



Asia-Pacific  
Economic Cooperation

---

**2005/STAR/016**  
Maritime Security Panel 2

## **How to Make Container Control Measures Using RFID Consistent with WTO Jurisprudence**

Submitted by: Ewha Womans University



**Third Conference on Secure Trade in the APEC  
Region  
Incheon, Korea  
25-26 February 2005**

# How to Make Container Control Measures Using RFID Consistent with WTO Jurisprudence

Third Conference on Secure Trade  
In the APEC Region  
25 February, 2005

**Choi, Won-Mog**

Professor of Law, Ewha Womans Univ.  
wmchoi@ewha.ac.kr

## I. RFID and International Trade

- RFID tag + antenna + RFID transceiver = Sharing information on the characteristics, location, arrival/shipment time of containers, etc.
- US "Safety Act" of 2002: "qualified anti-terrorism technology"
- Under discussion:
  - (i) company-specific recognition (certification) system,
  - (ii) RFID tag system
  - (iii) establishment of the MECO.
- Container control measures using RFID tags might be potentially in conflict with trade rules under the WTO Agreement.
  - ☒ principle of non-discrimination
  - ☒ principle of prohibition of quantitative restriction
  - ☒ principle of necessity
  - ☒ rules under the TBT (Technical Barriers to Trade) Agreement
- Resolution 1535 (2004); Resolution 1566 (2004)
  - ☒ "States ... must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law..."

2

## II. Applicable Laws & Principles

- “Technical Regulation (TR)” => Article 2 of TBT Agreement.
  - ☞ *Mandatory* regulations
  - ☞ dealing exclusively with terminology, symbols, **packaging**, marketing or **labelling** requirements as they apply to a product, process or production method
  - ☞ Ex) CCM *requiring* containers to bear RFID tags
- “Standard” => Annex 3 of TBT Agreement
  - ☞ *Non-mandatory* regulations
  - ☞ dealing exclusively with terminology, symbols, **packaging**, marketing or **labelling** requirements as they apply to a product, process or production method
  - ☞ Ex) Recommendation, guidance, incentive system, etc.
- Other requirements (“GATT Measures”) affecting trade in goods => GATT

3

## 1. Non-Discrimination Rule

(TBT §§ 2.1 and Annex 3.D; GATT §§ I, III, V.2/5/6)

- MFN + National Treatment
  - ☞ *de jure* discrimination
    - (i) only containers imported from, or exported to, country B are **required to bear** RFID tags;
    - (ii) containers imported from, or exported to, country B are required to **include more information** in RFID tags;
    - (iii) RFID tags of containers imported from, or exported to, country B only are subject to **thorough examination** at the customs border.
  - ☞ *de facto* discrimination
    - (i) a **specific type** of containers are subject to stricter RFID requirements, when this type is preferably used by producers of country B;
    - (ii) RFID requirements are imposed more strictly during a **particular time** span when most of B containers are imported, exported, transported or distributed;
    - (iii) RFID requirements are imposed more strictly at a **particular place** where most of B containers are imported, exported, transported or distributed.
- Containers in Transit

4

## 2. Prohibition of Quantitative Restrictions

(GATT §§ XI and XIII)

- Prohibition or restriction of importation or exportation in the case where certain RFID requirements are not satisfied.
- Ex) A WTO member prohibits importation or exportation of products or containers, not bearing RFID tags. <sup>5</sup>

## 3. Principle of Necessity

(TBT §§ 2.2/ 2.3/ 2.4/ 2.5/ Annex 3.E/ Annex 3.F)

- TR :
  - ☞ *ex ante* necessity (preparation/adoption) + *ex post* necessity (maintenance)
  - ☞ TR according to Intl standard <= presumption of necessity
- Standard
  - ☞ *ex ante* necessity
- Examples of *ex ante* necessity violations:
  - ☞ (i) “**every single item** of a package of products (or every parts and components of a product) bear an RFID tag” when the package (or product) itself is already bearing the tag and all items (or parts and components) are inseparable from the package (or product);
  - ☞ (ii) “RFID tags must include **unnecessary information** such as production methods, business secrets, any data invading privacy, etc.”;
  - ☞ (iii) **unnecessary prohibition** of importation or exportation, or **ban** of sales, of a product or container that is not bearing an RFID tag;
  - ☞ (iv) “containers not bearing RFID tags are subject to unnecessarily **burdensome procedure** of customs clearance”.

6

## 4. Freedom of Transit

(GATT § V.4 and 2)

- “All charges and regulations on traffic in transit must be reasonable, having regard to the conditions of the traffic”.
- Freedom of transit "via the routes most convenient for international transit”.
- Ex) Only RFID requirements on traffic in transit that are reasonable & most convenient to follow.

7

## 5. Minimization of Formalities Connected with Importation and Exportation

(GATT § VIII.1(c), 3 and 4)

- No "substantial penalties for minor breaches of customs regulations or procedural requirements"
- Ex) No substantial penalties for minor breaches of RFID requirements.

8

## 6. Transparency

(TBT §§ 2.9–2.11, 10, Annex 3.J–3.P ; GATT §10)

- TR + Standard
  - ☞ early notification (*ex ante*)
  - ☞ receiving comments
  - ☞ If urgent problems, notify upon adoption (*ex post*)
  - ☞ with reasonable interval, entry into force
- GATT Measures
  - ☞ *ex post* publication

9

## 7. S & D Treatment for LDCs

(TBT § 12)

- Prepare and apply TRs, taking account of the "special development, financial and trade needs" of LDCs;
- LDCs should not be "expected to use international standards" as a basis for their TRs, which are not appropriate to their development, financial and trade needs;
- Enable the TBT Committee to "grant specified, time-limited exceptions from TBT obligations."
- Ex) to provide with necessary technical assistance in complying with container control regulations using RFID set by developed countries (LDCs need to be aware that they have the rights to demand such technical assistance).
- EX) to request to the TBT Committee for a "time-limited exceptions"

## 8. Principles on Marks of Origin (GATT § IX)

- If a RFID tag includes information on country of origin of products
- MFN
- Minimum difficulties and inconveniences
- compliance without unreasonably increasing cost
- No “special duty or penalty” for failure to comply with marking requirements
  - ☞ prior to importation
  - ☞ unless (i) corrective marking is unreasonably delayed, (ii) deceptive marks have been affixed or (iii) the required marking has been intentionally omitted.
- Required marks of origin should be permitted to be affixed “at the time of importation”

11

	TR	Standard	GATT Measure
Non-Discrimination	○	○	○
Prohibition of QR	-	-	○
Necessity	○	○	×
Freedom of Transit	-	-	○
Minimizing Formalities	-	-	○
Transparency	○	○	○
S & D Treatment	○	○	×
Marks of Origin	-	-	○

12

## III. Exceptions

### 1. General Exceptions

- ☞ Measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of GATT, including those relating to customs enforcement".
- ☞ "not applied in an arbitrary or unjustifiable manner nor constitute disguised restrictions on trade"

13

### 2. Security Exception

- ☞ "necessary for the protection of essential security interests".
  - if taken in relation to "fissionable materials or their derivative materials", "traffic in arms, ammunition and implements of war", or "such traffic in military supply goods and materials",
  - taken "in time of war or other emergency in international relations",
- ☞ adopted in accordance with the "United Nations Charter"

### 3. Waiver of Obligations

- ☞ In exceptional circumstances
- ☞ "the pursued objective should be clearly stated and the reasons why such an objective cannot be achieved through measures consistent with the WTO Agreement should be provided"
- ☞ Approval by  $\frac{3}{4}$  majority

14



## IV. Conclusion

- Usefulness & danger of abuse
- Balance b/t free trade and national security
- WTO rules
  - ☞ Non-discrimination
  - ☞ Necessity
  - ☞ Transparency
  - ☞ Prohibition of QR
  - ☞ Freedom of transit
  - ☞ General exceptions + security exception + waiver
- Law and Politics must cooperate to make each other a success!

15