficiently explained and measures that may require disclosure of confidential corporate information, etc. If these regulations are more trade-restrictive than necessary in view of the policy objectives to guarantee cosmetics quality and safety and to assure consumers’ health, they may be in violation of TBT Agreement Article 2.2 and Article 5.1.2.

**<RECENT DEVELOPMENTS>**

Japan submitted comments expressing concerns regarding the TBT notifications involving the “Cosmetics Supervision and Administration Regulation” in December 2018, the “Regulation on Cosmetic Inspection in Registration and Filing” in February 2019, the “Regulation on Administration of Registration of Cosmetics for Non-Special Use” in June 2019, the “Regulation on Administration of Cosmetics Registration" and “Provisions for Cosmetics Registration" in August 2020, the “Guidelines for Cosmetic Safety Assessment” in September 2020, the “Administrative Measures for Cosmetic Labelling”, “Regulation on Administration of Toothbrushing”, “Regulation on Administration of Cosmetics Registration”, “Specifications for Registration and filing of New Cosmetic Ingredients”, and “Guidelines for Assessing the Promoted Effects of Cosmetic” in November 2020, and “Instructions for Dentifrice Notification Dossiers” in February 2021. Japan raised its concern regarding their TBT agreement consistency also in the TBT Committee and requested that the measures do not become more trade-restrictive than necessary. The United States and Europe, etc. also expressed their concerns at the Committee meetings.

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

# TRADE IN SERVICES

## [COMMITMENTS UPON ACCESSION]

Before China’s entry into the WTO, in China, foreign-

affiliated firms' entry into major service sectors was strictly restricted. For example, in the distribution industry, retailers' entry into the market is merely allowed on trial in limited large cities and special economic zones, and foreign-affiliated firms' entry into the telecommunications industry was prohibited.

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

Refer to page 44 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA -.

## (2) Construction, Architecture and Engineering

Refer to pages 49-50 of the 2016 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA -.

## (3) Telecommunications Services

### <Outline of the Measures>

In China, telecommunications services are classified into basic telecommunications services (services to provide public network infrastructures, public data transmission, and basic audio communication services) and value-added telecommunications services (services to provide telecommunication and information services by using public network infrastructures) in accordance with the Regulations on Telecommunications (promulgated in September 2000 and amended in August 2014 and February 2016). A telecommunications business license is required to provide a telecommunication service.

Regarding the entry of foreign investment companies in the telecommunications service market, the Catalogue on Telecommunications Services Classification (promulgated in December 2001 and amended in September 2008 and February 2016) and the Management Measures for Telecommunications Business Licenses (promulgated in March 2009), which were established based on the Regulations on Telecommunications, provide conditions for such entry.

China has been gradually easing restrictions including business scope, investment ratio, region of operations, and minimum capital requirement. Currently, the limitation on service provision areas has been eliminated, but foreign capital ownership for basic telecommunications services and value-added telecommunications services (excluding electronic commerce, domestic multiple communication, data storage/transfer, and call centers) is limited to 49% or less and 50% or less, respectively. The specific details of basic telecommunications services and value-added telecommunications services are shown in the "Catalog of Telecommunications Services Classifications" amended in December 2015. However, the scope of services actually provided by foreign companies is limited. Although some of the limitations on the foreign investment ratio have been removed, foreign investment is still restricted for value-added telecommunication service, such as data center and cloud services, etc. 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", which allows private capital to enter the basic telecommunication operation market in the form of capital participation. Furthermore, the National Conference on Industry and Information Technology 2013, which was held in December 2012, advocated private participation in trials for the resale business and access network business of mobile communications. Specifically, mobile communication resales have been carried out on trial in accordance with the Notice of Pilot Program for Mobile Communications Resale Business given by the Ministry of Industry and Information Technology in May 2013. However, regarding necessary conditions for application for the Pilot Program, it is provided that, in the case of a company listed in foreign countries, the percentage of equity acquired by foreign capital shall be not more than 10% and that its largest stockholder shall be a Chinese investor.

As of February 2022, the Telecommunications Law, which constitutes a fundamental law for telecommunications business in accordance with China's commitments upon its entry into the WTO, has not been promulgated or enforced yet.

### <Problems under International Rules>

Before its entry into the WTO, in telecommunication services, China strictly restricted sales, and foreign capital's entry into the market was prohibited. However, China made the following promises at its entry and is working to improve systems in China.

(i) Of basic telecommunication services (e.g., communication infrastructure facilities and data communication and speech communication services for the public), domestic and international call services and

the like: The limit of investment of foreign capital is 49%.
(ii) Mobile communication services: The limit of investment of foreign capital is 49%.
(iii) Value-added services such as information and database searches: The limit of investment of foreign capital is 50%.

There is a possibility that the operation of related regulatory measures is in violation of Article VI (Domestic Regulations) of the GATS, which requires that such operation be performed in an impartial manner. China also undertook obligations outlined in the reference paper regarding telecommunications services, and so Japan needs to pay attention to violations of the commitments, such as "Public availability of licensing criteria", etc.

**<RECENT DEVELOPMENTS>**

Japan has made requests to China regarding elimination of minimum capital requirements, elimination or easing of foreign capital restrictions, etc., and has been encouraging it to fulfill its accession commitments through the WTO Doha Round negotiations, Japan-China Economic Partnership Consultation, the WTO's Transitional Review Mechanism (TRM) for China, and other forums, and will need to pay attention to the country's regulatory status for telecommunication services in trade negotiations. Moreover, caution is needed to see whether China will impose excessive regulations on telecommunications services in a way that breaks its commitments connected with the WTO regarding broadcasts of foreign produced dramas and animations, computer-related services, and other adjacent services(*).

The restriction on foreign equity ratios, which previously had been limited to 50%, was abolished in the "Notice of the Ministry of Industry and Information Technology on Removing the Restrictions on Foreign Equity Ratios in Online Data Processing and Transaction Processing Business (Operating E-commerce)" (G.X.B.T. [2015] No. 196) promulgated by the Ministry of Industry and Information Technology on June 19, 2015.

"The Catalogue on Telecommunications Services Classification" had not been reviewed since its enforcement in 2003 and did not cover the actual conditions of telecommunications services that had developed rapidly. However, public comments were invited on a bill to revise that Catalogue in April 2013, and its revised edition was published in December 2015 (and put into effect in March 2016). It should be noted that in the revised "Catalogue on Telecommunications Services Classification", the resale of mobile communications is clearly classified as a basic telecommunications service and the 49% limit on foreign investment is assumed to apply to commencement of commercial services of such resale.

On June 30, 2019, the National Development and Reform Commission and Commerce Department announced the "Special Foreign Investment Access Management Measures" (2019 Negative List). In the field of value-added telecommunications, they abolished restrictions for foreign investments for three service items, including domestic multiple communication, data storage/transfer, and call centers.

## (*) REGULATIONS ON BROADCAST AND DISTRIBUTION OF FOREIGN MOVIES, DRAMAS, AND ANIMATIONS

### (1) Permission on foreign TV/internet-distributed programs

In accordance with the "Regulations on the Management of Introducing and Broadcasting Foreign Television Programs," which have been in effect since October 2004, foreign TV and Internet-distributed programs must be censored by the National Radio and Television Administration (NRTA).

In addition, based on the "TV Drama Content Management Regulations" enacted in 2010, it is necessary for foreign TV/internet-distributed programs to obtain a "TV Drama Issuance License" issued by the NRTA, and for animations, it is necessary to obtain an "Internet Culture Management License" issued by the Ministry of Culture based on the "Provisional Internet Culture Management Regulations."

### (2) QUANTITATIVE REGULATION AND TIME REGULATION OF FOREIGN TELEVISION PROGRAMS

"The Regulations on the Management of Introducing and Broadcasting Foreign Television Programs", stipulates that foreign movies, dramas, and animations shall not exceed 25% of the television dramas, movies, and animations broadcast on a given day and 15% of the total broadcast time, and that foreign movies, dramas, and animations shall not be broadcast during prime time (from 7 p.m. to 10 p.m.) without permission from the NRTA.

Specifically, in February 2008, pursuant to the "Notice on Much More Normative Control over Television Animation Broadcasts" given by the SAPPRFT, foreign animation broadcasts were prohibited from 5 p.m. to 9 p.m., and the proportion of foreign animations to Chinese-made ones was restricted in the ratio of three to seven in the whole airtime on channels for minors.

### (iii) QUANTITATIVE RESTRICTION OF WEBCASTING OF FOREIGN MOVIES AND DRAMAS

In the "Notice on Further Promotion of Certain Practice of Control over Foreign Movies and Dramas on the Internet" given by the SAPPRFT in September 2014, it was provided that the total number of foreign movies and TV dramas purchased/distributed by a video site on the Internet in a year shall not be more than 30% of Chinese-made movies and TV dramas purchased and distributed by it in the preceding year. As well, for online distribution of all foreign movies and dramas planned in the coming year, application for permission at the NRTA and other authorities is required.

(4) Quantitative regulation and time regulation of overseas remakes/formatted programs

In the “Notice on Powerful Promotion of Independent Innovative Work for TV-broadcast programs” publicized by the then SAPPRFT in June 2016, it was provided that no more than two overseas remakes/overseas formatted programs could be broadcast from 7:30 p.m. to 10:30 p.m. on the general channels of satellite broadcasting in one year.

Then, in the “Notice to Make the General Channels of Satellite TV Broadcasting a Cultural Mass-media Platform” publicized by the SAPPRFT in August 2017, it is provided that the maximum number of newly introduced overseas remakes/formatted programs each year shall be limited to one, and that overseas remakes/formatted programs shall not be broadcast during prime time (7:00 p.m. to 10:00 p.m.) in the first year of the notice.

**(5) Regulations on broadcast program import procedures**

Based on the “Notice on Further Strengthening and Improving Import and Broadcast Management of Foreign Movies and Television Dramas” publicized by the SAPPRFT in February 2012, it is stipulated that applications for import of foreign television programs are accepted twice a year (from the first to the tenth of January and July) and that, in principle, a program to be imported should not exceed 50 episodes.

**(6) Consideration of revision of the Regulations on the Management of Introducing and Broadcasting Foreign Television Programs**

Regarding foreign TV and Internet-distributed programs, revision is being considered for the “Regulations on the Management of Introducing and Broadcasting Foreign Television Programs”, and the following points are being discussed in terms of regulations:

- Add content restrictions (content must not infringe on the legitimate rights and interests of the minor or be harmful to the minor's mental or physical health)
- Prohibit foreign programs during the hours of 7:00 p.m. to 10:00 p.m. on radio and television broadcasting organizations without approval of the radio and television authorities of the State Council
- Regulate foreign movies, TV dramas, animations, documentaries, and other foreign television programs broadcast daily by each channel of radio and television broadcasting organizations to a maximum of 30% of the total broadcast time of the programs in the respective categories for the day
- Regulate online distribution of foreign movies, TV dramas, animations, documentaries, and other foreign TV programs to no more than 30% of the total amount of distributed programs in the respective categories

A public comment on the proposed revision was held from September 20 to October 19, 2018, and the Japanese Government submitted opinions on relaxation/elimination and transparency of regulations in the foreign content area, clarification of the regulations and transparent operation, as well as ensuring consistency with international practices.

**(7) Consideration of the enactment of a radio-television law**

The enactment of a "Radio-Television Law" that consolidates the previous regulations is under consideration, and the following points are being discussed in terms of regulations:

- Stipulate the implementation of program reviews prior to broadcast and reruns, etc., by operators in TV broadcasting and online distribution
- Make it mandatory, in importing radio or TV programs from outside the region, to obtain permission from the radio and television authorities of the State Council or the radio and television authorities of the provinces, autonomous regions, or direct-administered municipalities.

A public comment on the draft bill was held from March 16 to April 16, 2021, and the Japanese Government submitted opinions on relaxation/elimination and transparency of regulations in the foreign content area, clarification of the regulations and transparent operation, as well as ensuring consistency with international practices.

## (4) Financial Services

* 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.

**(i) Insurance**

**<Outline of the Measures>**

Article 95 of the Insurance Law allows "other business" related to insurance ratified by the insurance supervisory and management authority of the State Council as the scope of business of insurance companies, but the Ordinance on the Administration of Foreign Insurance Companies (Articles 15-18) does not allow "other business" related to insurance that has been examined and approved by the insurance supervisory and management authority of the State Council, except for personal accident insurance business (including insurance business such as life, sickness, and accident insurance) and property insurance business (including insurance business such as property damage, liability, credit, and guarantee insurance). (Article 95 of the Insurance Law)

**<Concerns>**

Since there is no mention of "other business" in the Ordinance on the Administration of Foreign Insurance Companies (Articles 15-18), the improvement of customer service is hampered by restrictions on the implementation of other business related to insurance that has been examined and approved by the insurance supervisory and management authority of the State Council, other than

personal accident insurance business and property insurance business. For example, foreign non-life insurance companies cannot provide comprehensive support to customers aimed at improving consumer convenience and satisfaction, as they are not allowed to provide companies with risk management services, or to provide adjusting services (examination services) in the event of an accident in China involving an insured person in Japan.

**<RECENT DEVELOPMENTS>**

While there have been no significant events regarding this matter, Japan will continue to monitor developments and seek improvements to this regulation.

**(ii) Banks**

**<Outline of the Measures>**

Chinese authorities have established foreign debt quota restrictions that limit foreign currency inflows to prevent the inflow of speculative funds (hot money) into real estate and equities.

**<Concerns>**

Borrowings by Chinese companies in foreign currency from financial institutions and companies outside China are called "foreign currency denominated debt (foreign debt)," and foreign banks' financing instruments and maximum amounts are restricted by the foreign debt quota regulations. Limited access to foreign capital by the banks has also constrained corporate financing. While similar regulations apply to local banks, Japanese-affiliated SMEs and companies with small net worth find it difficult to raise funds in China in the first place and tend to use offshore financing. But there is a cap on funding from overseas, which may cause problems in raising funds.

**<RECENT DEVELOPMENTS>**

In January 2017, the People's Bank of China promulgated the “Notice on Macroprudential Management of Full-Scope Cross-Border Finance” (Yinfa [2017] No. 9), which allows foreign investment companies and foreign financial institutions in China to choose from multiple models in setting their foreign capital issuance limits. (A transition period was initially set for one year, but is being extended).

In March 2020, the People's Bank of China and the State Administration of Foreign Exchange promulgated the "Notice on Adjustment of Macroprudential Policy Factors for the Full-Scope Cross-Border Loans" (Yinfa [2020] No. 64) to prevent the financial deterioration of enterprises against the backdrop of the spread of the novel coronavirus. As a result, for enterprises adopting the macroprudential management model, the foreign debt quota was increased from 2.0 times to 2.5 times the net assets.

In January 2021, in order to ease the pressure of RMB appreciation, the People's Bank of China and the State Administration of Foreign Exchange promulgated the "Notice on Adjustment of Macroprudential Policy Factors for Enterprise Full-Scope Cross-Border Loans" (Yinfa [2021] No. 5), which reduced the foreign debt quota for companies that adopt the macroprudential management model from 2.5 times to 2.0 times net assets.

## (5) CHINESE CYBER DATA REGULATIONS

**<Outline of the Measures>**

In recent years, various laws and regulations have been in placed by the Chinese Government to strengthen regulations related to cyber security and data security. The Cybersecurity Law came into effect in June 2017, followed by the enactment of the Data Security Law in September 2021 and the Personal Information Protection Law in November of the same year. With the passage of these three laws, it is said that China has established a legal framework for data protection. Currently, several subordinate regulations related in whole or in part to these laws have been published, and China is in the process of accelerating the development of cyber data regulations.

1) Cybersecurity Law

On June 1, 2017, the Cybersecurity Law (also known as the "Network Security Law") went into effect. The Law aims at “maintaining sovereignty and state security in cyberspace” and contains new regulations on building and operating networks, supervising cybersecurity and other matters. Specifically, the law provides for (1) the formulation of new national and industry standards for core networking products and cyber security dedicated products and the requirement for these products to obtain security authentication at the time of sale and provision, etc., and (2) (i) the protection of personal information of citizens and (ii) the obligation that requires operators of “critical information infrastructures” (networks for public communication and information services, energy, transportation, irrigation, finance, public services, and e-Government, etc.) to store data within China as well as the restrictions against “critical information infrastructures” on cross-border transfers of personal information and “critical data” ( cybersecurity review is required for bringing out data such as personal information overseas) in order to ensure the security of network data in accordance with the advancement of technology such as cloud computing and big data. The law may apply in certain cases to foreign agencies, organizations, and individuals as well, stipulating that "foreign agencies, organizations, and individuals will be held legally liable by law if they engage in attacks, intrusions, sabotage, destruction and other activities that threaten China's critical information

infrastructures, and cause serious consequences".

2) Data Security Law

On September 1, 2021, the Data Security Law (also known as the "Data Security Law") went into effect. The Law aims to "regulate data processing activities, guarantee data security, promote the development and use of data, protect the legitimate rights and interests of individuals and organizations, and defend the country's sovereignty, the interests of security and development," and stipulates data security management and supervision for all data processing activities (collection, storage, use, processing, transfer, provision, disclosure, etc.) in China. In addition, the Law may apply in certain cases to data processing activities outside of China, as it stipulates that "it will pursue legal liability in accordance with the law if national security, public interest, or the legitimate rights and interests of the people or organizations" of China are undermined.

The Law firstly stipulates a "classification grade category protection system" in which data is classified and protected according to risk, and stipulates that data included in an "Critical Data Protection List" to be formulated in detail in the future will be subject to priority protection.

In addition, data security protection is mandatory during data processing activities, and processors of "critaical data" in particular are subject to heavier obligations, such as specifying data security protection responsibilities and conducting periodic risk assessments.

Furthermore, it is stipulated that export restrictions will be implemented for data applicable to certain restricted items, but the details of these restrictions will be determined separately, so it is possible that restrictions on cross-border data transfers will be strengthened based on this law.

3) Personal Information Protection Law

On November 1, 2021, the "Personal Information Protection Law," China's first comprehensive law of this kind, went into effect. The Law applies not only to activities of processing personal information in China, but also to activities of processingpersonal information which exists within China outside of China, if (i) the purpose is to provide products or services to natural persons in China, (ii) the activities of natural persons in China are analyzed or evaluated, or (iii) other reasons specified by law or administrative regulations are applicable.

In the Law, there are several provisions which are similar to the General Data Protection Regulation (GDPR) of the EU and other countries' data protection legislation, such as the legalization basis for processing personal information and the rights granted to individuals (such as the right to correction and deletion). On the other hand, China also has unique regulations: "operators of critical information infrastructures" and "personal information processors who process more than the amount of personal information stipulated by the Cyberspace Administration of China " are required to store personal information domestically, and are required to undergo a security evaluation by the Cyberspace Administration of China when providing personal information outside of the country.

4) Cyber Data Subordinate Rules

With the enactment of the Cybersecurity Law, the Data Security Law, and the Personal Information Protection Law, the subordinate rules related to these three laws are being developed.

(i) Cyber Security Review Measures

The revised measures went into effect on February 15, 2022, following its enactment on June 1, 2020. The measures require a cyber security review by the Cyber Security Review Office when "critical information infrastructure operators" procure IT equipment and services or when data processing activities by "network platform operators" have or may have an impact on national security, and stipulate that a fine will be imposed in the event of violation. The measures also stipulate that a "network platform operator" which has the personal information of more than one million users must apply for a cyber security review by the Cyber Security Review Office when the operator wishes to list its shares overseas.

(ii) Critical Information Infrastructure Protection Regulations

The regulations were enacted on September 1, 2021. These regulations establish a certification system for "critical information infrastructure" and impose various obligations on "critical information infrastructure operators" such as taking technical protection measures, etc., in accordance with the conformity requirements of relevant laws and national standards.

(iii) Measures for Data Security Management (Draft)

Public comment was held in May 2019. The Draft requires "internet service providers" to notify the authorities when collecting personal information or "critical data" and conduct an assessment of security risks when transmitting, sharing, trading, or providing "critical data" outside of the country, as well as report to the authorities and obtain their consent. It also stipulates that if the relevant authorities of the State Council require the provision of relevant data held by Internet service providers for the performance of their duties, the Internet service providers must submit such relevant data.

(iv) Personal Information Outbound Transfer Security Assessment Measures (Draft)

Public comment was held in June 2019. The Draft stipulates the contents and procedures for security assessment when a "network operator" provides personal information overseas. The Draft prohibits the overseas transfer of personal information if the

overseas provision of the information is still likely to affect national security or damage public interests after going through a security assessment,or if the security of the personal information cannot be effectively guaranteed after going through a security assessment.

(v) Information Security Multi-Level Protection Scheme and Cyber Security Multi-Level Protection Scheme (Draft)

In 2007, the “Information Security Multi-Level Protection Scheme (MLPS)” was promulgated. In the MLPS, the Chinese Ministry of Public Security categorizes IT security products used in systems related to four categories of (1) systems such as communication networks and data centers, (2) systems of finance, railway, energy, etc., (3) general systems of government agencies, and (4) systems concerning the national secrets, into different grades (Grades 1 to 5) by security level and requires the use of Chinese products as the core element if the level is Grade 3 or higher.

In 2018, public comment was held for the draft of the “Cyber Security Multi-Level Protection Scheme” as a replacement for the MLPS. This scheme classifies networks according to security level (Grades 1 to 5), and for networks classified as Grade 3 or higher, it is required to use products, etc. corresponding to the grades and encryption technology, etc. approved by the National Cryptography Administration.

As for the Cyber Security Multi-Level Protection Scheme, China explained that the scheme was still in the draft stage at the TBT Committee.

vi) The Provisions on Management of Automobile Data Security

The provisions were enacted on October 1, 2021. The provisions target "automotive data processors" such as automobile manufacturers, parts and software suppliers, dealers, maintenance providers, and mobility service companies, define data such as off-board video and image data, vehicle traffic volume, and personal information of more than 100,000 personal information subjects etc. as "critical data" and then stipulate the cross-border transfer regulations of " and domestic storage obligations of "critical data," among others. Specifically, when "automobile data processors" process “critical data," they are required to conduct a risk assessment in accordance with regulations and submit a risk assessment report to the cyberspace administrations of the province, autonomous region, or municipality. In addition, "critical data" is required to be stored domestically, and if it needs to be provided outside the country for business needs, a security assessment by the Cyberspace Administration of China will be required. Furthermore, the provision of critical data outside of the country by automobile data processors is limited to the purposes, scope, methods, types, and sizes specified in the cross-border security assessment.

Note that although not a legally binding regulation, a national standard, " Information Security Technology: Security Requirements for Automotive Data Collection," was opened for public comment in October 2021. This standard is even stricter than the "The Provisions on Management of Automobile Data Security," as it prohibits the cross-border transfer of off-board data, seat data, and location and driving history data.

vii) Measures for the Administration of Data Security in the Field of Industry and Information Technology Sectors (Draft)

Public comment was held in September 2021 and February 2022. The measures stipulate the obligation to report data security risks related to the industry and information technology sectors, as well as regulations on the cross-border transfer of "critical data" and "core data" and the obligation to store such data in the country. Specifically, "critical data" and "core data" must be stored domestically if domestic storage is required by law, and security assessments for cross-border transfers must be conducted if the need to provide such data outside of the country is indeed recognized. Detailed lists of "criticaldata" and "core data" are to be prepared by the relevant government agencies in the future.

(viii) Outbound Data Transfer Security Assessment Measures (Draft)

Public comment was held in October 2021. The draft stipulates details of security review when personal information or "critical data" are transferred out of the country.

ix) Measures for Network Data Security Management (Draft)

Public comment was held in November 2021. The draft stipulates that the provisions would also apply to certain cases where data of individuals or organizations in China are processed outside of China. In addition, the report of cyber security review by "data processors" is required in cases where data processors that process more than one million individuals' personal information become listed outside of the country, for example. If data processors need to provide data outside of the country, some conditions must be met: they must undergo a data cross-border security assessment by the Cyberspace Administration of China, and both data processors and the data recipients must be certified for personal information protection by a professional organization that the cyberspace administration recognized. Furthermore, when data processors provide data outside of the country, they are under various obligations, such as data provision being limited to specified purposes, scope, methods, and data types and sizes, and retention of relevant records for a period of at least three years. The scope of such cross-border transfer restrictions is extended to non-personal data by this draft.

**<Problems under International Rules>**

1) Cybersecurity Law

The Cybersecurity Law provides that core networking products and cybersecurity dedicated products must conform to relevant national regulations and industry standards and obtain security authentication at the time of sale. It is presumed that technical regulations and conformity assessment procedures for products are established in the related subordinate rules. However, the regulations, etc. based on the Law have not been notified to the TBT Committee, which is considered to be in violation of Article 2.9.2 of the TBT Agreement that obliges the WTO Members to notify the technical regulations, etc., for comments. in advance

As well, there are many unclear areas regarding the definitions of the terms used in the articles, specific requirements of the review, details of the regulation and the conformity assessment procedures, the scope of regulations, etc. The specific content of the national regulations and industry standards is not provided for in the Law and it is unclear what criteria will be required. If technical regulations or conformity assessment procedures are not based on international standards or guides of international standardization bodies, they may violate Articles 2.4 and 5.4 of the TBT Agreement. In addition, in relation to the purpose of “preserving cyberspace sovereignty and national security” and the technical regulations, the conformity assessment procedures and othe rmeasures, if the Chinese measure is more trade-restrictive than necessary , it may be in violation of Articles 2.2 and 5.1.2 of the TBT Agreement.

The Law stipulates that operators of "critical information infrastructures" are obligated to store "critical data" and personal information domestically and are subject to cross-border transfer regulations (a security assessment by the government is required before "critical data" and personal information can be transferred out of the country). In general, it is presumed that foreign operators doing business globally use servers or cloud services outside of China to centrally manage the data they collect. If they are required to prepare a separate server in China due to the domestic storage requirement, it would possibly create an additional burden and cause a concern when considering market entry and business continuity, and at the same time, may effectively place them at a competitive disadvantage compared to operators who consolidate and manage data within China. In addition, the security risks associated with storing data in China are not eliminated. If data transfers outside of China are prevented by cross-border transfer restrictions, the cost burden will be especially high for foreign operators, etc., that have a great need for constant cross-border data transfers, and smooth business activities through data analysis and utilization may also be impeded. Thus, if foreign operators are effectively treated less favorably than Chinese domestic operators, this may constitute a violation of the national treatment obligation under Article 17 of the GATS and Articles 8.4 and 10.3 of the RCEP Agreement. Otherwise, if the national standards and criteria for evaluation as set forth in those related laws and regulations and other matters lack objectivity or transparency and cause a burden more than necessary to secure the quality of services, there is also a possibility that it may constitute a breach of the duty of domestic regulations as set forth in Article 6.5 of the GATS.

In addition, the obligation to store “critical data" and personal information domestically and the restrictions on cross-border transfers may, depending on their operation, conflict with Article 12.14 (prohibition of the requirement to install computer-related equipment) and Article 12.15 (principle of free cross-border transfer of information) of the RCEP Agreement.

2) Data Security Law

With regard to the security review stipulated in the Data Security Law, there are many unclear areas, such as the definitions of the terms used in the articles and specific requirements of the review. Arbitrary operations that treat foreign operators less favorably may constitute a violation of the national treatment obligation under Article 17 of the GATS and Articles 8.4 and 10.3 of the RCEP Agreement.

In addition, the Law stipulates export restrictions. If the export restrictions mean the obligation to store data in China and the cross-border transfer regulations, in general, it is presumed that foreign operators doing business globally use servers or cloud services outside of China to centrally manage the data they collect. If they are required to prepare a separate server in China due to the domestic storage requirement, it would possibly create an additional burden and cause a concern when considering market entry and business continuity, and at the same time, may effectively place them at a competitive disadvantage compared to operators who consolidate and manage data within China. In addition, the security risks associated with storing data in China are not eliminated. If data transfers outside of China are prevented by cross-border transfer restrictions, the cost burden will be especially high for foreign businesses, etc., that have a great need for constant cross-border data transfers, and smooth business activities through data analysis and utilization may also be impeded. Thus, if foreign operators are effectively treated less favourably than Chinese domestic operators, this may constitute a violation of the national treatment obligation under Article 17 of the GATS and Articles 8.4 and 10.3 of the RCEP Agreement. If this provision refers to domestic storage obligations and cross-border transfer restrictions, depending on its operation, it may also conflict with Article 12.14 (prohibition of the requirement to install computer-related equipment) and Article 12.15 (principle of free cross-border transfer of information) of the RCEP Agreement.

3) Personal Information Protection Law

There are many unclear areas regarding the scope and standards of regulations set forth in the Personal Information Protection Law. Arbitrary operations that treat foreign operators less favourably may constitute a violation of the national treatment obligation under Article 17 of the GATS

and Articles 8.4 and 10.3 of the RCEP Agreement.

The Law also stipulates that "operators of critical information infrastructures" and "personal information processors who process more than the amount of personal information stipulated by the Cyberspace Administration of China " are subject to the obligation to store personal information domestically and the cross-border transfer regulations (a security assessment by the government is required before personal information can be transferred out of the country). In general, it is presumed that foreign operators doing business globally use servers or cloud services outside of China to centrally manage the data they collect. If they are required to prepare a separate server in China due to the domestic storage requirement, it would possibly create an additional burden and cause a concern when considering market entry and business continuity, and at the same time, may effectively place them at a competitive disadvantage compared to operators who consolidate and manage data within China. In addition, the security risks associated with storing data in China are not eliminated. If data transfers outside of China are prevented by cross-border transfer restrictions, the cost burden will be especially high for foreign businesses, etc., that have a great need for constant cross-border data transfers, and smooth business activities through data analysis and utilization may also be impeded. Thus, if foreign operators are effectively treated less favourably than Chinese domestic operators, this may constitute a violation of the national treatment obligation under Article 17 of the GATS and Articles 8.4 and 10.3 of the RCEP Agreement. In addition, the domestic storage obligations and the cross-border transfer restrictions may, depending on their operation, conflict with Article 12.14 (prohibition of the requirement to install computer-related equipment) and Article 12.15 (principle of free cross-border transfer of information) of the RCEP Agreement.

4) Cyber Data Subordinate Rules

The subordinate rules of the Cybersecurity Law, the Data Security Law, and the Personal Information Protection Law provide for domestic storage obligations and cross-border transfer regulations for “critical data," and personal information, etc. In general, it is presumed that foreign operators doing business globally use servers or cloud services outside of China to centrally manage the data they collect. If they are required to prepare a separate server in China due to the domestic storage requirement, it would possibly create an additional burden and cause concern when considering market entry and business continuity, and at the same time, may effectively place them at a competitive disadvantage compared to operators who consolidate and manage data within China. In addition, the security risks associated with storing data in China are not eliminated. If data transfers outside of China are prevented by cross-border transfer restrictions, the cost burden will be especially high for foreign businesses, etc., that have a great need for constant cross-border data transfers, and smooth business activities through data analysis and utilization may also be impeded. Moreover, at this point, even the subordinate rules do not provide details on much of the security review for cross-border data transfers, which could have the effect of discouraging businesses from transferring data across borders. Thus, if foreign operators are effectively treated less favourably than Chinese domestic operators, this may constitute a violation of the national treatment obligation under Article 17 of the GATS and Articles 8.4 and 10.3 of the RCEP Agreement. In addition, the domestic storage obligations and the cross-border transfer restrictions may, depending on their operation, conflict with Article 12.14 (prohibition of the requirement to install computer-related equipment) and Article 12.15 (principle of free cross-border transfer of information) of the RCEP Agreement.

While extraterritorial application is found in various laws and regulations, thatin the Measures for Network Data Security Management (Draft) is particularly broad, covering not only personal information but also organizational data. However, it is international practice to limit extraterritorial application to what is necessary and reasonable so as not to impose excessive burdens on businesses, so this matter needs further attention in the future.

**<Recent Developments>**

Regarding the Cybersecurity Law, the Japanese Government and information and telecommunication-related industries submitted written opinions starting from the drafting stage and expressed concerns in bilateral consultations; however, in June 2017, the Law was enforced without reflecting almost any opinions from the Japanese Government. Japan expressed concerns about the Law at the TBT Committee meetings in March 2017 and thereafter.

The Japanese Government submitted comments on the Data Security Law during public comments in July 2020 and April 2021, but the Law went into effect in September 2021 without resolving concerns.

The Japanese Government submitted comments on the Personal Information Protection Law during public comments in July 2020 and April 2021, but the Law went into effect in November 2021 without resolving concerns.

As for the related subordinate rules, the Japanese Government expressed concern about inconsistencies with the international rules and requested improvements when public comments were held on each rule.

As for concerns in relation to GATS, Japan has registered this matter jointly with the US as a cybersecurity measure on the agenda of the WTO Council for Trade in Services since June 2017, and continues to express its concerns about the above-mentioned issues.

In addition, cyber data-related regulations were discussed at the 19th vice-minister-level regular consultation between METI and MOFCOM(China's Ministry of Commerce) held on December 9, 2019, as well

as at the Japan-China Economic Partnership Consultation held in November 2021. Japan also expressed concerns at the WTO Trade Policy Review (TPR) meeting with China in October 2021 that cyber data-related regulations could hinder the free flow of data. Furthermore, there are significant business concerns regarding the fact that cyber data-related regulations stipulate the obligation to cooperate with public security and national security agencies for the purpose of national security and criminal investigations (see description concerning government access in Part II, Addendum Digital Trade, 3. Regulations, etc., of Countries Concerning Cross-Border Data Distribution, (3) Recent Developments).

Japan will continue to closely monitor the implementation and operation of the Cybersecurity Law, the Data Security Law, the Personal Information Protection Law, and related subordinate rules, and, in cooperation with relevant countries, urge China to take corrective measures through the WTO Council for Trade in Services, the TBT Committee, and bilateral consultations.

# PROTECTION OF INTELLECTUAL PROPERTY

## [COMMITMENTS UPON ACCESSION]

China's system of protecting intellectual property was one of areas to which WTO members (especially developed countries) especially made strong demands for improvement at the Working Party on the accession as the more serious problem of illegal goods such as counterfeit and pirated products in China and other matters are reflected. That is, China stated that it would observe the duties under the TRIPS Agreement at the time of accession without requesting application of transitional measures for developing countries and specifically promised to amend and improve legislation, such as the Patent Law (including provisions for patents, utility models, and designs), Trademark Law, and Copyright Law in order to make it consistent with the TRIPS Agreement. In the area of enforcement. China further committed to performing its obligations under the TRIPS Agreement by rationalizing the amount of damage, facilitating 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.

## [STATUS OF IMPLEMENTATION]

As recent developments in intellectual property protection in China, the Central Committee of the Communist Party of China and the State Council released the "Guidelines for Building a Powerful Intellectual Property Country (2021-2035)" in September 2021 and the "National Standardization Development Outline" in October 2021, which position intellectual property as a strategic resource for national development and international competitiveness, and outline directions such as focusing on the digital transformation of IP and strengthening the influence on international standards. Future developments in new legislation and various policy proposals in line with these announcements will be closely watched. In addition, after establishment of intellectual property courts in Beijing, Shanghai and Guangdong as well as establishing expert courts in intellectual property rights cases in intermediate courts, due to the "Decisions regarding small issues in judicial procedures in intellectual property rights cases such as patent," implemented in January 2019, the jurisdictions of second instance in civil and administrative cases related to patent have been consolidated in the Supreme People's Court. In December 2020, the IP Court of Hainan Free Trade Port, the fourth intellectual property court, was established. Thus, in the judicial field as well, further unification of judgments and strengthening of IP protection by experts are expected.

In April 2019, the revised Anti-unfair Competition Law was enforced. This clarified the types of infringement of trade secrets and reinforced the legal responsibilities for acts of infringement. In September 2020, the "Interpretation of Some Issues in the Application of Laws in the Disposition of Criminal Cases of Infringement of Intellectual Property Rights (3)" (judicial interpretation by the Supreme People's Court and the Supreme People's Procuratorate) and the "Decision on Revising the Criteria for Assembling and Prosecuting Criminal Cases of Infringement of Trade Secretes" (Supreme People's Procuratorate, Ministry of Public Security) were enforced to relax the criteria for assembling/prosecuting criminal cases of infringement of trade secrets. Furthermore, the "Provisions on Some Issues in the Application of Laws in the Review of Civil Cases Pertaining to Trade Secrets" (judicial interpretation by the Supreme People's Court), which enforced in the same month, provide the objects of trade secrets, constituent elements, judgment criteria for rights infringement, and preservative measures, etc. in civil cases to clarify judicial practice. This type of series of initiatives is expected to lead to the deterrence and effective relief of infringement of trade secrets, and we must pay attention to future trends of operations. The Trademark Law, which was revised at the same time as the Anti-unfair Competition Law, was enforced in November 2019. This reinforced the punishment for acts of infringement of trademarks in addition to the reinforcement of regulation on filing of trademarks with malicious intent (so-called bad faith filings). In March 2021, the China National Intellectual Property Administration issued a "Special Action Plan for Combating Malicious Trademark Squatting" and decided to implement measures such as strictly controlling trademark squatting that have adverse social impact and

strengthening cooperation among relevant organizations.

In October 2020, the Patent Law was revised to enhance the protection of rights, including the introduction of the punitive compensation system, increase of the statutory upper limit of compensation amount, introduction of the partial design system, and extension of the protection period for design rights, etc. In addition, the Copyright Law was revised in November 2020 to enhance the protection of rights, just like the Patent Law, including the clarification of provisions on the protection of rights over the Internet, expansion of the scope of protection, introduction of the punitive compensation system, and increase of the upper limit of statutory compensation amount, etc. Both of them were enforced in June 2021. Refer to page 51 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA - for other movements in the past.

## [PROBLEMS]

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 some 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 there are still a number of counterfeit cases coming from China and that we cannot say that sufficient improvement has been made, in spite of the proactive efforts of the Chinese authorities.

Japan and China have been discussing countermeasures against counterfeiting and piracy at the Japan-China Joint IP Working Group, the Japan-China Economic Partnership Consultation, etc., and are working to strengthen protection of intellectual property in general. The following are specific matters that require further correction and improvement.

## (1) ISSUES RELATED TO COUNTERFEIT, PIRATED AND OTHER INFRINGING PRODUCTS

For protection of intellectual property rights, improvement to substantive provisions is first needed. In this respect, China's efforts for improvements through a series of revisions of the laws triggered by accession to the WTO, revisions of the Trademark Law and the Anti-Unfair Competition Law, etc. in 2019, and revisions of the Patent Law and the Copyright Law, etc. based on the effect of the trade agreement between the United States and China, etc. in 2020 can be appreciated. However, in order to secure effective protection of intellectual property rights as set forth in the TRIPS Agreement and domestic laws, regarding enforcement by civil, administrative and criminal procedures, it is essential that enforcement procedures provide expeditious and efficient remedies. In addition, responses are required for new issues, such as sophisticated counterfeit products operators, counterfeit products on the internet, and cross-border distribution channels for counterfeit products.

Furthermore, this is supported by the survey results showing that counterfeit damage which Japanese companies suffered in fiscal 2019 arose most frequently in China (not including Hong Kong)regarding production, transit points, and sales and offering (FY2020 Survey Report on Losses Caused by Counterfeiting, by the Japan Patent Office in March 2021) and the survey results showing that China accounted for slightly above 80% (85.2%, 25,828 cases) of countries of shipment in 30,305 cases of import suspension of goods infringing intellectual property rights at customs in Japan, still showing a high number (State of Suspension of Goods Infringing Intellectual Property Rights at Customs in 2019 publicized by the Ministry of Finance in March 2021).China still remains the top country in which intellectual property rights infringements occur for Japanese companies.

The following section notes several issues mainly on enforcement for anti-counterfeiting measures in China in the future.

### <PROBLEMS UNDER INTERNATIONAL RULES>

#### (i) INADEQUATE ADMINISTRATIVE AND CIVIL REMEDIES AND CRIMINAL PUNISHMENT

For intellectual property rights infringements, Chinese laws and regulations provide administrative penalties (suspension of infringements, levying of administrative fines, confiscation and disposal of goods infringing rights, etc., by the administrative authorities) and border control, and allow for civil remedies (injunction based on court judgment, damage, restoration of reputation through advertisements expressing apologies, etc.), as well as criminal sanctions (imprisonment, fines, etc.).

(Administrative Regulation)

The main agency responsible for administrative enforcement is the State Administration for Market Regulation. In the 2020 administrative enforcement, there were more than 42,000 cases of patent infringement (up 9.9% from the previous year, including 7,100 cases of patent imitation) and 31,300 cases of trademark infringement (up 0.64% from the previous year), with a total fine of 700 million yuan. In addition, 811 cases of trademark infringement were transferred to the judiciary as suspected criminal cases.

However, it has been pointed out that the fine is too low and thus weak as a penalty, facilitating repeat offenses.

(Border control)

The number of cases found in border control in 2020 increased from the previous year to 61,900 in terms of number of lots and 56,181,900 in terms of number of

related items.

(Civil Remedies)

Regarding civil remedies, although claiming damages for intellectual property rights infringements is allowed and the trend of a little rising damage is seen, it has been pointed out that civil remedies are not effective enough to eradicate counterfeit product operators because the amount of damages is not always sufficient even when a case is won, and in some cases, the infringer escapes enforcement by transferring their property to another company.

Based on these circumstances, the revised Trademark Law which was entered into force in November 2019 included the provision to enable increase of the compensation amount for trademark infringement up to 5 times (it was conventionally 3 times) and the provision to set the statutory compensation amount at 5 million yuan (it was conventionally 3 million yuan) or less. Similarly, the Patent Law and the Copyright Law that were revised in June 2021 include the provision to enable increase of the compensation amount up to 5 times and the provision to increase the statutory compensation amount to 5 million yuan (from 1 million yuan for the Patent Law and 0.5 million yuan for the Copyright Law).

In addition, as requirements for the application of punitive damages, "intentional infringement" and "serious circumstances" are stipulated in the Patent Law (Article 71), "malicious infringement" and "serious circumstances" in the Trademark Law (Article 63), and "intentional infringement" and "serious circumstances" in the Copyright Law (Article 54). The China National Intellectual Property Administration, in its response to the "Inquiry in relation to the criteria for determining Intentional Infringement of Intellectual Property Rights" by the Heilongjiang Intellectual Property Administration, stated that "intentional infringement" is a subjective requirement for applying the punitive damages clause of intellectual property rights, while "aggravating circumstances" is mainly an objective assessment of the means, methods, and consequences of the infringement by the perpetrator. Attention should be paid not to make inappropriate cross or overlapping assessments of the two requirements. In addition, the Supreme People's Court, in its "Interpretation on the Application of Punitive Damages in the Trial of Civil Cases of Infringement of Intellectual Property Rights " (effective March 3, 2021), provides judicial interpretation on "intentional infringement" and "serious circumstances." Article 3 provides the grounds for an initial finding of intentional infringement (e.g., when the defendant continues the infringing act after receiving a notice or warning from the plaintiff or other interested party), and Article 4 provides the grounds for a finding of serious circumstances (e.g., when the defendant has committed the same or similar infringing acts again after receiving an administrative penalty or being held liable by a court decision for infringement of a right). Future developments in legal interpretation, etc., will be closely watched.

(Criminal Punishment)

Patent infringement, trademark infringement, and copyright infringement are subject to criminal penalties, which may include a fixed-term imprisonment or fine, depending on the circumstances. In 2020, the public security organs nationwide uncovered more than 21,000 IP-related cases (involving more than 32,000 suspects), with damages amounting to more than 18 billion yuan. Of these, 7,174 people (in 3,930 cases) were arrested and 12,152 people (in 5,848 cases) were prosecuted.

The Criminal Law enforced on March 2021 has toughened the penalties for crimes of counterfeiting, manufacturing, or selling registered trademarks (Article 213-5) under particularly serious circumstances by increasing the long-term sentence from seven years to ten years. In addition, the Supreme People's Court and the Supreme People's Procuratorate have provided judicial interpretations of the criteria for determining the amount of the fine in their " Interpretation (III) on Several Issues Concerning Specific Application of Law in Handling Criminal Cases of Intellectual Property Infringement" (effective September 14, 2020). According to this, the amount of the fine shall be determined by comprehensively considering the amount of illegal income from the crime, the amount of illegal sales, the amount of damage caused to the right holder, the quantity of infringing goods, the harm to society, etc.; (i) Generally, the amount of the fine shall be between one and five times the amount of illegal income, (ii) if the amount of illegal income cannot be determined, the amount of the fine shall generally be between 50% and 100% of the amount of illegal sales, and (iii) if the amount of neither the illegal income nor the illegal sales can be determined, the fine shall be between 30,000 yuan and 1,000,000 yuan, or between 150,000 yuan and 5,000,000 yuan, depending on whether the offender is sentenced to imprisonment for a definite term of 3 years or more.

In the future, whether the penalties for intellectual property right infringement will become more severe will have to be monitored.

#### (ii) Local Protectionism

Refer to page 54 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements - WTO, FTA/EPA and IIA -.

## (2) Issue of Bad Faith Filings

### (i) Bad Faith Trademark Filings

#### <Outline of the Measure and Concerns>

It has been reported that there were many cases where Japanese geological names, regional brands, corporate trademarks, characters, etc. are applied for and registered

as trademark by third parties (bad faith filings). Many Japanese companies, etc. are still being harmed by misappropriated applications of trademarks, and responding to it remains one of the important issues in China.

Japan needs to pay close attention to the operation after the revision to strengthen the regulation on filing of trademarks with malicious intent in November 2019 as well as effective prevention of expansion of injury by bad faith filings, and respond by utilizing the opportunities at bilateral consultations and multilateral frameworks.

**<RECENT DEVELOPMENTS>**

In China, the China National Intellectual Property Administration issued in March 2021 a "Special Action Plan for Combating Malicious Trademark Squatting" and decided to implement measures such as strictly controlling trademark squatting that have adverse social impact and strengthening cooperation among relevant organizations.

In addition, at the annual Trademark 5 (TM5) meeting held from November 3 to 5, 2021 between Japan, the US, EU, China and Korea, it was reported that educational materials using cartoons had been completed and made public regarding the Japan-led "Bad Faith Trademark Filings Project" and it was agreed to continue to further promote educational activities, including holding seminars to promote the project to IP Offices other than the TM5.

### (ii) ABUSE OF MISAPPROPRIATED APPLICATIONS/NON-EXAMINATION SYSTEM ON INVENTIONS OF FOREIGN COUNTRIES

**<OUTLINE OF THE MEASURE AND CONCERNS>**

It is reported that there have been many cases in China where patent and utility models invented in a foreign country or a design created in a foreign country have been filed by a person other than the inventor, designer, and creator and registered by the patent office (so-called “misappropriated application”). In China, misappropriated application does not constitute a reason for rejection or invalidity. Remedy is available only by requesting verification of the ownership of a right (Articles 85 and 86 of the Implementation Regulations for the Patent Law). If the enforcement of administrative procedures for confirming the ownership of rights or the duration of court proceedings is prolonged, caution must be exercised because it may result in a situation where it is impossible to prevent damage from imitations based on applications filed by parties other than the inventor or creator.

Moreover, China does not adopt a substantive examination system for utility models and designs. Furthermore, a duty to submit a patent evaluation report drawn up by an examiner on the validity of a right is not required at the time of enforcement. Then industry is strongly worried that provisions for prevention of abuse of rights are insufficient.

**<RECENT DEVELOPMENTS>**

Article 20 of the Patent Law enforced in June 2021 includes provisions providing that “Patent applications and exercising patent rights must comply with the rules of good faith. Abuse of patent rights, infringing on the public interest or legal rights of others are not allowed.”. This provisions stipulate that the rules of good faith must be complied with for patent applications as well as exercising patent rights, however it is lack of clarity as to whether it is applicable to blocking a misappropriated application.

Furthermore, the said Law does not provide a substantive examination system for utility models and designs and obligatory requirement for submitting a patent evaluation report at the time of exercising rights and is also unclear in terms Article 20 of the said Law to whether or not it is effective as prevention for abuse of patent rights.

It is necessary to keep a close watch on the operation of the revised Patent Law and to continue to raise concerns through bilateral consultations and framework of multiple countries.

## (3) LICENSING REGULATIONS ON PATENTS AND KNOW-HOW

**<OUTLINE OF THE MEASURE AND CONCERNS>**

China has conventionally regulated contracts approving licensing intellectual property exploitation between foreign and Chinese domestic companies (so-called cross-border licensing agreements) through the Regulation on the Administration of Import and Export of Technologies (hereinafter referred to as “TIER”), the implementing rule of Regulation on the Administration of Import and Export of Technologies, and the Technology Export and Import Contract Registration Administrative Statute, etc. Issues with the said regulations had been pointed out in light of their consistency with Article 28, paragraph 2 of the TRIPS Agreement, which stipulates licensees’ right to conclude licensing contracts, from the viewpoint of Article 3 (National Treatment) of the said Agreement.

On March 18, 2019, by the decision of the State Council, China removed part of the articles of the TIER, for which Japan, the U.S., and EU had expressed concerns. We must continue paying attention the actual operation after the revision of the TIER, especially to whether or not appropriate operation will be carried out based on the legal revision in local governments, in the future. The section below notes several issues on the consistency with the TRIPS Agreement, which had been conventionally pointed out.

**OWNERSHIP OF IMPROVED TECHNOLOGY (ARTICLE 27 & 29(3) OF THE FORMER TIER)**

Article 27 of the former TIER (removed in March 2019) provided that an improved technology resulting from another technology licensed under cross-border

licensing agreements shall belong to the party that has improved that technology. In addition, Article 29, paragraph 3 of the former TIER prohibited the original technology licensor from restricting a technology licensee's right to improve the technology licensed under licensing agreements or to use such improved technology.

On the other hand, regarding domestic technology transfer or licensing agreements in China, Article 354 of the former Contract Law of China (Article 875 of the Civil Code) provides that a party to a contract may provide how and who to assume the products from technology improvement. In the said Law, such a compulsory provision as those in the former TIER cannot be found. In addition, Article 355 of the former Contract Law (Article 877 of the Civil Code) 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 indicates that the former TIER, which is a special law, is applied and supersedes license contracts that fall under technology import and export, while Article 354 of the former Contract Law of China is applied to other ordinary domestic technology transfer or licensing contracts. In technology export and import, to which the former TIER applies, it is contemplated that foreign companies are often in a position of a technology licensor. Then the former TIER, which provides that an improved technology shall automatically belong to the party that has improved the provided technology, irrespective of contractual terms between the parties, is designed to work as a mandatory provision applied only to foreign companies that become a technique licensor. It had been pointed out that there is a possibility that the former TIER is inconsistent with the national treatment obligation under Article 3, paragraph 1 of the TRIPS Agreement as discriminatory treatment against foreign countries.

### Licensor's Liability on Third Party Infringement (Article 24 of the former TIER)

Article 24 Paragraph 2 of the former TIER (removed in March 2019) had provided that, in technology export and import, if a technology licensee was sued by a third party for infringement of its right as a consequence of using the technology provided under the licensing agreement, the licenser was required to cooperate with the response to the third party's infringement claim. Furthermore, Article 24, paragraph 3 of the former TIER provides that, if the licensee's usage of the technology provided by the licensor in accordance with the provisions of a technology import contract infringes third party's legitimate interests, the licensor shall assume liability for that infringement. It is possible that a licensor would be exempted from liability in such a case as licensee's usage of the licensed technology which is not consistent with the contract terms infringes third party's legitimate interests. But it seems that a licensor must assume liability for infringement to a third party even if it has not been involved in that infringement, until it is clearly demonstrated that the licensor shall be exempted from the liability.

On the other hand, the former 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 dealt with by a mutual contract between the parties.

Therefore, as mentioned above, it had been pointed out that the provision in the former TIER that the licensor 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 paragraph 1 of the TRIPS Agreement, as a discriminatory treatment between domestic and foreign technology transfer.

### Guarantee of Completeness, etc. of Licensed Technology (Article 25 of the former TIER)

In Article 25 of the revised TIER, there remains a provision that a technology licensor shall warrant that the licensed technology is complete, free from defects and valid as well as can attain the objective of the technology as set forth in the contract. Then, as it is possible that a licensor may be obliged to ensure the fulfillment to attain the objective of a technique, that provision can be an obstacle to entering into a license contract for a technology licensor.

In this way, foreign companies providing technology are still in the situation where they must be cautious in providing technology. Japan needs to ask China to further clarify and deregulate the provisions under the TIER, and also to continue closely watching the authorities' operation to register, administer and permit the international license contracts, including whether there is the differences from the regulations on domestic technology provision contracts, including licensing contracts, between Chinese domestic companies.

### <Recent Developments>

With regards to restrictions for licenses. for patents/know-how, etc., in addition to Minister of Economy, Trade and Industry Seko directly expressing concern to Commerce Minister Zhong Shan that the provisions in the former TIER are discriminatory in nature in October 2018, each governments had an opinion exchange on this issues at the Japan-China intellectual property rights working group held in January 2019, Japan put pressure on China via a variety of opportunities for dialogue between both or multiple countries, for systemic reform and improving clarity of the TIER. Moreover, in the 2021 edition of the Special 301 Report by the U.S. Trade Representative (USTR), China continues to be on the Priority Watch List, with the concern that technology licensing regulations based on China's laws and administrative polices are compulsive obligation imposed only on foreign companies. Also, based on Section 301 in the 1974 Trade Reform Act,

investigation on the issue of China's transfer of technology/intellectual property rights was initiated in August 2017, and the investigation report made public in March 2018 indicated that the U.S. technology owners' abilities to negotiate the terms of technology transfer on a market-based conditions have been damaged by China's regulations related to technology licensing. Furthermore, the revised version of the above mentioned report made public in November 2018 indicated that China's policies had not been changed and expressed its plan to discuss the discriminatory license regulations at the WTO panel process.

Regarding measures related to China's intellectual property rights protections, including the TIER, the U.S. made a request for consultation in March 2018 based on the WTO Agreement, and since no resolution was reached through bilateral consultation, in November 2018 the WTO Dispute Settlement Panel was established.

Furthermore, in June 2018, the EU requested consultation for measures related to China's technology transfer, including the TIER.

Since then, China revised the TIER in March 2019 and removed a lot of the provisions that had been expressed concerns. As a result, after a temporary suspension, the above panel review was terminated in June 2020.

In January 2020, China signed the first stage economic and trade agreement with the United States. The agreement document provides a promise not to carry out technology transfer between private companies by governmental pressure, prohibition to request or exert pressure through the means of administrative procedures or licensing requirements, enhancement of civil and criminal actions against acts of infringement of trade secrets, and prohibition of improper disclosure of trade secrets and confidential information by government agencies, etc.

It is still important to continue giving the necessary pressure, as well as keeping a close watch on the implementation and movements for future reforms.

## (4) Issuance of an anti-suit injunction in standard essential patent disputes [Newly added]

**<Outline of the Measure and Concerns>**

An anti-suit injunction ("ASI") is an order by a court which prohibits a litigant from initiating or continuing legal proceedings in a foreign court, when substantially identical disputes are pending before courts in more than one country. In 2020, the Supreme People's Court (the "SPC") of China issued an ASI as an behavioral preservation measure in a case concerning standard essential patent ("SEP") licensing on mobile communications technology, *Huawei vs. Conversant*. In this case, the SPC considered the following five factors before issuing the ASI: (i) the impact that a foreign court enforcing an injunction may have on the ongoing litigation in China, (ii) the necessity of preventing such an enforcement of the injunction by the foreign court, (iii) the balance of interests between the damage to the applicant by not preventing such an enforcement of the injunction and the damage to the respondent by preventing that enforcement, (iv) the public interests, and (v) the international comity. The SPC also established a penalty of one million yuan per day for any failure to comply with the ASI. Following this case, Chinese lower courts have also issued ASIs in several cases involving SEP for mobile communication technology. Some of the ASIs issued by lower courts prohibit not only the continuance of legal proceedings in foreign courts with regard to substantially identical SEPs registered in those foreign countries, but also the initiation of new disputes in those foreign courts.

**<Recent Developments>**

In February 2022, the EU issued a request for consultations with China on the grounds that the Chinese ASIs is not consistent with *inter alia* Articles 1.1, 28.1, 41.1, 44.1, of the TRIPS Agreement (DS611).

Japan will closely monitor the use of ASI by China to ensure that they are not used in a manner inconsistent with the WTO agreements, in cooperation with the EU and other Members.

# Government Procurement

## [Commitments upon Accession]

A government procurement agreement is a so-called agreement among several countries and a rule that binds only countries that opt to accede to that agreement. Therefore, only a subset of countries, mainly developed countries, has have acceded to the GPA. At the time of its entry into the WTO, China promised to accede to the GPA in the future, to participate in it as an observer for the time being, to secure transparency in the procedure for government procurement, and to give non-discriminatory treatment in the case of procurement from foreign countries[5]. After its accession to the WTO, in February 2002, China has gained a qualification for the observer of the government procurement committee.

In December 2007, China submitted an application for the accession to the GPA and the initial offer referred to in Annex I[6], and accession negotiations were started. However, various problems with the initial offer were pointed out, and other countries requested early submission of a revised offer. In response to it, China submitted the first revised offer in July 2010[7], the second

[5] Report of the Working Party on the Accession of China (WT/ACC/CHN/49), Protocol on the Accession of the People's Republic of China (WT/L/432)

[6] GPA/ACC/CHN/1

[7] GPA/ACC/CHN/16

one in November 2011[8], the third one in November 2012[9], the fourth one in December 2013[10], the fifth one in December 2014[11], and the sixth one in October 2019[12]. President of the People's Republic of China, Xi Jinping spoke of acceleration of the process for acceding the GPA in his speech at the Boao Forum for Asia held in China in April 2018, and swift GPA accession is expected.

## [STATUS OF IMPLEMENTATION]

For the Government Procurement Law, which was enforced in January 2003, public comments were invited on its draft revision for the period from December 2020 to January 2021, but the status of the subsequent consideration is unclear and future developments should be closely monitored. Other Chinese laws and regulations on government procurement include the Law of the People's Republic of China on Tendering and Bidding and the Implementation Regulations thereof, in addition to the Implementing Regulations of the Government Procurement Law.

The draft revision of the Government Procurement Law for which public comments were invited included the same provision that requires procurement of domestic products ("buy-domestic" provision) as before the revision.

In August 2021, a British news agency reported that in May of the same year, China's Ministry of Finance and Ministry of Industry and Information Technology issued an undisclosed internal notice (Document No. 551) to local government departments under their jurisdiction, specifying the domestic procurement rate for government procurement of 315 items in 41 categories, and instructed them to give priority to purchasing domestic products. In fact, some Japanese companies have reported that the use of domestic products are required as a condition for bidding, so it is necessary to keep an eye on future developments to ensure that foreign imports are not effectively excluded from government procurement of the above items.

In addition, if China joins the Agreement on Government Procurement in the future, it is necessary to closely monitor whether China's relevant legislation, including the Government Procurement Law, is consistent with the obligations in the Agreement on Government Procurement.

In the Foreign Investment Law enforced in January 2020 and its implementation regulations, the Chinese Government stipulated that government procurement would treat products and services produced within China by foreign investment companies with fairness. In addition, China's Ministry of Finance has issued a notice dated October 13, 2021 on "Realization of Equal Treatment of Domestic and Foreign-Invested Enterprises in Government Procurement," announcing that products produced in China whether they were produced by domestic or foreign-invested enterprises would be treated equally. However, according to the White Paper of the American Chamber of Commerce in China and other sources, a system known as "安可 (安全可控)," meaning secure and controllable, or "信创 (信息化应用创新)," meaning information technology application innovation, has been in place since 2019. Under this system, only those included on the undisclosed "安可/信新创" list, a list of companies and products recommended for government procurement, will be procureed for government procurement, so not only foreign-made imports but also products locally produced by foreign companies may be excluded from government procurement. In this regard, some Japanese companies have also voiced their concerns that the conditions and criteria for products to be selected have not been disclosed, thus putting foreign investment companies at a significant disadvantage, and this opaque measure may conflict with the Foreign Investment Law and other related laws and regulations.

# UNILATERAL MEASURES/OTHER MATTERS

## (1) RULES ON COUNTERACTING UNJUSTIFIED EXTRA-TERRITORIAL APPLICATION OF FOREIGN LEGISLATION AND OTHER MEASURES [NEWLY ADDED]

**<OUTLINE OF THE MEASURES>**

In January 2021, China's Ministry of Commerce promulgated the Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures, which came into effect immediately. In accordance with China's National Security Law, this rule enables the government to take measures to counteract the impact on China caused by unjustified extra-territorial application of foreign legislation and other measures for the purpose of safeguarding national sovereignty, security and development interests, and protecting the legitimate rights and interests of Chinese citizens, legal persons, and other organizations (Article 1). Specifically, it requires Chinese citizens, legal persons, etc., to report such matters to the Chinese authorities, with penalties for violations, within 30 days if such citizens, legal persons, etc. are prohibited or restricted by foreign legislation and other measures from engaging in normal economic, trade, and related activities with a third State or its citizens, legal persons or other organizations (Articles 5 and 13). If the Chinese authorities confirm that there exists unjustified extra-territorial application, it may issue a prohibition order to the effect that, the relevant foreign legislation and

[8] GPA/ACC/CHN/30
[9] GPA/ACC/CHN/41
[10] GPA/ACC/CHN/44
[11] GPA/ACC/CHN/45
[12] GPA/ACC/CHN/51

other measures are not accepted, executed, or observed (Article 7). Furthermore, if the legitimate rights and interests of Chinese citizens, legal persons, etc., are infringed by the foreign legislations and other measures within the scope of the prohibition order, Chinese citizens, legal persons, etc., may file a claim for compensation in a Chinese court against the party that complied with said legislations and other measures, and if the party that received a judgment approving the claim for compensasions refuses to comply with the judgment, the citizen, legal person, etc. may apply to the court for enforcement (Article 9). However, Chinese citizens, legal persons, etc., may apply for exemption from compliance with a prohibition order (and as a result of exemption, are immune from liability for damages under Article 9) (Articles 8 and 9). In addition, the Chinese citizens, legal persons, etc. may seek the Chinese authorities's support for significant losses suffered as a result of non-compliance with the foreign legislation and other measures (Article 11). In response to unjustified extra-territorial application of foreign legislation and other measures, the Chinese Government may take necessary counter-measures (Article 12).

**<PROBLEMS UNDER INTERNATIONAL RULES>**

Under this rule, companies, etc., in third countries may be held liable for damages for complying with the foreign legislations or other measures and may be subject to compulsory execution if they do not comply with such compensation judgements. Therefore, they get caught in a double bind where they are forced to choose between the risk of non-compliance with the foreign legislations and other measures and the risk of enforcement of claims for compensation in China.

In this regard, Chinese companies, etc., may obtain exemption from compliance with a prohibition order and be exempted from liability for damages under Articles 8 and 9 of this rule, but third-country companies, etc., are not eligible for such exemption, which may constitute preferential treatment for Chinese businesses, and may constitute a violation of the national treatment obligation under Article 17 of GATS if within the scope of China's commitments under the GATS.

In addition, while in accordance with Article 11 of this rule, Chinese companies, etc., may seek authorities' support for significant losses suffered due to failure to comply with foreign legislations and other measures, no similar support is provided for foreign companies. As to whether or not authorities' support is available for losses due to non-compliance with foreign legislations, only Chinese companies can receive favorable treatment. Therefore, this could still constitute a violation of the national treatment obligation under the GATS (Article 17 of the GATS) if it is within the scope of China's commitments under the GATS. Moreover, for example, when comparing domestic products and imported products using foreign regulated technology, the support (for continuing to sell without complying with foreign legislations) under Article 11 of this rule is available not at least to producers (in foreign countries) of imported products, but it is available to producers (in China) of domestic products, which could constitute a violation of the national treatment obligation under the GATT (Article III: 4 of the GATT) as treatment less favouravle to imported products.

Besides, specific counter-measures taken by the Chinese Government against other governments under Article 12 of this rule are likely to violate the prohibition of unilateral measures that do not involve dispute settlement procedures to determine whether or not benefits have been impaired under the WTO Agreement (Article 23 of the DSU). Furthermore, depending on the details of such counter-measures, they may be inconsistent with the substantive disciplines of the WTO Agreement. For example, if the said measures include a ban or restriction on importation of any product, it is highly likely that they would constitute a violation of the general elimination of quantitative restrictions (Article XI: 1 of the GATT), unless there are any legitimate grounds. Whether or not to comply with the foreign legislations and regulations is basically a matter to be left to the judgment of each company and the country in which the company is located. China's attempt to exercise discipline over such judgments beyond its territory may constitute an improper exercise of jurisdiction that is also impermissible under general international law. While criticizing the extra-territorial application of laws and regulations by other countries, China itself tries to impose the same structure of extra-territorial application, which makes it difficult to justify the application of these measures, at least in relation to third countries.

**<RECENT DEVELOPMENTS>**

Japan will continue to monitor developments in this matter and seek improvements to these measures in cooperation with other concerned countries.

## (2) ANTI-FOREIGN SANCTIONS LAW [NEWLY ADDED]

**<OUTLINE OF THE MEASURES>**

In June 2021, the Anti-Foreign Sanctions Law was passed by the National People's Congress and came into effect immediately. Under this law, if a foreign country contains and suppresses China, employs discriminatory restrictive measures against Chinese citizens and organizations, and meddles in China's internal affairs, China shall have the right to adopt corresponding counter-measures (Article 3). Counter-measures extend not only to individuals and organizations on the countermeasure list, but also to their immediate relatives and senior managers in the

organizations (Article 5). Counter-measures include: (i) suspension/cancellation of visa issuance, prohibition of border entry, and deportation; (ii) seizure/distraining/freezing of movable property/real estate; (iii) prohibition/restriction of relavant transactions/cooperation, etc., with entities in China; and (iv) other necessary measures (Article 6). The counter-measures included prohibitions and restrictions of related transactions, etc., with entities in China. Chinese organizations and individuals shall enforce counter-measures taken by the State Council and shall be held legally responsible for any violations (Articles 11 and 14). Any organization or individual shall not enforce or cooperate in the enforcement of discriminatory restrictive measures adopted by a foreign country against Chinese citizens or organizations, and if they violate this provision and infringe upon the legitimate rights and interests of Chinese citizens or organizations, the Chinese citizens or organizations concerned may file a lawsuit against the violator and request that they stop the infringement and compensate losses (Article 12).

**<PROBLEMS UNDER INTERNATIONAL RULES>**

Under Article 12 of this law, companies, etc., in third countries that are subject to the prohibition of enforcement of discriminatory restrictive measures adopted by a foreign country may be held liable for damages for complying with the laws or measures of other countries and may be subject to compulsory execution if they do not comply with such compensation judgements. Therefore, they get caught in a double bind where they are forced to choose between the non-compliance with the laws and regulations of other countries and the enforcement of claims for compensation in China.

In addition, specific counter-measures taken by the Chinese Government against other governments under this law may violate the prohibition of unilateral measures that do not involve dispute settlement procedures to determine whether or not benefits have been impaired under the WTO Agreement (Article 23 of the DSU), insofar as China considers measures taken by other countries to be inconsistent with the WTO Agreement.

Furthermore, depending on the details of China's counter-measures, they may be inconsistent with the substantive disciplines of the WTO Agreement. For example, if the said measures include a ban or restriction on importation of any product, it is highly likely that they would constitute a violation of the general elimination of quantitative restrictions (Article XI: 1 of the GATT), unless there are any legitimate grounds.

**<RECENT DEVELOPMENTS>**

A series of measures under this law have been announced. In July 2021, as a counter-measure to the US sanctions against seven Chinese officials, China announced that in accordance with this law, it would impose sanctions against seven US individuals and organizations, including former Secretary of Commerce Wilbur Ross. In December of the same year, in response to the US announcement of a ban on entry into the US and other measures against senior officials of the Chinese Xinjiang Uyghur Autonomous Region government, China announced in accordance with this law sanctions against four officials of the US Commission on International Religious Freedom (USCIRF), a US government-affiliated organization, including a ban on entry, freezing of assets, and prohibition of transactions with Chinese citizens and organizations in China. In February 2022, China announced that it would impose sanctions against two US companies.

Japan will continue to monitor developments in this matter and seek improvements to this law in cooperation with other concerned countries.

## (3) PROVISIONS ON THE UNRELIABLE ENTITY LIST [NEWLY ADDED]

**<OUTLINE OF THE MEASURES>**

In September 2020, China's Ministry of Commerce promulgated the Provisions on the Unreliable Entity List, which came into effect immediately. These provisions are formulated in accordance with the Foreign Trade Law, and the National Security Law, etc., and take measures for the purpose of safeguarding national sovereignty, security and development interests, and protecting the legitimate rights and interests of Chinese enterprises, other organizations and individuals. In other words, the State shall establish the Unreliable Entity List System, and adopt corresponding measures in response to the following actions taken by a foreign entity (including foreign companies, other organizations and individuals) in international economic, trade and other relevant activities: (i) endangering national sovereignty, security or development interests of China; (ii) suspending normal transactions with an enterprise, etc., of China or applying discriminatory measures against an enterprise, etc., of China, which violates normal market transaction principles and causes serious damage to the legitimate rights and interests of the enterprise, etc., of China (Article 2). Foreign entities to be included in the List are to be determined and announced based on the consideration of the following factors; (i) the degree of danger to national sovereignty, security or development interests of China; (ii) the degree of damage to the legitimate rights and interests of enterprises, etc., of China; (iii) whether being in compliance with internationally accepted economic and trade rules; and other factors (Article 7).

The following measures may be taken against foreign entities which is included in the List: (i) restricting or prohibiting the foreign entity from engaging in China-related import or export activities; (ii) restricting or

prohibiting the foreign entity from investing in China; (iii) restricting or prohibiting the foreign entity's relevant personnel or means of transportation from entering into China; (iv) restricting or revoking the relevant personnel's work permit, status of stay or residence, etc.; (v) imposing a fine of the corresponding amount; and (vi) other necessary measures, while other units and individuals shall cooperate in the implementation(Article 10).

**<PROBLEMS UNDER INTERNATIONAL RULES>**

These provisions are ambiguous, and it is not clear how the factors to be taken into consideration for inclusion in the Unreliable Entity List (in particular, whether or not the entity is harmful to the China's "sovereignty" or the "development interests") should be interpreted, or what measures will actually be taken against foreign entities on the List, depending on what considerations are taken. Therefore, there are concerns about whether fairness and transparency can be ensured in identifying foreign entities to be placed on the Unreliable Entity List and in applying the measures to be taken against foreign entities. Also, since the predictability regarding the administration of these provisions is significantly low, these provisions may be inconsistent with Article X:3(a) of the GATT 1994, etc., which requires the administration of measures in a uniform, impartial and reasonable manner. In addition, depending on the actual measures to be taken against listed entities under Article 10 of these provisions, the measures may be inconsistent with the relevant WTO substantive disciplines (e.g., possible violation of Article XI:1 of GATT 1994 if import restrictions are imposed).

Furthermore, according to Article 2 of these provisions, compliance by a third-country company with foreign government regulations prohibiting transactions with Chinese companies (e.g., US re-export controls) could be assessed as "suspending normal transactions with an enterprise, etc., of China or applying discriminatory measures against an enterprise, etc., of China, which violates normal market transaction principles" and therefore "causeing serious damage to the legitimate rights and interests of the enterprise, etc., of China." It is pointed out that such a company could find itself in a bind where they have to either comply with other countries' regulations or are placed on the List and subject to the measures described in Article 10 of these provisions.

**<RECENT DEVELOPMENTS>**

The List has not been published at this time. Although the Chinese authorities explain that "the listing is strictly limited to a very small number of illegal foreign entities," these provisions are vague, making it difficult to predict how they will be applied, and as mentioned above, it is pointed out that third-country companies that comply with re-export control regulations of other countries may be caught in a double bind, so continued close monitoring is necessary.