On International Trade and the Extended Producer Responsibility

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1, The Packaging Recycling Law of Japan and its effect on trade.

In Japan, as in many OECD member countries, it is municipal government's responsibility to collect, recycle, incinerate and finally dispose of non-industrial wastes from households. However, in view of various reasons, both domestic and international, the Japanese Government introduced the Packaging Recycling Law in 1995, which took effect in April 1997. The major difference to the German or French schemes is that, in our law, responsibilities are shared among the parties interested. First of all, individual households are required to separate their packaging waste. Secondly, local government assumes responsibility of collecting, pressing and washing packaging waste appropriately and storing it at stock points. The cost of establishing such stock points should be borne by local governments. Thirdly, manufacturers/fillers, including importers (hereinafter called producers), of the packaging are responsible to materially recycle (reuse) them. Small and Medium sized Enterprises (SMEs) are exempted from their obligation until March 2000, but thereafter, except for very small companies, they have to assume the responsibility.

Producers of packaging have three different ways to comply with their obligation: to transfer their obligations to authorized entities (as of April 1st, 1998 one entity has been authorized), to ask another independent party to assume their duties, and to collect (through their agents) and reuse/recycle packaging they produced/used by themselves or recyclers.

Though the new Package Recycling Law is not fully implemented at this stage [1], and not all local governments have participated in this scheme yet (participation is voluntary), it has shown a good start. For example, the volume of collected PET bottles in the first three months since the law took into effect was almost equivalent to the volume for the twelve months prior to enactment.

Now I should like to examine its effect on trade. So far we have encountered

[1] For example, SMEs are exempted as well as carton boxes and plastic containers other than PET bottles.

no complaints from importers or other Governments. One of the reasons for this situation is that we have only one year's experience and it is too early to examine the real effect on trade. However there are several other reasons I can think of. First of all, the law does not discriminate against importers. Usually it will be hard for importers to establish their own take back and recycling systems. However, they can contract out to an authorized entity to take over their obligations, or can fulfil their obligations by asking a licensed independent recycler to do the job for them, or they can do it by themselves by obtaining a permit from the Government. An entity would not be authorized unless they are able to prove to the Government they do not discriminate against any party. Also it will be important to note that the entities are not able to cancel their reuse/recycling contract except in unusual circumstances. In view of the above, at least legally, Most Favored Nation and National Treatment Principles under GATT (Article 1 & 3 respectively) is clearly guaranteed. The second reason may derive from a lack of incentives. Basically in our country, the cost of rubbish collection is borne 100% by local governments (a very limited number of municipalities charge money in various ways). Households, in most municipalities, can discharge of as much waste as they wish without any additional payment. Therefore there is no incentive for households to sort packaging waste from general waste so as to discharge less general waste to save money. Whereas, in Germany, fees for the collection of general household waste are charged in proportion to its volume. The DSD (German version of the Producer Responsibility Organization) collect packaging wastes (with green dots) free of charge. Hence, especially at the first stage, a large volume of packaging wastes, far exceeding the countries recycling capacities, were collected, causing export dumping to neighboring countries. The third reason why the law has not caused trade related conflict so far is that a producer would not assume his responsibility unless the local government decided to join this scheme. In 1997, between 716 (for PET bottles) and 2,473 (for aluminum cans) out of 3,300 local governments are believed to have participated

Then how about its relationship with the TBT Agreement (Agreement on Technical Barriers to Trade)? In the TBT agreement, there is a clear distinction between “technical regulation” and “standard”. Any document with which compliance is mandatory is defined as regulation and any other document with which compliance is not mandatory is called as standard. The Japanese packaging recycling law is a “regulation” in this sense. Under article 2 of the TBT Agreement, technical regulations “are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations

shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create". In this context environment is one of the legitimate objectives. The article also states, "in assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products". To begin with, I would like to examine whether the law creates unnecessary obstacles to trade. In other words, whether it will be more trade-restrictive than necessary to protect the environment. As discussed above, it seems that the law is not more trade-restrictive than necessary at this moment. However we have to scrutinize the case where all local governments join the scheme and all packaging wastes as well as all applicable producers come under the jurisdiction of the law. The important point here is whether an authorized entity works efficiently or not. If it doesn't, then the fees to the entities might become very expensive. However, what we need to know with respect to packaging waste in Japan is that not only importers but also domestic producers (regardless of the size) equally suffer from the increase of the fees. Because even large producers, instead of carrying out their duties by themselves, commission authorized entities with their obligations. In this sense, it is my observation the law can never be interpreted as an infringement of the TBT Agreement.

I would like to mention another factor, the cost of "The Packaging Ordinance" of Germany to Japanese exporters. In 1991, when Germany first introduced the ordinance, Japanese exporters became very nervous about its effect to their export to Germany. As DSD hadn't been established yet at the time of the introduction of the ordinance, they thought each of them would have to establish their own take back and recycling facilities[2]. That being the case, it is very clear that exporters are badly discriminated against. However DSD was later set up and importers can obtain green dots on their packaging material by paying a certain amount of money to DSD. Some Japanese exporters took advantage of this situation and devised ways to use less packaging materials or to switch them into ones whose fees were lower than the previous ones. But because the portion of the cost of packaging is relatively small in comparison to the goods themselves, the cost of meeting the ordinance was minimal and never threatened their competitiveness. As Japanese law is rather moderate as to the obligations of producers; it is hard to predict that it will become an unnecessary trade obstacle even for developing countries.

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[2] "Under the 1991 German packaging law, "PRO" was not defined, although the 1991 law hinted at the possibility of a PRO by stating that manufacturers and distributors may call upon "third parties" and join "a system" to fulfil their individual EPR requirements". Extended and Shared Producer Responsibility Phase 2 Framework Report. OECD ENV/EPOC/PPC (97) 20.

Another important aspect with TBT Agreement is the notification process. Article 2 of the Agreement stipulates as follows. In the absence of a relevant international standard, and if the law may have a significant effect on trade, Member countries should "publish a notice in a publication at an early appropriate stage", "notify other Members through the Secretariat------at an early appropriate stage", "upon request, provide to other Members particulars of copies of the proposed technical regulation", and "without discrimination, allow reasonable time for other Members to make comments in writing----". It is my understanding that neither the Japanese Government nor other countries followed these procedures. Possibly each government might have thought their laws on packaging wastes would not have a significant effect on trade. However it would be hard to foresee any possible trade effects in advance. It is my opinion that countries follow "the precautionary principle" to deal with this issue, because until the time of actual introduction we usually do not know whether a law affect world trade significantly or not.

2, Bill of Specified Household Apparatus Recycling

On March 13, 1998, the Japanese Government submitted to the Diet (Parliament) the Bill of Specified Household Apparatus Recycling (Electric and Electronic Equipment Recycling Bill). Basically this is an electric appliance wastes version of the Packaging Recycling Law. Under this draft, manufacturers and importers will become obliged to collect (through mainly retailers) and recycle them. As of mid-April this draft is still under scrutiny and it is uncertain whether this will become law, and what the final contents would be.

The draft covers, at the first stage, four typical electric appliances: TVs, refrigerators, washing machines and air-conditioners. The reasons those four have been picked are: a) they are among wastes which local municipalities find difficult to recycle, b) increasing necessity to recycle, c) it is relatively easy for retailers to collect, etc. The typical case of collection and recycling under this draft law is that, at the time of replacement purchase of those goods, consumers can ask retailers, at the time of delivery, to take back end-of-life goods (TV etc.). Retailers assume the obligation to accept their customers' request to take old goods back. The situation remain unchanged even when retailers are asked to take back an end-of-life good which is not the one they sell but of the same kind they newly sell. Retailers in turn have to deliver them to the manufacturers or importers of those goods, and manufacturers/importers have to receive and recycle them. Small and medium sized manufacturers and importers, if they wish, can commission authorized entities to recycle end-of-life appliances for them.

Authorized entities are also obliged to recycle those goods for which no responsible party exists (in such cases as bankruptcy of the manufacturers). The most important distinctive feature of this draft is that, at the time of collection, it allows manufactures/importers to charge for the actual cost of recycling. All manufacturers/importers have to release their price lists.

An OECD paper on Extended and Shared Producer Responsibility Phase 2 Framework Report (ENV/EPOC/PPC (97) 20, page 29) clearly put priority on advance payment of recycling cost. The paper says "to assess the fee at the point of original sale is administratively the most simple and effective way". It goes on, "To impose a separate fee later at the time of disposal---is to provide an incentive to encourage consumers to engage in fee evasion". "This may take the form of refusing to return or separate products, hiding products in the undifferentiated waste stream, or undesirable back-yard burning or dumping of products in hidden places". This is quite a different approach from the Japanese draft discussed above. However we have to take into consideration that the OECD paper was written focusing mostly on packaging wastes. The main difference between packaging wastes and electric appliance wastes is the interval between sales and disposal. In the latter case it may take ten to fifteen years. There are several reasons the Japanese draft scheme opted to charge fees at the time of disposal. Firstly, it is very hard to make an exact estimation of how much the cost of recycling after, say, 10 years from the sale will be. Secondly, due to severe competition, it was deemed difficult to increase the price of goods exactly equivalent to recycling cost. Thirdly, there may be such cases where manufacturers/importers go bankrupt. In these cases, an authorized entity has to take care of the end-of-life goods of those manufacturers/importers. Though consumers paid recycling fees in advance, that money went to the insolvent companies (in the course of bankruptcy). The authorized entity, having received no fees, has to charge those costs again, and thus, consumers are unfairly discriminated against. Fourthly, the administrative cost of deposit money will be enormous. We do not have a simple conclusion as to which is better, either advance payment or post-payment. The conclusion may change by country. What I should like to stress is we have to study carefully the difference between durable goods and others and find out the most suitable way of charging fees.

This draft law, if enacted, may have a different impact on international trade in comparison to the one of packaging law. On the assumption that the draft will eventually become the law, Japanese large electric manufacturers are in the midst of trying to find out the most cost effective way of recycling their own goods. If they are fairly successful, they will be able to offer lower costs for collection fees and by doing so,

they can increase their competitive edge. Usually importers (and domestic SMEs) are not as large as leading domestic manufacturers. This might become a serious concern to importers (and domestic SMEs), especially when large domestic manufacturers advertise in various media of their advantage of collection cost. Whether the fact that importers and domestic SMEs are put in the same situation can be justified or not, should be examined under TBT Agreement case by case, taking into consideration the extent of disadvantage suffered by importers. This tendency may become markedly clearer for goods that are technically difficult to recycle. In Germany, draft ordinance has been in Congress for several years to impose auto manufacturers with the same kind of obligations as package producers. To avoid any new legal measures, German auto manufacturers (including importers) established voluntary system of collection and recycling of their cars. In Japan, an end-of–life recycle initiative was launched in May 1997 and manufacturers are trying to increase their car recycling ratios. We have to pay careful attention to whether these obligations will not be more trade-restrictive than necessary for the purpose of environmental protection, taking account of the risks non-fulfillment would create. As both environmental protection and multilateral trading schemes are priority objectives of our society.