

## SUBMISSION ON REGIONAL TRADE AGREEMENTS

### Communication from the Republic of Korea

The following communication, dated 10 June 2003, has been received from the Permanent Mission of the Republic of Korea.

#### I. INTRODUCTION

1. There has been a common understanding among WTO Members since the inception of the GATT that the purpose of regional trade agreements (RTAs) should be limited to the facilitation of trade between the constituent territories. RTAs should not be used as a means to create barriers to trade for non-Members of the RTA. The Minister's meeting at Doha also recognized this purpose when they *"agree[ed to] negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements"*. In order to implement further this well-established understanding of the role of RTAs, Korea believes that the goal of the Doha negotiations should be to develop rules for RTAs that recognize the principle of multilateralism and protect the role of the WTO as the unique forum for global trade rule-making and liberalization.

2. One of the most important issues regarding RTAs is the need for clarification and improvement of the terms "Other Regulations of Commerce" ("ORC") and "Other Restrictive Regulations of Commerce" ("ORRC"). Paragraph 5(a) of the GATT Article XXIV requires that ORCs imposed on non-members of a customs union at the institution of the customs union, *"shall not on the whole be higher or more restrictive"* than those in effect prior to the formation of the customs union. Paragraph 5(b) imposes the same requirement (omitting the phrase "on the whole") on free trade agreements. Paragraph 8(b) of GATT Article XXIV defines a free-trade area as one in which *"other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV, and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories"*. Paragraph 5 is, to an extent, complemented by the Understanding on the Interpretation of Article XXIV of the GATT.

3. Both paragraphs 5 and 8 of GATT Article XXIV are essential to the assessment of the compatibility of individual regional agreements with the governing WTO rules. However, neither of these provisions currently contains any clear definitions or guidelines as to what constitutes an ORC or an ORRC, nor as to how these terms should be interpreted in examining an individually notified RTA. These *lacunae* complicate considerably the process of reviewing a notified RTA. In accordance with the Doha mandate, therefore, Korea proposes that this group should negotiate clarifications and improvements in the definition and interpretation of these two terms.

4. The purpose of this communication is to elaborate on some key questions regarding ORCs and ORRCs that could be clarified or improved by the Rules Negotiation Group. Most of the

questions already have been raised, not only in the review of the procedures on individually notified RTAs, but also in the discussions on the systemic issues under the Committee of Regional Trade Agreements (CRTA). Nevertheless, these issues have yet to be resolved. This paper does not propose solutions to the outstanding questions, but rather attempts to identify some key questions for the first stage of the negotiations. The questions elaborated below are not exhaustive, and Korea reserves the right to raise additional issues and questions at a later time.

## **II. DEFINITION & SCOPE OF ORCS AND ORRCs:**

### ***What is the relationship between ORCs and Non-tariff measures?***

5. GATT Article XXIV assumes two possible types of trade barriers, duties and other regulations of commerce. The terms "duties" and "tariffs" are used interchangeably in the relevant paragraphs and thus may be interpreted in the same way. Regarding the term ORC, however, the text of the GATT contains no alternative language and no clear definition of this term. Members are thus free to interpret the scope and coverage of the term ORC as they wish, giving rise to recurring disputes between Members as to the correct meaning of the term. Accordingly, this group needs to consider whether, in parallel with the synonymous use of the terms "tariff" and "duty", the term ORC should be interpreted as having the same scope as the term non-tariff measures (NTMs), or whether ORCs and ORRCs should be considered as having a parate scope and meaning than that of NTMs.

6. Many of the issues to be considered in interpreting the terms ORC and ORRC arise out of the Standard Format for Information on Regional Trade Agreements, WT/REG/W/6 (15 August 1996). This Standard Format was established to provide uniform guidelines for RTAs that would standardize the format in which RTAs would be notified in accordance with paragraph 7(a) of GATT Article XXIV. The Standard Format contains a section titled "Trade Provisions", which provides the standard format for both tariff and non-tariff measures. However, the Standard Format does not use the terms ORC and ORRC, even though those terms appear in GATT Article XXIV. It would be instructive to review why the Standard Format does not use the same terms to describe measures other than tariff measures that are specifically used in GATT Article XXIV.

### ***What is the scope of the term ORC?***

7. As noted above, in its section covering "Trade Provisions", the Standard Format requests information on virtually all possible measures relating to trade that may be covered by a RTA. The Standard Format lists the following types of measures:

- Import Restrictions: Duties and Charges, Quantitative Restrictions, Common External Tariffs;
- Export Restrictions: Duties and Charges, Quantitative Restrictions;
- Rules of Origin;
- Standards: Technical Barriers to Trade, Sanitary and Phytosanitary Measures;
- Safeguards;
- Anti-dumping and countervailing measures;
- Subsidies and State-aid;
- Sector-specific provisions; and
- Other: cooperation in customs administration, import licensing and customs evaluation, etc., in cases where they differ from those applied on a MFN basis.

8. Korea recognizes that the list of measures for which the Standard Format seeks information does not attempt to be exhaustive or to prejudge the scope and coverage of the examination of a RTA for GATT consistency. Nevertheless, this represents a comprehensive list of the types of trade disciplines that are applied under RTAs. There is a very close link between the scope of this list and

the scope of the term ORC. Korea is not aware of any substantial arguments for differentiating between these trade disciplines and the concept of "other regulations of commerce". Any clarification of the scope of the term ORC should not only address the textual meaning of the words, but should also reflect the purpose of the clarification. Korea believes that the Standard Format provides helpful assistance in clarifying the types of measures that should come within the scope of the term ORC.

***How does the term "restrictive" in ORRC affect the meanings of ORC and ORRC?***

9. Paragraph 8 of GATT Article XXIV calls for the elimination of ORRCs with respect to substantially all the trade between the constituent territories of the RTAs, subject to the following listed exceptions:

- Article XI (General Elimination of Quantitative Restrictions);
- Article XII (Restrictions to Safeguard the Balance of Payments);
- Article XIII (Non-discriminatory Administration of Quantitative Restrictions);
- Article XIV (Exceptions to the Rules of Non-discrimination);
- Article XV (Exchange Arrangements); and
- Article XX (General Exceptions).

10. The use of the different terms ORC and ORRC and the existence of the listed exceptions give rise to two systemic questions: first, how does the insertion of the word "restrictive" affect the meanings of the terms ORC and ORRC; and, second, are the listed exceptions exhaustive or illustrative? Clarification of both of these systemic questions is essential to a proper understanding of these terms and to achieving the purpose of RTAs.

11. Paragraph 5 of GATT Article XXIV requests that the general incidence of an ORC, either in a customs union or a free-trade area, which affects trade with third parties shall not be *higher or more restrictive* after the establishment of the RTA. The use of the qualifier "more" before "restrictive" suggests that ORCs may be restrictive to some extent, but simply cannot be "more" restrictive after the creation of the RTA than before. The possibility of some element of restriction must be borne in mind in reviewing the meaning of the terms ORC and ORRC.

12. Korea considers that more detailed sub-criteria are needed for examining whether or not the "general incidence of an ORC" or the "corresponding ORC" is more restrictive in accordance with paragraph 5 of GATT XXIV. In order to stimulate discussions on this point, Korea proposes the following possible criteria as follows:

- whether the measures differs from those applied on a MFN basis;
- whether the formation of RTAs would be prevented if it were not allowed to introduce the measures; and
- Whether the effects of the measures have a negative effect on the trade of third parties in terms of economic tests.

### **III. MEASURE-SPECIFIC ISSUES**

13. In this section, Korea touches upon some issues relevant to specific measures that have been identified in the work of the CRTA. Without prejudging whether the measures mentioned below fall should be treated as ORCs or ORRCs, Korea would like to address some questions that warrant our attention.

***Preferential Rules of Origin (PRO)***

14. The question of whether PROs constitute ORCs or ORRCs is very important. Some Members that are parties to RTAs have expressed the view that PROs are trade provisions that are only applied to the trade between constituent parties on a technical basis. Other Members, however, feel that the trade of third parties with the members of the RTA has been negatively affected by the use of PROs.

15. In most cases, the parties to the RTA have established PROs that are more stringent than those applied on an MFN basis. Consequently, producers are obliged to change their source of supply from third party country suppliers to constituent party suppliers in order to receive preferential treatment under the RTA. This matter requires attention when considering whether PROs should be treated as an ORCs or ORRCs.

16. In particular, these negotiations should address whether to permit diagonal cumulation schemes, which favor certain third parties to a particular RTA but discriminate against the rest.

***Standards (Technical Barriers to Trade, Sanitary and Phytosanitary Measures)***

17. Several practices in the standards area require careful consideration. Some RTAs provide a preferential standard criteria or procedure for the products traded from the constituent parties whereas they do not do so on the products of third parties. Another example is the establishment of a conformity assessment standard on a regional basis. In this situation, products from both the region including the constituent parties and from third parties may comply with the standard, but the parties to the RTA in the region treat only the products from the region itself as satisfying the standard. We should carefully look at whether these cases have discriminatory aspects.

***Safeguard Measures***

18. There are threshold questions of whether safeguard measures constitute ORCs or ORRCs and whether they can constitute the exception list of ORRC or not. In addition, there is an issue whether the discriminatory application of investigation procedures and safeguard measures between the constituent parties and third parties are allowed under GATT XXIV. These matters have been brought under the jurisdiction of the WTO Dispute Settlement Body, though there has yet to be a definitive ruling from a Panel or the Appellate Body. Some Members continue to exercise their own discretion in interpreting this issue.

19. There are two possible scenarios. If it is assumed that safeguard measures constitute ORCs or ORRCs, then this issue should be addressed under GATT Article XXIV. In contrast, if safeguard measures do not constitute ORCs or ORRCs, then departures from the obligations under the Safeguard Agreement are not permitted since GATT Article XXIV is an exception to the principle of MFN in the WTO, and the exception should be permitted only to the extent contemplated in GATT Article XXIV.

20. The unique question of whether safeguard measures already in place by a customs union should be applied by acceding parties without conducting a new investigation should be addressed separately. This question gives rise not only to issues involving GATT Article XXIV, but also affects the Safeguard Agreement.

***Anti-Dumping Measures***

21. Anti-dumping measures give rise to similar questions as safeguard measures. There is also the question of whether the maintenance of a dual system (of anti-dumping duties for third parties and

competition policy among RTA parties) can be considered as not consistent with GATT Article XXIV.

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