

COMMUNICATION FROM THE REPUBLIC OF KOREA

An Example of Economic Needs Tests

The following communication, dated 25 November 2005, from the delegation of the Republic of Korea is being circulated to the Members of the Council for Trade in Services and the Committee on Specific Commitments.

I. INTRODUCTION

1. Korea has prepared this paper in relation to paragraph 7 of the annotated agenda (JOB(05)/109) by the Chairman of the Committee on Specific Commitments dated 15 June 2005, which called for an information exchange on the concrete operation of economic needs tests (ENTs). With a view to facilitating more in-depth discussions on the specifications of ENTs and their applications, this paper presents a practical example of an ENT inscribed in Korea's revised offer along with some issues to be further considered. This paper does not prejudge Korea's final position in the on-going services negotiations, in particular, related to the ENTs in the existing schedule as well as in the offers.

II. BACKGROUND

2. It has been noted that, while Members may maintain the right to use ENTs to regulate trade flows in their GATS schedules of specific commitments, most of the ENTs in Members' schedules provide no guidance concerning the criteria on which the tests are based, nor do they describe the criteria as set out in the Scheduling Guidelines.¹ Combined with the lack of further elaboration on the term "economic needs test" in the GATS, the absence of clear specifications of ENTs has led to the criticism that ENTs may have a more or less restrictive impact on trade depending on the manner in which they are implemented.² Accordingly, deliberation on the degree of specification of ENTs has been called for so as to raise their predictability.

3. As emphasized in the communication of JOB(04)/171 by Hong Kong, China, Korea supports the idea of further discussing the meaning and criteria for ENTs and sharing experiences and information of their application for transparency purposes. In line with this proposal, Korea has inserted the criteria of ENTs in its revised offer as specified in existing domestic laws and regulations,

¹ Para 12, S/CSS/W/118 and Para 3, JOB(04)/171.

² Para 1, "Lists of Economic Needs Tests in the GATS Schedules of Specific Commitments," UNCTAD, UNCTAD/ITCD/TSB/8, 6 September 1999 and Para 8, "The Scheduling of Economic Needs Tests in the GATS: An Overview," OECD, TD/TC/WP(2000)11/FINAL, 10 November 2000..

in order to improve clarity, certainty and comparability in the scheduling of Article XVI limitations. Korea would like to share with Members these criteria and invite others to do likewise.

III. AN EXAMPLE OF ENT

4. For the ENT on mode 3 MA limitation in wholesale trade services for used cars and gaseous fuels and related products, Korea inserted in its revised offer the following main criteria³:

- (a) formation of reasonable prices
- (b) the number of and impact on existing suppliers for balance of demand and supply
- (c) healthy development of the industry
- (d) establishment of orderly trade
- (e) population density
- (f) traffic
- (g) environmental pollution
- (h) local conditions and other local characteristics
- (i) public interest

5. This economic needs test is conducted on a non-discriminatory case-by-case basis, as each application for licence or permit/authorization is submitted to the central, local or municipal governments. The central, local or municipal governments review each application and may reject the application if any of the criteria is not satisfied. Unlike the measures of Article VI:4, these criteria are currently subject to overall market conditions based on total demand and supply and their fulfilment should be *beyond the control* of the affected individual service supplier.⁴

IV. RELATED ISSUES FOR FURTHER THOUGHT

6. ENTs may serve the role of a comfort measure for regulators of host countries, especially in sectors where any attempts for opening the domestic market cause severe political resistance. Once the economy reaches a certain level of maturity that allows for free competition in the domestic market, perhaps by restructuring the domestic industry, regulators can give more positive consideration to the elimination of ENTs.⁵

7. If an ENT, typically applied as an *ex ante* measure, is to provide more predictability to service suppliers, clear specification and enhanced transparency should be assured.⁶ Once potential service suppliers meet the criteria of the ENT and get the approval for entry, a stable business environment

³ The criteria are inscribed as they exist in the laws and that no further specificity can be demanded.

⁴ This distinction has been pointed out in paragraph 7 of S/CSS/W/118.

⁵ On the other hand, elimination of ENTs may become more difficult afterwards, once political interests build up and strengthen. Hence, whether it is better to inscribe ENTs in the first place or not depends on the interest relations in each market.

⁶ It has been argued that there is no difference between an ENT with essentially little or no specification on the one hand and an unbound on the other hand. Para 11, JOB(04)/171.

needs to be guaranteed in the local market within the boundary of the existing criteria and acquired rights.

8. Since a Member is naturally bound in administering an ENT by the relevant provisions of Article VI,⁷ that concerned Member would need to ensure that the criteria in its ENTs “are administered in a reasonable, objective and impartial manner.”⁸ Also, with respect to the delay in deciding on an individual application under an ENT, a Member would need to inform the applicant of a decision “within a reasonable period of time.”⁹ Furthermore, its trading partners can challenge any rejection of an application for a license, by establishing that the rejection is not justified on the basis of the specified criteria of the ENT.

9. Therefore, the critical issue is how to decrease the degree of subjectivity associated with ENTs. To the extent that some sectors and modes would remain subject to the application of ENTs before being ready to apply less trade-restrictive ways of achieving specific goals, efforts should be made to reduce the scope for arbitrary and discriminatory practices, provide greater transparency and specify more neutral economic criteria.¹⁰

⁷ Para 7, S/CSS/W/118.

⁸ Article VI:1

⁹ Article VI:3

¹⁰ Para 7, “Lists of Economic Needs Tests in the GATS Schedules of Specific Commitments,” UNCTAD/ITCD/TSB/8, 6 September 1999.