JAPAN – MEASURES RELATED TO THE EXPORTATION OF PRODUCTS AND TECHNOLOGY TO KOREA

REQUEST FOR CONSULTATIONS BY THE REPUBLIC OF KOREA

The following communication, dated 11 September 2019, from the delegation of the Republic of Korea to the delegation of Japan, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

---

1. Upon instructions from my authorities, and on behalf of the Government of the Republic of Korea ("Korea"), I hereby request consultations with the Government of Japan ("Japan") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 24 of the *Agreement on Trade Facilitation* ("TFA"), Article 8 of the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), Article XXIII of the *General Agreement on Trade in Services* ("GATS"), and Article 64.1 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement") regarding certain measure of Japan restricting exports of fluorinated polyimide, resist polymers and hydrogen fluoride, and their related technologies destined for Korea.

2. Korea considers that this measure is inconsistent with Japan's obligations under various provisions of the covered agreements.

3. Korea's request also concerns any amendments, reviews, or extensions of this measure, as well as any laws, regulations or administrative decisions closely related to the challenged measure identified in more detail below. Korea's request also concerns any and all individual export licenses granted or denied by Japan in connection with the measure identified herein.

4. Below, Korea identifies the measure at issue and indicates the legal basis for its complaint.

I. IDENTIFICATION OF THE MEASURE

5. On 1 July 2019, the Ministry of Economy, Trade and Industry of Japan ("METI") announced[1] that it would apply different licensing policies and procedures on the export and transfer of certain controlled products and their relevant technologies destined for Korea based on Article 25(1) and Article 48(1) of the Foreign Exchange and Foreign Trade Act of Japan.[2]

6. In accordance with the announcement, with effect from 4 July 2019, Japan began subjecting three specific products and their related technologies to unduly stringent export licensing policies and procedures whenever export of such products and technologies are destined for Korea (the "Amended Export Licensing Policies and Procedures") . These specific products are (i) fluorinated polyimide;[3] (ii) resist polymers;[4] and (iii) hydrogen fluoride.[5] These products are used primarily in the production of smartphone and TV displays and of semiconductors.

7. Japan alleged that it had "recently found that certain sensitive items have been exported to Korea with inadequate management by companies"[6] and that it was thus necessary to apply more stringent export licensing procedures in relation to these products and their relevant technologies.[7] However, Korea considers that the changes to Japan's export control treatments vis-à-vis Korea have been based instead on political considerations unrelated to any legitimate export control considerations with respect to Korea or to the three identified products.[8] In Korea's view, the implementation of the Amended Export Licensing Policies and Procedures constitutes politically-motivated, disguised restrictions on trade.

8. Japan's Amended Export Licensing Policies and Procedures have been implemented by certain amendments to the following four notifications:[9]

- Notification (*tsuutatsu*) on the implementation of the Export Trade Control Order (dated 6 November, 1987, Trade and Economic Cooperation Bureau Notification No. 322 of 1987 / Export Caution No. 11 of 1987);
- Notification (*tsuutatsu*) on licensed technology transfer conducted in conformity with the provisions of Article 25(1) of the Foreign Exchange and Foreign Trade Act and Article 17(2) of the Foreign Exchange Order (dated 21 December 1992, Trade and Economic Cooperation Bureau No. 492 of 1992);
- Notification (*tsuutatsu*) on instructions for bulk licenses (dated 25 February 2005, Trade and Economic Cooperation Bureau Notification No. 1 of 23 February 2005 / Export Caution No. 7 of 2005); and
- Notification (*tsuutatsu*) on documents and instructions for application for export license, service transaction license and export license for specific recorded media (dated 2 April 2012, Trade and Economic Cooperation Bureau Notification No. 1 of 23 March 2012 / Export Caution No. 18 of 2012) .

9. Pursuant to the Amended Export Licensing Policies and Procedures, Japan has removed Korea from the category "Region *I* ①" and placed it alone in the newly established category "Region *Ri*". As a result, (i) "bulk licenses" are no longer applicable to the three identified products when the export of such products and their related technologies are destined for Korea; (ii) all previously granted "bulk licenses" for the three identified products and their related technologies destined for Korea were effectively terminated; (iii) exporters of the three identified products and their related technologies can now apply for export licenses on individual contract basis only (as Japan defines, "individual export licenses") when such exports are destined for Korea; (iv) the licensing procedures for exports of the three identified products and their related technologies when such exports are destined for Korea are now administered exclusively by

METI's Security Export Licensing Division; and (v) METI subjects exporters seeking to export the three identified products and their technologies to Korea to unduly complex and burdensome export formalities.[10]

10. In sum, no form of "bulk license" is applicable to export of the three identified products and their related technologies when destined for Korea. Applications for individual export licenses are placed under increased scrutiny, causing unnecessary delay and other serious restrictions to the exportation of these products and their related technologies destined for Korea. Moreover, the Amended Export Licensing Policies and Procedures effectively restrict various other forms of international trade, including investments, licensing or other transfer of intellectual properties, and supply of certain services relating to the technology transfer.

II. LEGAL BASIS

11. Korea considers that Japan's implementation of its Amended Export Licensing Policies and Procedures is inconsistent with Japan's obligations under various provisions of the covered agreements. Specifically, the Amended Export Licensing Policies and Procedures are inconsistent with:

- Article I of the GATT 1994 because, with respect to all rules and formalities in connection with exportation, Japan fails to accord immediately and unconditionally any advantage, favor, privilege or immunity granted to products destined for other countries to like products destined for Korea. In particular, Japan no longer allows "bulk licenses" when the exportation of the three identified products and their related technologies are destined for Korea while not imposing similar restrictions on the exportation of the like products destined for other WTO Members.

- Article XI:1 of the GATT 1994 because the Amended Export Licensing Policies and Procedures constitute restrictions other than a duty, tax or other charge, that is made effective through an export license on the exportation or sale for export of the three identified products and their related technologies destined for Korea.

- Articles XIII:1 and XIII:5 of the GATT 1994 because Japan no longer allows "bulk licenses" when the exportation of the three identified products and their related technologies are destined for Korea while the exportation of like products destined for third countries is not similarly restricted.

- Article VIII of the GATT 1994 and Articles 6 and 10 of the TFA because Japan's Amended Export Licensing Policies and Procedures impose unduly burdensome and complex administrative formalities, and excessive fees and charges.

- Article X of the GATT 1994, as well as Article 2 of the TFA because Japan fails to administer its laws, regulations, decisions, and rulings of general application relating to the restrictions on exports in a uniform, impartial and reasonable manner. Furthermore, Japan implemented the Amended Export Licensing Policies and Procedures only three days after they were announced on its website, without providing Korea with an adequate opportunity for comment and consultation.

- Articles 7 and 8 of the TFA because by unilaterally and abruptly implementing the Amended Export Licensing Policies and Procedures, Japan fails to provide for additional trade facilitation measures for authorized operators based on objective criteria; creates arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and fails to ensure that its agencies responsible for border controls and procedures relating to exportation cooperate with Korea and coordinate mutual activities in order to facilitate trade.

- Article 2 of the TRIMs Agreement because the Amended Export Licensing Policies and Procedures constitute an investment measure related to trade in goods, which is inconsistent with the provisions of Article XI of the GATT 1994.

- Articles 3.1 and 4 of the TRIPS Agreement, because by creating certain obstacles for Korean nationals concerning the transfer of the technologies related to the three identified products, which are not faced by Japanese nationals or nationals of certain other WTO Members, Japan has failed to accord to Korean nationals treatment no less favorable than that accorded to Japan's own nationals and nationals of any other country with regard to the protection of the intellectual property related to the three identified products.

- Article 28.2 of the TRIPS Agreement, because Japan fails to ensure patent owners' rights to assign or otherwise transfer the patent and to conclude relevant licensing contracts in relation to the three identified products.

- Articles VI:1 and VI:5 of the GATS, because Japan fails to administer its laws, regulations, decisions, and rulings of general application affecting trade in services in a reasonable, objective and impartial manner. Furthermore, the Amended Export Licensing Policies and Procedures nullify or impair Japan's specific commitments in a manner more burdensome than necessary to ensure the quality of the relevant service, or in a manner that constitutes a restriction on the supply of the relevant service.

- Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization because Japan, through the implementation of the Amended Export Licensing Policies and Procedures, is not ensuring the conformity of its laws, regulations and administrative procedures with its obligations as provided in the covered agreements.

12. In addition to, and independently of, the multiple violations of obligations under the GATT 1994 identified above, Korea considers that benefits accruing to Korea directly and indirectly under the GATT 1994 are being nullified and impaired as a result of implementation of the Amended Export Licensing Policies and Procedures, within the meaning of Article XXIII:1(b) of the GATT 1994.

III. CONCLUSION

13. In light of the foregoing, Korea considers that Japan's Amended Export Licensing Policies and Procedures nullify or impair the benefits accruing to Korea directly or indirectly under the covered agreements, or impede the objectives of these agreements.

14. Korea reserves the right to address additional measures and claims under other provisions of the covered agreements regarding the above matters during the course of the consultations.

15. Korea looks forward to receiving Japan's reply to this request and to fixing a mutually acceptable date for consultations.

---

[1] "Update of METI's licensing policies and procedures on exports of controlled items to the Republic of Korea" (1 July 2019, Ministry of Economy, Trade and Industry) < https://www.meti.go.jp/english/press/2019/0701_001.html >.

[2] Kanpou (Official Gazette) Gougai No. 135 (1 December 1949) .

[3] Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Control Order and the Appended Table of the Foreign Exchange Order (Ordinance of the Ministry of International Trade and Industry No. 49 of 1991), Kanpou (Official Gazette) Gougai No. 151 (14Â October 1991), Article 4(xiv)(b) . This product is classified within Export Control Classification Number ("ECCN") 1C009.b under the US Export Administration Regulations ("EAR"), to which the Japanese export control regulation refers.

[4] Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Control Order and the Appended Table of the Foreign Exchange Order (Ordinance of the Ministry of International Trade and Industry No. 49 of 1991), Kanpou (Official Gazette) Gougai No. 151 (14Â October 1991), Article 6(xix) . These products are broadly classified within ECCN 3C002 under the US EAR, to which the Japanese export control regulation refers.

[5] There is no additional definition of hydrogen fluoride under Japan's export control regulation, but this product (also identified under C.A.S. #7664-39-3) is classified within ECCN 1C350.d.10 under the US EAR. Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Control Order and the Appended Table of the Foreign Exchange Order (Ordinance of the Ministry of International Trade and Industry No. 49 of 1991), Kanpou (Official Gazette) Gougai No. 151 (14Â OctoberÂ 1991), Article 2(1)(i)(f) .

[6] "Update of METI's licensing policies and procedures on exports of controlled items to the Republic of Korea" (1 July 2019, Ministry of Economy, Trade and Industry) < https://www.meti.go.jp/english/press/2019/0701_001.html >; "Regarding the Notification (*tsuutatsu*) to amend parts of notifications including the 'Notification (*tsuutatsu*) on the implementation of the Export Trade Control Order'" (1 July 2019, Security Export Licensing Division, Ministry of Economy, Trade and Industry)
< Â https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_gaiyo.pdf >

[7] "Regarding the Notification (*tsuutatsu*) to amend parts of notifications including the 'Notification (*tsuutatsu*) on the implementation of the Export Trade Control Order'" (1 July 2019, Security Export Licensing Division, Ministry of Economy, Trade and Industry)
< https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_gaiyo.pdf >

[8] https://www.reuters.com/article/southkorea-japan-laborers/japans-seko-says-export-curbs-for-skorea-not-in-violation-of-wto-rules-idUSL4N2422V4

[9] "Regarding the Notification (*tsuutatsu*) to amend parts of notifications including the 'Notification (*tsuutatsu*) on the implementation of the Export Trade Control Order'" (1 July 2019, Security Export Licensing Division, Ministry of Economy, Trade and Industry)
ã€€< https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_gaiyo.pdf >; Notification (*tsuutatsu*) to amend parts of notifications including the 'Notification (*tsuutatsu*) on the implementation of the Export Trade Control Order' (dated 1 July 2019, Trade and Economic Cooperation Bureau Notification No. 2 of 25 June 2019 / Export Caution No. 28 of 2019)
< https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_jyobun.pdf >, which amended four Notifications: Notification (*tsuutatsu*) on the implementation of the Export Trade Control Order (dated 6Â November, 1987, Trade and Economic Cooperation Bureau Notification No. 322 of 1987 / Export Caution No.Â 11 of 1987)
< https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_1.pdf >; Notification (*tsuutatsu*) on licensed technology transfer conducted in conformity with the provisions of Article 25(1) of the Foreign Exchange and Foreign Trade Act and Article 17(2) of the Foreign Exchange Order (dated 21Â DecemberÂ 1992, Trade and Economic Cooperation Bureau No. 492 of 1992)
< https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_2.pdf >; Notification (*tsuutatsu*) on guidelines for bulk licenses (dated 25 February 2005, Trade and Economic Cooperation Bureau Notification No.Â 1 of 23 February 2005 / Export Caution No. 7 of 2005)
< https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_3.pdf >; Notification (*tsuutatsu*) on documents and cautions for application for export license, service transaction license and export license for specific recorded media (dated 2 April 2012, Trade and Economic Cooperation Bureau Notification No. 1 of 23Â March 2012 / Export Caution No. 18 of 2012)
< https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_4.pdf >.

[10] For hydrogen fluoride, simplified export formalities applicable to exports destined for countries placed in the category "Region *I* â' " are no longer applicable to exports destined for Korea. For fluorinated polyimide and resist, simplified export formalities applicable to exports destined for countries placed in the category "Region *To* â' " are no longer applicable to exports destined for Korea for the sole reason that Korea is now placed in the category "Region *Ri*".