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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE REPUBLIC OF KOREA

The following communication, dated 18 June 2020, from the delegation of Korea to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

1. On 11 September 2019, the Government of the Republic of Korea ("Korea") requested 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 Japan's amended export licensing policies and procedures imposing certain licensing requirements on exports of fluorinated polyimide, resist polymers, and hydrogen fluoride, as well as their related technologies ("subject products and technologies"), when destined for Korea.

2. The subject products in question (i.e. fluorinated polyimide,¹ resist polymers,² and hydrogen fluoride,³ as specified under Japanese export control regulations) are products primarily used in the production of semi-conductors and of displays for smartphones and TVs. The subject technologies in question include "technology"⁴ associated with the design, manufacture or use of hydrogen

¹ Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Trade 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 (14 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.

² Ordinance of the Ministry Specifying Goods and Technologies Pursuant to Provisions of the Appended Table 1 of the Export Trade 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 (14 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.

³ 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 Trade 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 (14 October 1991), Article 2(1)(i)(f).

⁴ METI has defined the term "technology" to mean "specific information necessary for the design, manufacture or use of goods. This information may be provided in the form of technical data or technical assistance." 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) (外国為替及び外国貿易法第25条第1項及び外国為替令第17条第2項の規定に基づき許可を要する技術を提供する取引又は行為について) at 1(3)(a),

https://www.meti.go.jp/policy/anpo/law_document/tutatu/t10kaisei/ekimu_tutatu140814.pdf.

fluoride⁵ and "technology" associated with the design and manufacture of fluorinated polyimide⁶ and resist polymers,⁷ including but not limited to technical data such as diagrams, user manuals and design specifications, and technical assistance such as the provision of know-how, training, consulting services and other related services.

3. Consultations were held on 11 October 2019 and 19 November 2019 with a view to reaching a mutually satisfactory solution. However, these consultations failed to resolve the dispute.

4. Therefore, Korea requests, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 24.8 of the TFA, Article 8 of the TRIMs Agreement, Article XXIII of the GATS, and Article 64.1 of the TRIPS Agreement, that the Dispute Settlement Body establish a panel to examine this matter.

5. Pursuant to Article 6.2 of the DSU, Korea proceeds below to identify the specific measure at issue and to provide a brief summary of the legal basis of the complaint.

I. IDENTIFICATION OF THE MEASURE

6. On 1 July 2019, the Ministry of Economy, Trade and Industry of Japan ("METI") announced⁸ that it would apply more stringent licensing requirements and procedures to the export or transfer of the subject products and technologies when destined for Korea, based on Article 25(1) and Article 48(1) of the Foreign Exchange and Foreign Trade Act of Japan ("1 July 2019 announcement").⁹ In accordance with the 1 July 2019 announcement, with effect from 4 July 2019, Japan thus imposed unduly stringent export licensing requirements and procedures on the subject products and technologies whenever exported to Korea ("Amended Export Licensing Requirements").

7. The Amended Export Licensing Requirements were initially implemented by Japan mainly through certain amendments to the following four notifications:¹⁰

- 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);¹¹
- 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);¹²

⁵ Notification (*tsuutatsu*) on instructions for bulk licenses (25 February 2005, Trade and Economic Cooperation Bureau Notification No. 1 of 23 February 2005 / Export Caution No. 7 of 2005), Appended Table B, Article 3.

⁶ Notification (*tsuutatsu*) on instructions for bulk licenses (25 February 2005, Trade and Economic Cooperation Bureau Notification No. 1 of 23 February 2005 / Export Caution No. 7 of 2005), Appended Table B, Article 5.

⁷ Notification (*tsuutatsu*) on instructions for bulk licenses (25 February 2005, Trade and Economic Cooperation Bureau Notification No. 1 of 23 February 2005 / Export Caution No. 7 of 2005), Appended Table B, Article 7.

⁸ METI, "Update of METI's licensing policies and procedures on exports of controlled items to the Republic of Korea" (1 July 2019), https://www.meti.go.jp/english/press/2019/0701_001.html.

⁹ Kanpou (Official Gazette) Gougai No. 135 (1 December 1949).

¹⁰ METI's Security Export Licensing Division, "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), 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' (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; and Notification (*tsuutatsu*) to amend part of 'Notification (*tsuutatsu*) on instructions for bulk licenses' (20 December 2019, Trade and Economic Cooperation Bureau Notification No. 1 of 17 December 2019 / Export Caution No. 52 of 2019), https://www.meti.go.jp/policy/anpo/law_document/tutatu/191220.pdf.

¹¹ https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_1.pdf.

¹² https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_2.pdf.

- Notification (*tsuutatsu*) on instructions for bulk licenses (25 February 2005, Trade and Economic Cooperation Bureau Notification No. 1 of 23 February 2005 / Export Caution No. 7 of 2005);¹³ and
- Notification (*tsuutatsu*) on documents and instructions for application for export license, service transaction license and export license for specific recorded media (2 April 2012, Trade and Economic Cooperation Bureau Notification No. 1 of 23 March 2012 / Export Caution No. 18 of 2012).¹⁴

8. Pursuant to the 1 July 2019 announcement, Japan has removed Korea from the export-control category "Region I ①" and placed it alone in the newly established category "Region Ri". In effect, this resulted in five primary changes to Japan's export control laws and procedures in relation to the subject products and technologies: (i) exporters could no longer obtain or use "bulk licenses" (e.g. "general bulk licenses", "special general bulk licenses" and "special bulk licenses" that involve simplified export authorization procedures) when exporting the subject products and technologies to Korea; (ii) all existing "bulk licenses" for the export of the subject products and technologies to Korea were effectively terminated; (iii) exporters have to apply for individual licenses when seeking to export the subject products and technologies to Korea; (iv) METI's Security Export Licensing Division is exclusively in charge of the administration of the relevant licenses for the export of the subject products and technologies to Korea; and (v) METI subjects exporters seeking to export the subject products and technologies to Korea to unduly complex and burdensome export formalities.¹⁵

9. Applications for individual export licenses are subject to a significant number of requirements and are placed under increased scrutiny, giving rise to unnecessary delays, uncertainties, costs, and other serious restrictions to the exportation of the subject products and technologies to Korea. The Amended Export Licensing Requirements also restrict other forms of international trade, including investments, licensing or transfer of intellectual properties, and supply of certain services relating to the subject products and technologies.

10. When initially announcing the Amended Export Licensing Requirements, Japan stated that it had "recently found that certain sensitive items have been exported to Korea with inadequate management by companies",¹⁶ and that it was thus necessary to apply more stringent export licensing requirements and procedures in relation to these products and their related technologies.¹⁷ However, Korea considers that the restrictive changes made to Japan's export control requirements vis-à-vis the subject products and technologies when exported to Korea were based on political considerations unrelated to any legitimate export control considerations connected to Korea or the subject products and technologies.¹⁸

11. In Korea's view, the Amended Export Licensing Requirements constitute a politically-motivated, disguised restriction on trade.

¹³ https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_3.pdf;
https://www.meti.go.jp/policy/anpo/law_document/tutatu/191220.pdf.

¹⁴ https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_4.pdf.

¹⁵ For hydrogen fluoride, simplified export formalities applicable to exports destined for countries placed in the category "Region I ①" are no longer applicable to exports destined for Korea. For fluorinated polyimide and resist polymers, simplified export formalities applicable to exports destined for countries placed in the category "Region To ①" are no longer applicable to exports destined for Korea for the sole reason that Korea is now placed in the category "Region Ri".

¹⁶ METI, "Update of METI's licensing policies and procedures on exports of controlled items to the Republic of Korea" (1 July 2019), https://www.meti.go.jp/english/press/2019/0701_001.html; METI's Security Export Licensing Division, "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), https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_gaiyo.pdf.

¹⁷ METI's Security Export Licensing Division, "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), https://www.meti.go.jp/policy/anpo/law_document/tutatu/190701_gaiyo.pdf.

¹⁸ Reuters, "Japan's Seko says export curbs for S. Korea not in violation of WTO rules" (2 July 2019), <https://www.reuters.com/article/southkorea-japan-laborers/japans-seko-says-export-curbs-for-skorea-not-in-violation-of-wto-rules-idUSL4N2422V4>.

12. On 20 December 2019, METI announced a slight amendment of the Amended Export Licensing Requirements ("20 December 2019 announcement"),¹⁹ limitedly allowing the use of "special bulk licenses" for certain qualified exporters exporting resist polymers to particular customers in Korea. To obtain these licenses, an exporter must first establish a history of repeated and continued exports to a particular customer over a period of time with individual export licenses. It remains that no form of "bulk license" is available with respect to exports of fluorinated polyimide and hydrogen fluoride, and their related technologies, destined for Korea.

13. The implication of the 20 December 2019 announcement is further limited in that (i) "general bulk licenses" and "special general bulk licenses" still remain unavailable even with respect to exports of resist polymers destined for Korea; (ii) even "special bulk licenses" are not available for the transfer of certain technologies related to resist polymers; (iii) exporters that do not qualify for "special bulk licenses" are still required to apply for individual licenses whenever seeking to export resist polymers to Korea; and (iv) obtaining "special bulk licenses" is more burdensome when compared to obtaining other "bulk licenses" such as "general bulk licenses" in terms of documentary and procedural requirements.

14. The Amended Export Licensing Requirements imposed on the subject products and technologies in accordance with the 1 July 2019 announcement, as further amended in accordance with the 20 December 2019 announcement, are the measure being challenged by Korea ("measure").

15. This request for establishment of a panel also concerns any implementation or effect of any modification, replacement or amendment to the measure identified above, and any closely connected subsequent measures.

II. LEGAL BASIS

16. Korea considers that the measure is inconsistent with various obligations of Japan under the Marrakesh Agreement Establishing the World Trade Organization, the GATT 1994, the TFA, the TRIMS Agreement, the GATS and the TRIPS Agreement ("covered agreements"). Specifically, the measure is inconsistent with:

- Article I:1 of the GATT 1994 because, with respect to all rules and formalities in connection with exportation, Japan fails to accord immediately and unconditionally to the export of the subject products and technologies when destined for Korea any advantage, favor, privilege or immunity granted to the export of the like products when destined for certain other WTO Members. In particular, Japan has generally disallowed the use of "bulk licenses" and requires individual licenses for the export of the subject products and technologies when destined for Korea, while not imposing similar restrictions on the exportation of the like products to certain other WTO Members;
- Article XI:1 of the GATT 1994 because the measure constitutes a restriction, other than a duty, tax or other charge, that is made effective through licensing requirements on the exportation or sale for export of the subject products and technologies when destined for Korea;
- Articles XIII:1 and XIII:5 of the GATT 1994 because the measure imposes restrictions on the exportation of the subject products and technologies when destined for Korea while the exportation of the subject products and technologies to all third countries is not similarly restricted. In particular, Japan has generally disallowed the use of "bulk licenses" and requires individual licenses for the export of the subject products and technologies when destined for Korea, while the exportation of the like products to certain other WTO Members is not similarly restricted;
- Article VIII.1 of the GATT 1994 and Article 10.1 of the TFA because Japan failed to minimize the complexity of requirements and formalities in connection with exportation, and to minimize the trade restrictive effect of the measure affecting exportation. In

¹⁹ Notification (*tsuutatsu*) to amend part of 'Notification (*tsuutatsu*) on instructions for bulk licenses' (20 December 2019, Trade and Economic Cooperation Bureau Notification No. 1 of 17 December 2019 / Export Caution No. 52 of 2019), https://www.meti.go.jp/policy/ampo/law_document/tutatu/191220.pdf.

particular, prior to the adoption of the measure, Japan failed to review and assess whether the requirements and formalities it was going to impose on exports of the subject products and technologies to Korea were not more trade restrictive and complex than necessary. Also, Japan failed to ensure that its formalities and documentation requirements were as fast and efficient as possible, in light of the existence of less trade-restrictive alternatives;

- Articles X:1 and X:3 of the GATT 1994 and Article 2.1 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 measure only three days after the 1 July 2019 announcement without providing Korea and other interested parties an adequate opportunity to comment and hold consultations. In doing so, Japan also failed to publish or make publicly available these amendments as early as possible before their entry into force in order to enable traders to become acquainted with them;
- Articles 7.7 and 8.1 of the TFA because Japan fails to provide additional trade facilitation measures for operators based on objective criteria that are not applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and fails to ensure that its agencies responsible for border controls and procedures cooperate and coordinate their activities with Korea to facilitate trade;
- Article 2 of the TRIMs Agreement and paragraph 2 of the Annex of the TRIMs Agreement because the measure constitutes an investment measure related to trade in goods that is inconsistent with Article XI:1 of the GATT 1994;
- Articles 3.1 and 4 of the TRIPS Agreement because, with regard to the protection of intellectual property, Japan fails to accord to the nationals of Korea treatment no less favorable than that accorded to the nationals of Japan and the nationals of certain other WTO Members. In particular, Japan creates certain obstacles for the transfer of the technologies related to the subject products with regard to the nationals of Korea;
- 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. The measure also nullifies or impairs 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; and
- Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization because Japan, through the implementation of the measure, fails to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the covered agreements.

III. CONCLUSION

17. In light of the foregoing, Korea considers that Japan's measure on the subject products and technologies nullify or impair the benefits accruing to Korea directly or indirectly under the covered agreements, or impede the objectives of these agreements.

18. Therefore, Korea respectfully requests that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

19. Korea further asks that this request for the establishment of a panel be placed on the agenda of the next meeting of the Dispute Settlement Body to be held on 29 June 2020.
