

COMMUNICATION FROM THE REPUBLIC OF KOREA

A Thought on the Alternatives to MFN Exemptions in the Annex on Article II Exemptions

The following communication has been received from the delegation of the Republic of Korea with the request that it be circulated to the Members of the Council for Trade in Services.

I. BACKGROUND

1. MFN principle is one of the few pillars on which the whole WTO regime is built. The importance of the MFN principle is manifested by the fact that it appears at the outset of the WTO agreements as the first Article of the GATT 1994, and as Article II of the GATS, only after the scope and definition of the services. Without MFN, a multilateral agreement may lose its reason to exist. In this vein, Article II of the GATS requires Members to “accord immediately and unconditionally” MFN treatment.

2. Despite the necessity of preserving this fundamental principle, individual Members could have difficulties in fulfilling the MFN obligation, and GATS provides several layers for the flexibility in accommodating special circumstances which the individual Members face. Paragraph 3 of Article II provides the first layer in that Members may confer or accord “advantages to adjacent countries in order to facilitate exchanges.” Other layers include those provided by the *Recognition* in Article VII, by *Economic Integration* in Article V, and more generally by *General Exception* in Article XIV. All these provisions, however, are not without strict conditions under which such flexibility is allowed.

3. Most far reaching among these layers of flexibility is the one provided by the *Annex on Article II Exemption*, and the annex specifies conditions under which Members are exempted from the MFN obligations. The conditions in the annex, however, are different from the other layers in that the annex only specified conditions for procedures, and not the conditions for ‘exceptional circumstances’ under which a Member needs to be exempted from the MFN obligation.

4. Many, if not all, Members have sought MFN exemptions under the *Annex*, and as many as over 400 measures were exempted from the MFN obligations. Almost all the measures did not have the definite date for termination, even though the *Annex* stipulates that the duration be 10 years, in principle. In accordance with the *Annex*, the first review in the year 2000 was held and extensive discussions took place, only to show a substantial amount of work and efforts are needed to streamline the wide spread derogation from the most fundamental principle of the WTO agreements. In this respect, there is a need to examine the current MFN exemptions regarding the conditions creating the need for exemptions and the duration, with a view to exploring the possibility of streamlining the MFN exemptions.

II. EXAMINATION OF CONDITIONS CREATING THE NEED FOR MFN EXEMPTION

5. OECD has recently released a very comprehensive paper on the MFN exemptions under the GATS (TD/TC/WP(2001)25), titled "Trade in Services: A Roadmap to GATS MFN Exemptions." The paper includes a section containing an in-depth analysis on the conditions creating the need for MFN exemptions. According to the analysis, as many 92% of the exemptions relate to reciprocity and international agreements.

6. Members cited reciprocity as a means to secure equal access or treatment in foreign markets. However, securing equal access or treatment in specific sectors goes against the general practice in multilateral trade negotiations where participants seek balance or trade-off of concessions across sectors. Moreover, seeking MFN exemptions when equal access or treatment was not secured cannot constitute 'exceptional circumstances' upon which usual exemptions from the fundamental principles are allowed in a multilateral framework. Having said that, Members now may secure such access or treatment during the upcoming concession negotiations.

7. Existence of international agreement constitutes 55% of all MFN exemptions according to the OECD study. This high percentage is all the more significant if we consider that several layers for flexibility were provided in the GATS, including provisions on contiguous areas, *Recognition and Economic Integration*. Regarding international agreement, GATS can benefit from the 50 years of experience in GATT history. GATT has dealt with the relationship between MFN principle and the international agreements (which cannot qualify as Customs Union or Free Trade Agreements), through granting waivers. Examples include ECSC in Europe, US-Canada Automotive Products Agreement, the Benelux Association, and EU's Lome Convention.

8. According to the aforementioned OECD analysis, there are 11 categories of MFN exemptions from description of conditions. Upon scrutiny, many, if not all, conditions such as foreign policy and security considerations, social objectives and environment and conservation, would qualify as general exceptions or waivers, or can be addressed during the upcoming negotiations, instead of MFN exemptions under the *Annex*.

III. EXAMINATION OF DURATION OF MFN EXEMPTIONS

9. The Annex stipulates that the duration of MFN exemptions is 10 years in principle. However, 98% of the exemptions have unspecified duration, the principle became an exception. Mexico has submitted in October 2001 a meaningful contribution in this regard, and strongly argued that 10 year duration should be strictly observed.

10. Korea believes that this 10 year duration should not be viewed as a minimum period of exemptions, but should be viewed as a maximum period of transition for the Members. Ten years is not a period during which Members are securely exempted from obligations without doing anything, but a period during which Members should actively seek ways to bring these MFN inconsistent measures in conformity with the general principles of the GATS. In general, 10 year period is a long period of transition in the WTO regime, during which inconsistent measures are brought into conformity with the WTO principles.

IV. AN ALTERNATIVE TO MFN EXEMPTION THROUGH WAIVER

11. The analysis above suggests that Members should exert efforts during the remaining 5 years to search ways to bring MFN inconsistent measures into conformity with the GATS principles. Also most of the conditions creating the need for MFN exemptions can be addressed during the upcoming

concession negotiations, and still remaining conditions can be dealt with by means other than MFN exemption under the Annex.

12. One such means is already stipulated in paragraph 2 of the Annex: waiver in paragraph 3 of Article IX of Marrakesh Agreement Establishing the WTO. Waiver in that article is a means available in the WTO regime where 'exceptional circumstances' can be adequately addressed.

V. CONCLUSIONS

13. Korea believes that the fundamental principle of MFN should be reinforced in GATS at the earliest possible date. In doing so, Korea would like to urge Members to eliminate and/or reduce MFN inconsistent measures before the end of 10 year period, considering the 10 year period as a maximum period. Members can also address the conditions creating the need for MFN exemptions during the upcoming concession negotiation. Still remaining conditions can be first dealt with by several flexibilities given in the GATS, and lastly by the waiver provision. Korea does not believe that this suggestion leaves no other options, and welcomes comments and other suggestions regarding MFN exemptions.
