

Chapter 13

MISCELLANEOUS ISSUES

Although the following measures fall outside the scope of the countries/regions covered in this report, they are addressed below since they are recent measures having trade-distorting effects.

INTRODUCTION OF AN IMPORT LICENSE SYSTEM IN ARGENTINA

<Outline of the measure>

In November 2008, the Argentine government introduced an import license system for approximately 400 items, including metal products (elevators, etc.), that would require applications to be submitted along with information on the importers/exporters, the prices and quantities of the goods to be imported, etc. By February 2011, the number of items subject to the system reached about 600.

Additionally, the Argentine government implemented trade balancing requirements (for example, requiring one-dollar of export or domestic investment as a condition for the same amount of import) and domestic production requirements aimed at restraining imports.

In February 2012, the prior import declaration system (DJAI) was introduced. It requires those intending to import to register designated items with the Federal Administration of Public Revenue (AFIP) and obtain its approval prior to initiating import procedures.

On January 2013, the non-automatic import license was abolished; however, the other measures (the prior import declaration requirements and the trade balancing requirements) continue to remain valid.

<Problems under international rules>

The trade balancing requirements violate GATT Article XI, which prohibits export restrictions in principle, because the issuance of licenses requires meeting trade-balancing requirements for exports of Argentine products, etc. In addition, the trade balancing requirements are orally-rendered guidance not based on specific laws or regulations and therefore also violate GATT Article X, which requires trade regulations to be published.

The prior import declaration system involves arbitrary discretions by Argentine authorities and thus violates GATT Article XI. It also violates the transparency principles of GATT Article X and Articles 1, 3, and 5 of the WTO Agreement on Import Licensing Procedures, etc.

<Recent developments>

Since 2009, Vice-Minister for International Affairs of Ministry of Economy, Trade

and Industry, the Japanese Embassy in Argentina, and Japanese industries have repeatedly requested the Argentine government to make improvements in the measure. At the WTO, Japan has expressed its concerns since 2009 at the WTO Import Licensing Committee, TRIMs Committee, and Council for Trade in Goods, in cooperation with the United States and EU, etc. In particular, 14 Members including Japan, the United States and EU jointly expressed their concerns in March 2012 at the WTO Council for Trade in Goods. However, no improvements in the measure were made. In May 2012, the EU requested bilateral consultations with Argentina based on the WTO Agreements. In August 2012, Japan requested bilateral consultations along with the United States and Mexico, taking into account the request for improvement by the industries (Japan Foreign Trade Council, Japan Machinery Center for Trade and Investment and JEITA, the Tokyo Chamber of Commerce and Industry, and the Japan Chamber of Commerce and Industry). Consultations were held in September of the same year in Geneva, but a satisfactory resolution was not achieved. Therefore, in December of the same year, Japan jointly with the United States and the EU requested the establishment of a panel. The panel was established in January 2013, and at present the issue is being considered by the Panel.

EXPORT RESTRICTIONS ON GRAIN IN UKRAINE (EXPORT QUOTA)

*** 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 measures>

In October 2010, the Ukrainian government decided to introduce export quotas for grain, including wheat, barley, and corn, due to a decrease in the domestic grain production, etc. caused by drought. After extending the measure twice, it was abolished in May or June 2011 for corn, wheat and barley, meslin and rye.

An export tariff was scheduled to be imposed on wheat, barley and corn from July 2011 to January 2012; however, since an increased yield for wheat and corn was expected, these tariffs were eliminated in October of the same year.

According to FAO's statistics, Ukraine's share in export volume (2008) was 2.9% for wheat and flour (eighth in the world), 17.3% for barley (second in the world), and 2.6% for corn (sixth in the world).

<Concerns>

Ukraine is a major exporting country of wheat and barley. This measure can impact grain supply and demand in the world and so affect its price. The Ukrainian government explains that the measure is taken for the reason of "critical shortages of foodstuffs" prescribed in Article XI:(2)(a) of the GATT. While it is not possible to definitely say that the measure clearly has a problem in terms of the WTO Agreements, looking at the export capacity left for wheat and corn, doubts remain whether there really was a "critical shortage of foodstuffs". In addition, as it cannot be said, under the present circumstances, that a mechanism for disclosing information on export restriction

measures to other WTO members has been sufficiently developed, it is extremely difficult to determine whether measures taken by each country are consistent with Article XI(2) and Article XX of the GATT.

<Recent developments>

According to the press, in September 2012, the Ukrainian Minister of Agriculture and the grain export union agreed on the export ceiling for grain of FY 2012/2013 (4 million tons for wheat, 3 million tons for barley, and 12.4 million tons for corn). Nevertheless, since November 2012, exports continued while the export ceilings for wheat and others have been reviewed.

At the meeting of the WTO Agricultural Committee in November 2012, Japan, Australia and the EU questioned the possibility of introducing an export regulation, and Ukraine answered that if a regulation is introduced, it will comply with the WTO rules. The status must be observed.

SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS IN UKRAINE

<Outline of the measure>

In July 2011, pursuant to decision No. SP-259/2011/4402-27 by the Inter-Departmental Commission for International Trade (hereinafter referred to as the “Commission”), the Ministry of Economic Development and Trade of Ukraine initiated a safeguard investigation on passenger cars (with displacement of 1000cc-1500cc and 1500cc-2200cc); the investigation period was 2008 to 2010. After holding a public hearing for interested parties, in April 2012, the Ministry of Economic Development and Trade sent the interested parties the main conclusions of the investigation report, which included findings of the relative increase in imported cars and the threat of serious injury to the domestic industry, and suggested the Commission to impose additional tariffs through special safeguard measures. In response, the Commission decided to impose a safeguard measures on April 30 of the same year. In March 2013, the Commission announced the safeguard measures on imported passenger cars, which would be effective for three years, with an additional tariff of 6.46% on passenger cars of 1000-1500cc displacement, 12.95% on 1500-2000cc displacement. The measures took effect after 30 days of the announcement date.

<Problems under international rules>

No increase in imports of passenger cars at issue was seen in Ukraine during the investigation period of 2008-2010. In fact, the import level of 2010 was significantly lower than that of 2008. In addition, the measures were imposed in April 2013, more than two years after the completion of the investigation at the end of 2010, but no data on exports during this period was provided. In this regard, Ukraine did not comply with the requirements for imposing safeguard measures set out in Article 2.1 of the Agreement on Safeguards because there was no increase in imports that was “recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury”, the test stated by the

Appellate Body¹. Also, there was not sufficient explanation from Ukraine regarding the “unforeseen developments” stipulated in GATT Article XIX. In addition, sufficient explanations were not provided regarding other requirements for imposing safeguard measures, such as “serious injury to domestic industry or threat thereof” and “causation”. Also, the difficult situation that domestic producers faced was not caused by the increased imports but might have been a result of the economic crisis of 2008. However, no detailed explanations were given by the investigation authority on whether genuine or substantial relationships existed between the increased imports and the serious injury or the threat thereof.

With regard to the measures, there are also failures to follow the procedures set forth in the WTO Agreements. More concretely, Article 12 of the Agreement on Safeguards requires WTO members imposing safeguard measures to immediately notify the WTO Safeguards Committee at each stage of initiation of the investigation, determination of serious injury, and decision on imposition of measure. However, the Ukrainian government notified the WTO on March 21, 2013, which is almost a year from the determination of injury and that of imposition of the measures of April 2012, indicating problems in the procedures. The content of the notification was not sufficient, as a timetable for progressive liberalization, and evidence of serious injury to the domestic industry, etc. were not provided. In addition, the Ukrainian government did not provide relevant countries with an opportunity for prior consultations based on paragraph 3, Article 12 of the Agreement on Safeguards.

For the reasons given above, the safeguard measures do not meet both the substantive and procedural requirements for imposition, and are therefore deemed to violate GATT Article XIX and the Agreement on Safeguards.

<Recent developments>

Japan has been observing the trends on Ukraine’s safeguards measures since the investigation initiated in 2011 and has expressed concerns, along with the EU, in October 2011 and April 2012 at the WTO Committee meetings. At the same time, Japan has expressed concerns about these measures through participating in the public hearing, holding bilateral consultations, and sending letters to the Minister of Economic Development and Trade, and requested Ukraine not to impose the measures. In March 2013, upon the announcement by the Ukrainian government of imposing the measures, Japan jointly requested an immediate withdrawal of the decision with the EU and other member countries at the WTO Council for Trade in Goods.

However, the measures were imposed in April 2013. Subsequently, Japan urged the withdrawal of the measures at the bilateral foreign ministers' meeting in August of the same year and requested Ukraine to withdraw the measures through every possible channel, including multilateral consultations at the WTO Council for Trade in Goods and Safeguards Committee meetings, etc. However, no improvements were made. In consideration of the requests from industries, Japan requested bilateral consultations pursuant to the WTO Dispute Settlement Understanding and held consultations in November 2013 and January 2014. However, a satisfactory resolution was not achieved. Japan then requested the establishment of a panel in February 2014, and the

¹ See paragraph 131 of the Appellate Body report on “Argentina — Safeguard Measures on Imports of Footwear” (DS121).

panel was established at the DSB meeting in March of the same year. Japan will request the withdrawal of the measures to Ukraine in parallel with the panel procedures.

Japan will also continue to urge Ukraine for an immediate withdrawal of the decision to impose the safeguard measures through utilization of every possible channel.

INTRODUCTION OF VEHICLE RECYCLING FEE SYSTEM IN UKRAINE

<Outline of the measure>

In July 2013, the Supreme Council of Ukraine adopted draft revisions of the law on recycling of vehicles and relevant tax codes, which went into effect in September 1, 2013. The objective is to protect the human health and the environment by adequately handling waste disposal of transport vehicles.

Importers and Ukrainian domestic manufacturers of vehicles are required to pay a vehicle recycling fee. The amount of the fee is calculated based on a coefficient determined on the basis of the basic tariff rate, type of vehicle, displacement, and the year of manufacture. For example, a preliminary calculated recycling fee of approximately 60,000 yen to 380,000 yen is imposed on each new vehicle (passenger car). In addition, the amount of recycling fee on a used vehicle is twice that of a new vehicle.

Provisions exist to exempt payment of recycling fees, which are applicable to cases where: (1) vehicles are imported to be used by Embassies or international institutions, etc., (2) vehicles were manufactured at least 30 years ago not for commercial use and have antique values, (3) vehicles are imported for the purpose of humanitarian relief, and (4) the obligation to adequately handle waste disposal of transport vehicles is undertaken. In particular, the obligation to adequately handle waste disposal of transport vehicles as given in item (4) above means to (i) establish a collection point for vehicle disposal, (ii) establish a waste disposal site, (iii) ensure transfer from the collection point to the waste disposal site, and (iv) publicize information on the collection point and the waste disposal site on websites, etc. Vehicles manufactured by manufacturers who take on this obligation will be exempt from the fee. However, requirements for exemption include that corporations must be registered in Ukraine and that certain manufacturing processes take place within Ukraine, etc. Some vehicle bodies imported for industrial assembly are also exempt if manufacturers that meet the above requirement (4) use the vehicle bodies to manufacture finished vehicle products within Ukraine.

<Problems under international rules>

The measure likely violates the national treatment obligations of Article III:2 of GATT and Article 2 of the TRIMs Agreement, which stipulate non-discrimination between domestic and imported goods with respect to taxes and other charges such as fees, because only domestically-made vehicles can be exempt from the fee (undertaking of the obligation to adequately handle waste disposal of transport vehicles) and imported cars are precluded from exemption. Also, exemptions may only be granted to some vehicle bodies imported for industrial assembly and thus preferential treatment

is given to such vehicle bodies. Therefore the measure may violate the most-favored-nation treatment obligation under Article I:1 of GATT.

<Recent developments>

On August 5, 2013, Ukraine announced a Presidential Directive requesting deleting provisions of draft revisions of vehicle recycling fee related laws that are not consistent with the WTO Agreements. However, the draft revisions were not altered and went into effect on September 1, 2013, imposing vehicle recycling fees.

Japan expressed its concerns on the introduction of vehicle recycling fees by Ukraine at the foreign ministers' meeting in Kiev in August 2013. Also at the WTO Japan expressed its concerns at the WTO Council for Trade in Goods meeting in October 2013. Japan, in cooperation with other countries, will continue to urge Ukraine to make the measure consistent with the WTO Agreements.

INFRINGEMENT OF TRADEMARK RIGHTS IN TURKEY

<Outline of measures>

In July 2008, the Supreme Court of Appeals of Turkey rendered the following judgment concerning the penal provisions for infringement of trademark rights in Decree Law 556 on the protection of trademark rights: "It is unconstitutional to provide for penalties in a decree law, and the penal provisions in said decree law shall lose effect on January 5, 2009, which is six months later." Furthermore, the aforementioned penal provisions in the decree law ceased to be effective on January 1, 2009, as the revised Penal Code stipulating that a decree law set by an administrative agency may not prescribe either offenses or penalties entered into force on that date.

However, since the revised Trademark Act, which included penal provisions, was not enacted until January 28, 2009, there was a period during which there was no penal provision for infringement of trademark rights.

In addition, the Constitution of Turkey provides that where penal provisions were revised, a law that is most advantageous to the defendant shall apply out of laws that were effective as of the time when the offence was committed and laws that were put in force after the offence was committed. In the criminal trials dealing with infringement of trademark rights committed before January 28, 2009, when the revised Trademark Act was enacted, and in those trials whose periods prior to decisions overlapped the lapse period as mentioned above, the most advantageous law, namely the one without penal provisions, was applied to the defendant. As a result, defendants were found not guilty in those trials. With regard to the infringing goods, if the goods were found to be: 1) harmful to the public safety or 2) subject to another criminal case, the court ruling was to confiscate the goods permanently. In all other cases, infringing goods that were confiscated during investigations were returned to defendants.

<Problems under international rules>

The aforementioned penal provisions in the decree law lost effect on January 1, 2009, and there was no penal provision for infringement of trademark rights until the entry into force of the revised Trademark Act on January 28, 2009. This violates Article 41 of the TRIPS Agreement requiring Members to ensure enforcement

procedures against any act of infringement of intellectual property right under their law, and Article 61 of said Agreement obliging Members to provide for criminal procedures and penalties that are to be applied to the unauthorized use of a trademark.

<Recent developments>

In June 2010, the Japanese government decided to conduct investigations on facts, etc. in response to a motion filed with the Office of Intellectual Property Protection by a company in February 2010, based on the investigation request system for intellectual property infringement overseas. In November of the same year, Japan, the United States, and the EU jointly proposed that in order to comply with the TRIPS Agreement, infringing goods which are confiscated during the period of lapse of penal regulations, must be prevented from going into markets again. They also requested that the Turkish government promptly respond to the proposal. In May 2011, the Japanese government visited the Ministry of Justice, the Constitutional Court of Turkey and various local intellectual property courts. It requested simplification of procedures of provisional seizure of infringing goods in order to prevent the goods from going back into markets, and again to act quickly and appropriately to these situations. Furthermore, these cases were requested to be settled in the WTO/TPRB meeting held in February 2012 and the Japan-Turkey Trade and Investment ministerial meeting held in July of the same year. The Japanese government visited relevant Turkish authorities (the Ministry of Justice, Turkish Patent Institute, High Council of Judges and Prosecutors, and the Grand National Assembly of Turkey) again in June 2013 to confirm the present situations, etc. and strongly requested enactment of revised laws to make possession for the purpose of sales subject to criminal penalties.

FOREIGN INVESTMENT RESTRICTIONS IN MONGOLIA

<Outline of measures>

In May 2012, the “Law on the Regulation of Foreign Investment in Business Entities Operating in Sectors of Strategic Importance (hereafter the Foreign Investment Restriction Act)” submitted in the Parliament was passed and enacted by the Mongolian government.

The Law regulated foreign investment in strategic fields (including mineral resources, banking / finance, mass media, telecommunications) from the perspective of national security, and approval from the Parliament was required if foreign investment in a business was 49% or more and if the capital invested was more than approximately 6 billion yen, based on the exchange rate when the law was enacted”. Also, the approval of the Mongolian government was necessary upon the foreign acquisition of more than one third of the shares of a corporation, or regarding management personnel selection, etc. Subsequently, the revised Law, which requires the Parliament’s approval for cases where the share of foreign-owned investors or investors with foreign capital exceeds 49% and the Mongolian government’s approval for all the other cases, was established in April 2013.

Japan has concerns on the effect this Law may have, including potential interference in business activities of Japanese companies currently operating in Mongolia through reversal of licenses currently being granted to Japanese companies in the covered fields, thus resulting in worsened business environment in Mongolia.

<Problems under international rules>

The strategic fields that are covered by this Law include fields in which Mongolia has made liberalization commitments in its accession Protocol in accordance with the GATS (some professional services (engineering services, services related to minerals, etc.), some telecommunication services, and some financial services). This indicates a violation of Articles XVI, which provides for market access, and XVII, of the GATS, which provides for national treatment.

<Recent developments>

Through the Japan-Mongolia EPA negotiations, the problems concerning this Law were pointed out and Japan urged Mongolia to make improvements. Japan again requested improvement at the meeting between the Minister of Economy, Trade and Industries of Japan and the Minister for Foreign Affairs of Mongolia in August 2013; it also sent a verbal note from Japanese Embassy in Mongolia to the Mongolian government expressing Japan's concerns over the lack of establishment of a fair and competitive business environment.

In October 2013, the new "Investment Law" was approved and enforced and at the same time the Foreign Investment Law was abolished. Under the Investment Law, the Mongolian government's approval is required only for cases of investment by foreign-owned investors or investors with foreign capital, and the Mongolian government offers legal guarantees for stabilization of the taxation environment (clarification of types and rates of statutory taxes, making legal adjustment for imposition and payment) and intellectual property rights protection.

After the enforcement of the Investment Law, cases, in which licenses are not granted to Japanese companies for the reason of the Foreign Investment Law, no longer exist. However, Japan needs to continue to pay attention to the status of enforcement of the Investment Law.

Column: Global Spread of Counterfeit Products and Legislative/Administrative Issues

(1) Global Spread of Counterfeit Products and Increasing Sophistication of Counterfeiting Techniques

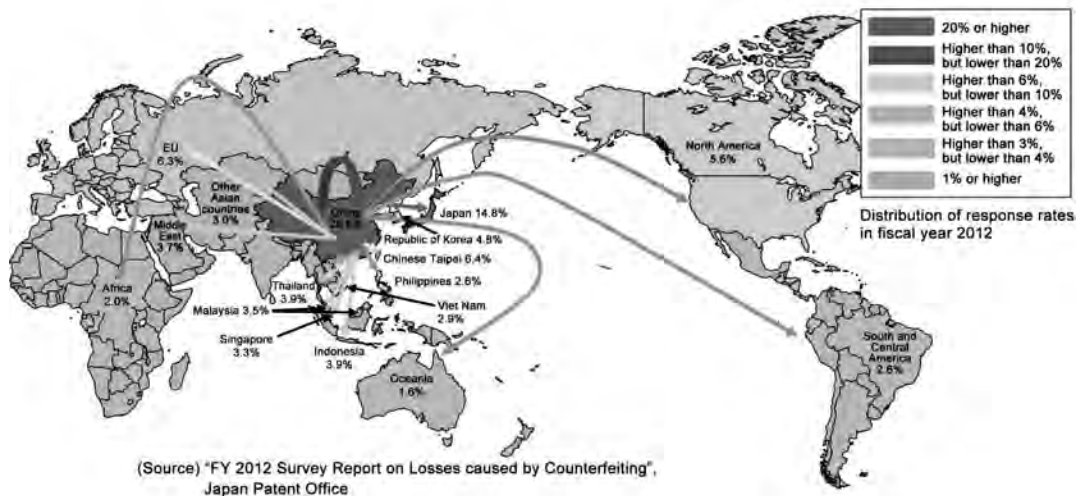
In the global economy, the spread of counterfeit products across borders at the global level is increasingly becoming more serious. According to the OECD (2009), the damage caused by counterfeit products worldwide amounts to 250 billion dollars as of 2007, and many types of intellectual property rights, including trademark, industrial design, copyright, and patent, etc., are infringed.

Expanded information distribution over the Internet and advancement in physical distribution systems are considered to be the contributing factors for the spread of counterfeit products. A large portion of counterfeit products is exported from China as the "World's Factory" and flows out, not only to Asian regions, but also to an enormous market in the EU and the United States, South America, the Middle East, and Africa, etc. (see Figure I-13). For example, counterfeit products deemed to be

produced in China are pointed out to be flowing into neighboring countries in the Middle and Near East, Central Asia, Africa, South and Central America, EU, and Russia, etc. by way of free trade zones (FTZ) and free ports (FP) in Dubai, the largest distribution center in the Middle East. Similarly, counterfeit products deemed to be produced in China are also pointed out to be flowing into Brazil and Mexico by way of FTZs in Colón, Panama and Iquique, Chile, etc.

In addition, counterfeiting techniques are reported to be increasingly sophisticated and advanced, such as manufacturing and distributing through an organized international division of labor, etc. For example, cases in which no-brand generic products are manufactured in China, etc. and exported to third countries with low levels of intellectual property rights protection, where trademark-infringing counterfeit labels and packaging are produced/printed and affixed, have been recognized. In addition, cases were also recognized in which trademarks of Japanese brands translated into Arabic were registered in China, etc. and were affixed to counterfeit products, which were then exported and caused deception and confusion among overseas consumers.

Figure I-13



(2) Legislative/Administrative Issues

The global spread of counterfeit products is causing significant problems for Japanese companies globally operating businesses; and various problems are reported to exist in legislative systems and administration in foreign countries that are restricting Japanese companies from effectively and immediately executing their rights.

For example, in some emerging countries in ASEAN² or South and Central America, etc., export/transit cargos that infringe intellectual property rights are not subject to border control measures, and this has been a contributing factor in the spread

² See "Issues Related to Counterfeit, Pirated and Other Infringing Products" in Chapter 2, Part I for details.

of counterfeit products produced in China, etc. to other countries. In addition, partial design protection system and rules for regulating dead copies are not established in India, and imitations of other peoples' products cannot easily be eliminated. Opposition and invalidation trial procedures against distributors of counterfeit products that made misappropriated applications of trademarks or industrial designs take a long time, and verifying that they are not entitled to the rights concerned is difficult. Therefore, counterfeit product measures obstruct smooth progress of counterfeit product measures. Furthermore, in China³ and Russia, etc. sales of trademark-infringing products are not subject to criminal actions unless the total amount of sales exceeds a specific level⁴. In addition, use of the methods for calculating the total amount of sales, etc. in individual cases is not always consistent within a country, thus making it difficult to pursue liabilities of distributors of counterfeit products. In Chinese Taipei, cases of infringement of intellectual property rights of Japanese entertainment contents are increasing despite enacted legislations. Japanese industries understand that the spread of pirated DVDs/CDs is interfering with legal distribution. In addition, with the expanded use of the Internet in recent years, cases of infringement of intellectual property rights on websites as well as cases of counterfeit products being sold via websites are increasing, and thus a need for establishing effective legal systems to respond to these cases is being pointed out.

In particular, motivation to make active efforts in addressing infringement of intellectual property rights by private companies mainly in these developing countries is likely to be weak. In order to solve these problems, urging individual countries to raise awareness and take active measures for eradicating counterfeit products, in addition to securing the effectiveness of execution of rights to eliminate infringement of intellectual property rights as provided for in the TRIPS Agreement, is considered necessary.

(3) Japan's action

As described above, in addition to the issue of implementation of international rules such as the TRIPS Agreement, etc., there are many issues where the existing international framework for protecting intellectual property rights such as the TRIPS Agreement, etc. are not sufficient to provide remedies and appropriate enforcement are not being secured due to lack of effective administration, despite the rules that have been established.

Under such circumstances, the Japanese government is requesting China, India, and other emerging ASEAN countries to comply with the existing intellectual property rights protection obligations under the TRIPS Agreement, etc. as well as to establish high-level intellectual property rights protection based on these international rules, strengthen measures against counterfeit products, and improve transparency of procedures and administration of intellectual property rights protection systems. On the other hand, Japan expects that a model of high-level intellectual property rights protection will be established through consultations with developed countries and will become a new international rule.

³ See "Issues Related to Counterfeit, Pirated and Other Infringing Products" in Chapter 1, Part I for details.

⁴ See "China" (Criminal Sanctions) in Chapter 1, Part II for thresholds for criminal actions and issues concerning consistency with the TRIPS Agreement.

Furthermore, requesting improvements from the governments of the countries concerned through bilateral governmental consultations, and quantitatively and qualitatively expanding cooperative approaches that are acceptable to emerging countries, etc. through globally conducted seminars, training, and educational activities is also considered important. Within frameworks such as EPA/FTA, in the Sub-Committees on Intellectual Property and the Sub-Committee on Improvement of Business Environment, Japan is encouraging the countries concerned to strengthen measures against counterfeit products, etc. Japan also uses approaches in addition to through EPA/FTA. Concrete examples are investigations of actual conditions surrounding counterfeit products in Chinese Taipei and handling of rights infringement (enforcement) in cooperation with Intellectual Property Rights (IPR) Police of Chinese Taipei, etc. These activities have been conducted as a project of the Ministry of Economy, Trade and Industry since 2011, and the cooperative relationship is steadily being strengthened. The Japanese government and the IPR Police of Chinese Taipei cooperate in conducting seizures and giving press conferences about the seizures. In February 2014, an educational event for eradicating pirated copies was conducted in Chinese Taipei with the cooperation of Chinese Taipei authorities.