

Exhibit 4

Customs, trade regulations and trade remedies in Japan

Mitsuo Matsushita

1. An overview of trade laws in Japan

In Japan, customs, trade and trade remedies are regulated primarily by four major laws; (a) the Foreign Exchange and Foreign Trade Law (" FEFT Law"), (b) the Customs and Tariff Law, (c) the Customs Law and (d) the Export and Import Transactions Law ("Transactions Law").

The FEFT Law¹ covers foreign exchange and capital transactions and foreign trade. Issues on foreign exchange and capital transactions (investments) are discussed in another chapter and so here the discussion focuses on the regulation of foreign trade.

Japan is a member of the World Trade Organization ("WTO") and is obligated to comply with rules incorporated in agreements contained in WTO. Therefore, the Japanese international trade laws must conform to the norms of WTO. This applies to FEFT Law and all other laws.

2. The FEFT Law

Article 1 of the FEFT Law declares the objective of the Law that foreign exchange transactions, capital transactions and foreign trade are basically free and subject only to the minimum control, that it aims at the normal development of external transactions and the maintenance of peace and security in Japan and international community and thereby contribute to the balance of international payment, to stabilize currency and the sound development of the national economy. Under this guiding principle, the FEFT Law provides export control and import control.

[Export control]

Article 47, *et seq.*, of the FEFT Law states that export of goods is permitted with the minimum restrictions and the minimum restrictions must be limited to the situations where the public welfare necessitates them. Export control is exercised by the Minister of the Ministry of Economy, Trade and Industry ("METI") in conformity with the objective of the Law. METI can decide that certain items of goods are subject

¹ Gaikokukawase oyobi gaikoku boueki ho, Law 52 (1950), as amended

to approval of METI for export. When this decision is made, export of such items is subject to approval by METI and METI can refuse such approval and attach conditions for export of such items. If such approval system is applied, an export without an export approval constitutes a violation of the Law and is subject to criminal penalty. Details of procedures for approval are provided for in the Export Trade Order (a Cabinet decree) and METI ministerial regulations.

In 1969, the Tokyo District Court handed down a decision declaring that the invocation of export approval under the FEFT Law by METI must be made in compliance with Article 1 of the Law which states that export restriction can be made only when this is necessary for the purpose of the Law and such necessity must be measured in light of Article 1. Involved in the case was a proposed export of electronic items to China and, at that time, the export of such items to China without approval was prohibited. The exporter applied for an approval which was denied by METI. Thereupon the exporter brought an injunctive action against METI and argued that this prohibition of export constituted an infringement of Article 22 of the Constitution which states that the freedom of trade is guaranteed.

The Court held that METI had to prove the necessity of such prohibition and this necessity had to be grounded on the objective of the Law incorporated in Article 1. However, in those days, Article 1 merely stated that export prohibition could be invoked when it was necessary to maintain international balance of payment and the sound development of the national economy and did not contain the language which suggested that it could be involved for the sake of maintaining national security and international peace. The Court stated that, therefore, the invocation of export approval system in this instance would be *ultra vires* on the part of METI and would be contrary to Article 22 of the Constitution. In 1987, the National Diet (the legislature) passed an amendment to FEFT Law which added to Article 1 thereof the language that this Law could be involved to maintain national security or international peace.²

In order to invoke export approval system, METI has to specify the destination of the export and the kind of items to be exported. Nowadays export approval system and export prohibition is invoked to prohibit export of rare materials (such as tungsten), to restrict export to avoid trade friction with other trading nations (orderly marketing), to maintain public order and to maintain national security and

² The 1969 Peking-Shanghai Nihon Kogyo Tenrankai Case, Decision of Tokyo District Court, 8 July 1969, *Gyosai Reishu* (Administrative Cases Reporter), 20 (1989), 842 *et seq.*

international peace. The third objective above stated involves prohibition of weapons, drugs, obscene literatures, etc. and the last objective is invoked to comply with, for example, an export ban based on U.N. resolution to prohibit exportation of certain items to a certain country and to prohibit export of certain items to belligerent countries. Also export approval system is used to control export for the sake of national security. Examples include the control of export of strategically sensitive items to certain countries.

Article XI of the GATT prohibits export quota unless permitted by Article XX of the GATT and other provisions in the GATT which exempt export prohibition from GATT disciplines. Therefore, any export approval system has to be justified by a provision in the GATT which provides exception to such export control.

[Import control]

Article 52 of the FEFT Law and the Import Control Order (a cabinet decree) prescribe that METI can put into effect an import approval system and, when it is effectuated, an importer has an obligation to obtain a prior import approval before it export such an item. METI can prohibit importation of items by not giving approval or allow import with certain conditions if it is necessary. The necessity test here has the same meaning as in export control. In accordance with this order, goods which need approval for exportation are made subject to prior approval of METI and an importer who intends to import items coming under the order must obtain an import approval before importing it. An import without such an approval constitutes a violation of the FEFT Law and subject to criminal penalty.

Items are subject to import approval system order to protect (a) the public order, (b) the national security and (c) in cases of marine and agricultural products, the protection of domestic industry regardless of the origin of goods. Prohibited items include marine products, narcotics, uranium ore, nuclear-related parts, weapons and certain goods the importation of which is controlled under the Convention on International Trade in Endangered Species of Wild Fauna and Flore (the Washington Convention) and the Stockholm Convention of Persistent Organic Pollutants. Those items are prohibited from being imported in principle.

Some other items are under the approval system in regard to specific place of origin or shipment. This regulation concerns certain goods to be imported where such goods have a particular place of origin or where such goods are to be imported from particular places of shipment. Such regulated goods include marine products,

textiles, looted cultural assets, logs and lumber, diamond and certain goods the importation of which is controlled under the Washington Convention, Montreal Protocol, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention) and the Chemical Weapons convention.

Article 52 of the FEFT Law provide for safeguard to protect domestic industry in emergency. Safeguard is provided for in Article XIX of the GATT, the Agreement of Safeguard which implements Article IX and a number of FTAs including TPP. Safeguard under Article 52 of the FEFT Law must comply with those provisions of the international agreements to which Japan is a contracting party. Therefore, in order to invoke Article 52 to protect a domestic industry from import, the METI has to establish that: (a) due to an unforeseen development and as the result of concession of tariffs, (b) there is an increase of import and (c) a domestic industry is seriously injured. The remedy under Article 52 is a quantitative restriction of import or a tariff quota.

So far there has been no instance where this safeguard measure was invoked. Unlike the enforcement mechanism of safeguard in major trading nations, the safeguard system in Japan is implemented by bifurcated mechanism: i. e., (a) through Article 52 of the FEFT Law as above explained and (b) through emergency tariffs under the Customs and Tariff Law which will be explained later. As stated above, there has been no case yet where a safeguard is invoked. When more safeguard actions are brought up to the government by domestic industries in future, the dichotomy of enforcement mechanism, e. g., between MOF and METI may be problematic.

3. The Customs and Tariff Law³

The Customs and Tariff Law is another important piece of legislation to control international trade. Unlike the FEFT Law which provides for regulating export and import, the Customs and Tariff Law is limited to the control of import through the imposition of tariffs.

[An outline of the Customs and Tariffs Law]

The Customs and Tariffs Law provides for such items as customs valuation (Articles 1-4), retaliatory tariffs (Article 6), countervailing duties (Article 7), antidumping duties (Article 8), emergency tariff (safeguard) (Article 9) and tariff

³ Kanzei Teiritsu Ho, Law 54, 1913, as amended

quota (Article 9-2). All of such items are regulated by provisions of the GATT and of FTAs including TPP and must comply with the requirements stipulated in such international agreements.

The enforcement agency of the Customs and Tariff Law is the Ministry of Finance (MOF).

[Customs valuation]

Articles 1-4 of the Customs and Tariffs Law provide for retaliatory tariffs according to which valuation of customs on an imported article must be based on transactions value but, if it is not possible or inappropriate to rely on transactions value, the Law enumerates various factors to be taken into account. For example, if the domestic importer and the foreign exporter are related parties such as parent and subsidiary, it is not appropriate to rely automatically the transactions value in calculating the import price because, due to such corporate relationship, the export/import price between them may be deviated from the market value. In such cases, it may be appropriate to rely on a constructed value, e.g., the value that the customs office calculate by taking into account import prices of similar products between unrelated parties.

[Retaliatory tariffs]

In accordance with Article 6, a retaliatory tariff can be imposed on an imported article if it is allowed by the WTO under the WTO agreements as a retaliatory measure to an infringement of a WTO agreement on the part of another Member.

[Countervailing duties]

Details of countervailing duties (CVD) are stipulated in the SCM Agreement (a part of Annex 1 A of the WTO Agreement). Article 7 authorizes the imposition of CVD on an imported article if that imported article has benefited from a subsidy given by the exporting country and if a domestic industry is materially injured because of such import. The amount of CVD is limited up to the maximum of the margin of benefit given by the exporting country.

[Antidumping duties]

Details of antidumping duties (AD) are stipulated in the AD agreement (a part of Annex 1 A of the WTO Agreement). Article 8 authorizes the imposition of AD duties on a product from abroad if the export price of such product is lower than its domestic price (fair value) in the country of exportation, if a domestic industry is materially injured due to such export and if there is a causal relationship between dumping and injury. The amount of AD duties is limited to the maximum of dumping margin with regard to that exported product.

[Safeguard]

A safeguard measure is provided for in Article 9 of the Law as an emergency tariff. If, as the result of unforeseen development and tariff concession, the import of a product has increased and a domestic industry is seriously injured or there is a threat thereof, MOF can impose an emergency tariff whose maximum is the difference between the wholesale price in the domestic market of that article minus regular tariff that may be imposed on it.

As seen above, this is a safeguard measure. A safeguard measure is provided for in the FEFT Law and enforced by METI as above explained. Therefore, as seen before, this is an example of bifurcated structure of safeguard. When a case occurs, the Ministers of MOF and METI engage in consultation to decide which law would apply.

[Tariff quota]

Tariff quota is provided for in Article 9-2 of the Law. When tariff quota is invoked, articles subject to the tariff quota can be imported with a lower tariff rate until the amount of import reaches a certain stipulated level. Any import above this quantity is subject to a higher tariff.

4. The Customs Law⁴

The Customs Law provides for details of procedures to be followed in export and import of goods to and from Japan such as notification, inspection and appeals process for refusal to import, etc. It also provides for some substantive matters such as contrabands and rules of origin.

⁴ Kanzei Ho, Law 61, 1954, as amended

[Export prohibitions]

Article 69-2 of the Law prohibits exportation of items that amount to drugs, pornography, items that infringe intellectual property laws and constitute unfair competition. Any item that falls under this category is subject to forfeiture by the customs authority.

[Import prohibitions]

Article 69-11 of the Law enumerates items whose import is prohibited, e. g., drugs, weapons, explosives, powders, chemicals whose import is prohibited by the law prohibiting chemicals weapons, certain pathogens, money and similar instruments, published materials which infringe the public order, pornography, items that infringe intellectual property rights and the law against unfair competition.

Among those items, parallel importation of items covered by intellectual property rights (Article 69-11: 9) raises a special problem. In the trademark area, courts have held that a parallel importation of genuine trademarked goods did not infringe the Japanese domestic trademark⁵. Therefore, such import is allowed. In the area of copyright, Article 26-2 of the Copyright Law declares the international exhaustion of copyright when a published material which is the subject of the Japanese trademark right is sold abroad, that is, the copyright of that published matter is exhausted in Japan as well as in that country where it is sold. Therefore, such item can be freely imported to Japan.

In patent, the situation is more complicated. The Supreme Court of Japan held⁶ that, when a patentee sold abroad a product covered by a patent registered in Japan (and registered in the foreign country when such sale took place), the patentee notified the first purchaser of the product that it could not be exported to Japan and this prohibition is represented on the product, then the patentee can prevent a parallel importation of such product to Japan. Otherwise the patentee is presumed to have given a license to the purchaser to export to Japan (implied license). Therefore, it is a matter of case-by- case review to decide whether a parallel import

⁵ Decision of Osaka District Court, 27 February 1970 (*Mutaishu* (Intellectual Properties Reporter) 2:1:71) as endorsed by the Supreme Court (Decision of the Supreme Court, 27 February 2003, *Minshu* (Civil Cases Reporter) 57:2:125

⁶ Decision of the Supreme Court, 9 July 1997, *Minshu* 52:6:2299

of patented product can be lawfully made.

[Rules of origin]

The rules of origin are a set of rules to decide the origin of an imported product. Rules of origin are declared in Article 71: 1 of the Law and Article 4-2, Para 4 (1) and (2) of the Enforcement Order of the Law which provide that the origin of an imported product is determined by the following tests; e.g., the origin of a product is the country or area: (a) where the whole process of production was completely made or (b) where the product was partly processed or manufactured by using materials other than those that fall under (a) above) and has been substantially transformed into another product as distinguished from the materials from which it is made. Further a notice of MOF for the enforcement of the Law states that, with regard to application of the tariff rates in free trade agreements, if the production process of a product transcends a country and stretches over two or more countries, the last country in which a substantial transformation is made and the new feature is added to the product is deemed to be the country of origin.

As one can see from the above, Japan has adopted the substantial transformation rule whereby a product is regarded as that of the exporting country if it was made completely in the country of exportation or it has undergone a substantial transformation from the materials out of which it has been made and acquired the characteristic and identity of its own even if materials or parts and components of them had been imported from a third country. Whether or not such a substantial transformation is made is determined by either (a) that 45% or more of the value of that product has been added in the country of exportation or (b) the product is classified as a tariff line different from that of the original materials.

Therefore, if, for example, an automobile was produced in Germany with parts and components supplied partly by Germany domestic producers in Germany and partly foreign producers in other countries is regarded as a product of Germany if 45 or more percent of the value of the product was added in Germany. In another situation, if a U.S. producer of medical drapers purchased cloth in U.S., export it to Vietnam, processed it into medical draper and export it to Japan, it should be regarded as a Vietnam product because the tariff classification of cloth is different from the tariff classification of medical draper. As long as the draper was produced in Vietnam, it is a product of Vietnam and should be represented as such.

Japan adopts the third person certificate system with regard to certification

of the origin of a product. Therefore, it should be the government or an entity authorized by the government to issue a certificate of origin. The Chamber of Commerce in Tokyo is authorized to issue a certificate of origin.

5. Export and Import Transactions Law “Transactions Law”⁷

[Export agreement]

Exporters are authorized to agree on the terms of export such as kind of export product, price, quantity and channel through which export is made by making a prior notification to the Minister of METI. An export agreement which has been notified to METI enjoys an exemption from the Antimonopoly Law. Export agreement is allowed only when it is not contrary to any international treaty or agreement, it does not give undue disadvantages to importers and relevant other enterprises, it is not unduly discriminatory, it does not unduly restrict participation in it or withdrawal from it and it does not unduly affect adversely the interest of relevant domestic enterprises engaged in agriculture and fisheries, small business and general consumers. Exporters can also establish an export association which enacts rules concerning export as in agreement touched upon above.

Export associations were often used in the past to avoid trade frictions with other trading nations. But nowadays, export associations are seldom used.

When METI decides that an export agreement and export association does not accomplish the purpose as envisaged by the Law due to, for example, activities of outsiders and, if so, METI can put into effect an export order which binds all exporters so that they are compelled to abide by the terms of the agreement or association. In this way, an export agreement or association is not a mere private agreement or association but it an instrumentality of the state.

A duly notified export agreement or association is exempted from the application of the Antimonopoly Law.

[Import association]

Importers are authorized to establish an import association to engage in activities for the common benefit of its members including the improvement of import price. For example, Japanese importers can establish an import association and

⁷ Yushutunyu Torihiki Ho, Law 299, 1952.

entrust it with the power to negotiate with a foreign exporter which is the dominant power in the export market and if the export price that it charges is likely to be excessively high in light of the existing market price. Import association cannot be discriminatory and any new member should be admitted and any existing member can withdraw from it.

Examples of import association allowed under the authority of the Transactions Law include, among others, a buying consortium organized by, for example, iron ore users (steel industry) in the field of iron ore where a few producers possess dominant market power and are capable of raising export prices as they wish. In this sense, import association has a feature of countervailing association.