

Regional Trade Agreements and the WTO: WTO Consistency of East Asian RTAs

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I. Introduction

1. East Asian RTAs in Effect

(as of September 2005)

- **Korea – Chile FTA (KCFTA)**
- **Korea – Singapore FTA (KSFTA)**

- **Japan – Singapore EPA (JSEPA)**
- **Japan – Mexico EPA (JMEPA)**

- **CEPA (China, HKC & Macao)**
- **ASEAN – China FTA (ACFTA)**

I. Introduction (cont.)

2. Relevant Issues (not exhaustive)

- **GATT Art. XXIV***
 - **“Substantially All the Trade” (SAT)**
 - **“Other Restrictive Regulations of Commerce” (ORRC)**
- **Forum Shopping** (Exclusion of WTO Dispute Settlement Mechanism)
- **Rules of Origin (ROO)**

* Excluding procedural requirements

II. Substantially All the Trade

1. Interpretative Issues

(1) GATT Art. XXIV:8(b)

“A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (...) are eliminated on *substantially all the trade* between the constituent territories in products originating in such territories.”
(emphasis added)

II. SAT (cont.)

(2) Possible approaches

A Quantitative Approach

Favouring the definition of a **statistical benchmark**, such as a certain percentage of the trade between the parties, to indicate that the coverage of a given RTA fulfils the SAT requirement.

II. SAT (cont.)

(2) Possible approaches

A Qualitative Approach

The SAT requirement means that **no sector (or at least no major sector) was to be kept out of intra-RTA trade liberalization.**

Under this approach, SAT is viewed as preventing the exclusion of any sector where the amount of trade was small before the formation of the RTA due to the restrictive policies in place, as would be the case if a quantitative approach was used.

II. SAT (cont.)

(3) Doha Proposals

- **Australia:**
(for the quantitative approach) The threshold should be **95 percent** of all HS tariff lines at the six-digit level.
- **Argentina, Switzerland and HKC:**
(for the qualitative approach) **All sectors** should be included.

II. SAT (cont.)

2. East Asian RTAs

- **JSEPA:**
 - The coverage of Japan's tariff elimination accounts for **93.8 percent** of Singapore's exports to her.
 - Japan's schedule contained significant tariff-line carve outs and omissions – four chapters of the HS, **58 percent of agricultural products** (HS 6 digit).
- **JMEPA:**
 - The coverage of Japan's tariff elimination accounts for **only 86 percent** of Mexico's exports to Japan.
- **KSFTA:**
 - Korea should eliminate **91.6 percent** of customs duties within 10 years.

II. SAT (cont.)

Overall Assessment

- RTAs of Korea and Japan allow **comparatively wide ranges of exceptions** for trade liberalization. (even in terms of quantity, 86 or 91.6 percent would still be considered as not being “substantially all”.)
- Overall, RTAs of Japan and Korea need **more trade liberalization.**
- Korea – Japan FTA under negotiation.

III. Other Restrictive Regulations of Commerce

1. Interpretative Issues

(1) GATT Art. XXIV:8(b)

“A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and *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.” (emphasis added)

III. ORRC (cont.)

(2) Relevant Issues

- Whether safeguard and anti-dumping measures should be considered as ORRC or not
- Whether WTO Members that are part also of an RTA can or must exclude regional imports from safeguard/anti-dumping measures
- Whether a special safeguard or a bilateral safeguard can be allowed under the WTO Agreements

III. ORRC (cont.)

(3) Conflicting Views on “safeguard as ORRC”

- **Australia:**
The application of safeguard measures is **forbidden** in the trade among parties to an RTA, since the list of ORRC exceptions is exhaustive.
- **Japan:**
Safeguard measures are **obliged to be applied on an MFN basis**, *i.e.*, both to the RTA parties and to other WTO Members.
- **EC:**
The application of safeguard measures is **permitted** in trade among parties to an RTA, since RTA parties are entitled to vary their rights and obligations between themselves, provided they do so in a manner that does not abridge the rights of third parties.

III. ORRC (cont.)

2. East Asian RTAs

(1) RTAs with explicit provisions for non-exclusion of the global safeguard/
anti-dumping measures

- **KCFTA**, Art. 6.1.1 (& 7.1.1):

“Both Parties **maintain their rights and obligations** under Article XIX[Article VI] of GATT and the Agreement on Safeguards[the Antidumping Agreement and the SCM Agreement], ...”

- **JSEPA** (Art. 14.5 & 18.5), **KSFTA** (Art. 6.2.1, 6.3.1 & 6.5) and **the ACFTA** (Art. 9): similar to the above.

III. ORRC (cont.)

(2) An RTA which explicitly excludes anti-dumping measures

- Art. 7 of **CEPA** provides that:
“The two sides undertake that neither side will apply anti-dumping measures to good imported and originated from the other side.”
(=Australia-New Zealand FTA)

(3) An RTA which is silent on trade remedies

e.g., JMEPA

III. ORRC (cont.)

(4) RTAs which have special or bilateral safeguard measures

- **JSEPA**: special safeguards during the transitional period (Art.18)
- **JMEPA**: bilateral safeguard measures (Chapter 6)
- **KCFTA**: emergency clause for agricultural goods (Art. 3.12)
- **KSFTA**: bilateral safeguard measures (Art. 6.4)
- **CEPA**: special intra-regional safeguard (Art. 9)
- **ACFTA**: special safeguard measures within the transition period (Art. 9)

IV. Forum Shopping

1. Issues on the relationship of dispute settlement mechanisms of RTAs and the WTO

- Whether an RTA party may bring a matter before an RTA tribunal when the matter involves both the RTA and the WTO Agreement (so-called *Forum Shopping*)
- Whether an RTA party may bring a matter before a WTO panel while the same matter is pending before an RTA tribunal
- Whether an RTA party may resort to a WTO panel after it receives an unfavorable award by an RTA tribunal

IV. Forum Shopping (cont.)

2. East Asian RTAs

Choice of Forum

KSFTA (Art. 20.3.1):

“Disputes regarding any matter arising under both this Agreement and the WTO Agreement, any agreement negotiated thereunder, or any successor agreement, may be settled in **the forum selected** by the complaining Party.”

KCFTA (Art. 19.3)

JSEPA (Art. 139.3)

JMEPA (Art. 151)

Agreement on Dispute Settlement Mechanism of ACFTA (Art. 2.6)

IV. Forum Shopping (cont.)

Exclusion of WTO Dispute Settlement Mechanism

KCFTA(Art. 19.3):

“Disputes regarding *any matter arising under both this Agreement[KCFTA] and the WTO Agreement, ..., may be settled in the forum selected by the complaining Party.*” (emphasis added)

“Once dispute settlement procedures have been initiated under ...[this Agreement or the WTO Agreement], *the forum selected shall be used to the exclusion of the other.*” (emphasis added)

→ Consistent with WTO DSU Art. 23?

V. Rules of Origin

1. Why Concerned?

- ROO could function as another trade barrier because of its ambiguity and complexity of ROO as such, and possibility of its discriminative application.
- Need to harmonize ROO for RTAs for more trade liberalization.
- The WTO lacks effective ROO for RTAs.

V. ROO (cont.)

2. Two Types of ROO for RTAs

(a) *PANEURO model*

Mainly combining CTC (change in tariff classification) with exceptions, RVC (regional value content) and/or TECH (technical requirement).

(b) *NAFTA model*

- High degree of variation in ROO across products
- Different types of CTC in combinations with VC and/or TECH

V. ROO (cont.)

3. An Examination of East Asian RTAs

(1) Overview

All of East Asian RTAs took the “wholly-obtained” criterion and the “substantial transformation” criterion, but differences in details.

(2) The Wholly-Obtained Criterion

Article 23.1 of **JSEPA**:

“[G]oods wholly obtained or produced entirely in a Party shall be treated as originating goods of that Party.”

Other RTAs → similar.

V. ROO (cont.)

(3) The Substantial-Transformation Criterion

Disciplines on this criterion are complex and diverse:

	KCFTA	KSFTA	JSEPA	ACFTA	JMEPA
CTC	Yes	Yes	Yes	Not	Yes
RVC ratio	45-30%	45-40%	60-40%	40%	not less than 50%
Cumulation	Yes	Yes	Yes	Yes	Yes
<i>de minimis</i>	8%	10%	8-10%	No mention	10%

VI. Conclusion

- Above discussions are illustrative only.
- Needs more consistency, but desperately calls for clear multilateral rules.

Issues involving consistency with national systems:

e.g.,

- NTMs (non-tariff measures),
- Investment (pre-establishment National Treatment)
- Agricultural policy (protectionist or for security/stability)
- Competition policy (replacing antidumping measures?)